

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA(OS) No. 44/2008**

Reserved on: December 17th, 2008

% Date of Decision: January 16th, 2009

Anil Nanda & Anr. Appellants
Through: Mr. S. Ganesh, Sr. Advocate
with Mr. P.K. Bansal,
Advocate.

Versus

M/s Escorts Ltd. & Ors. Respondents
Through: Mr. Arvind Nigam, Mr. R.M.
Mehta and Ms. Simran
Mehta, Advocates for
Respondents No. 1, 3, 4 and
5.
Mr. P.V. Kapoor, Sr.
Advocate with
Mr. Anshul Tyagi, Mr. Manik
Sood, Advocates for
Respondent No. 2.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

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

J U D G M E N T

MANMOHAN, J

1. The Appellants have filed the present appeal being RFA(OS) No. 44 of 2008 under Section 96 of the Code of Civil Procedure, 1908 (hereinafter to be referred as 'CPC') against

the judgment and order dated 3rd July, 2008, by virtue of which the plaint filed by the Appellants has been rejected under Order VII Rule 11 Clauses (a) and (d) of the CPC.

2. It is pertinent to mention that the Appellants had filed the present suit praying for the following reliefs:-

“1A. pass a decree of declaration declaring that no amalgamation of EHIRC- Delhi took place with EHIRC Chandigarh.

a) in the alternative, pass a decree of declaration declaring the amalgamation of EHIRC-Delhi with EHIRC-Chandigarh as non-est, void and bad in law in view of the provisions contained in the Societies Registration Act, 1860;

b) pass a decree of declaration thereby declaring the conversion of EHIRC-Chandigarh (post amalgamation) into a Limited Company under the Companies Act, 1956, as being void and contrary to law;

c) pass a decree of permanent injunction in favour of the Plaintiffs and against the Defendant No. 1, injuncting its officers, agents and employees from transferring, alienating or otherwise creating any third party rights or interest with respect to the shares held by the Defendant No. 1 in Defendant No. 2;

d) pass a decree of permanent injunction in favour of the Plaintiffs and against the Defendant No. 2, its officers, agents and employees from registering any transfer of shares effected by the Defendant No. 1;

e) pass a decree of mandatory injunction directing the restoration of the assets, properties and facilities of the Second Defendant, and its ownership, management and control and its character and structure to its original status of a public charitable institution, dedicated wholly and exclusively to public service;

f) award costs of the suit in favour of the Plaintiffs and against the Defendants;

g) pass such further order or directions as this Hon'ble Court may deem fit and proper on the facts of the present suit."

3. The learned Single Judge by the impugned order has dismissed the suit filed by the Appellants on the grounds that firstly, mandatory leave under Section 92 of CPC had not been obtained by the Appellants prior to the institution of the suit and secondly, no relief personal to the Plaintiffs had been claimed in the plaint. The reasoning of the learned Single Judge in rejecting the plaint is reproduced hereinbelow:-

"17. The first thing that has to be considered in this case is whether the suit is of the kind as would fall within the four corners of Section 92, CPC. It is apparent that before Section 92, CPC is attracted, there must be (1) as alleged breach of trust; (2) the trust may be express or constructive; (3) the trust, however, must have been created for public purposes (of a charitable or religious nature); and (4) the suit must be instituted so as to obtain a decree of the nature indicated in clauses (a) to (h) of sub-Section (1) of Section 92, CPC. It has to be seen as to whether the present case satisfies these tests. In the earlier part of this judgment, the averments made in the plaint have been referred to in detail and they clearly indicated that the plaintiffs have alleged breach of trust. It is also clear that the plaintiffs have alleged that EHIRC-Delhi was constituted for public purposes of a charitable nature. The reliefs that have been sought all pertain to re-establishing the public charitable nature of the assets of EHIRCL (Defendant No.2), owned in major share by Escorts Limited (Defendant No.1). Such reliefs may be covered under clause (c) and definitely under clause (h) of sub-Section 1 of Section 92, CPC. In my view, therefore, the plaintiffs were

required to have obtained the leave of the court before instituting the present suit. As noted in the decisions referred to by the learned counsel for the defendant No.1, the requirement of obtaining leave of the court is not a mere formality, but a mandatory condition precedent for the institution of a suit under Section 92, CPC. If this pre-condition is not satisfied, the suit would be barred by the provisions of Section 92, CPC consequently, the plaint would be liable to be rejected on the ground referred to in clause (d) of Order 7 Rule 11, CPC. In the present case, this condition precedent has not been satisfied. Admittedly, no leave of the court has been taken prior to the institution of the present suit. Consequently, the plaint has to be rejected under order 7 Rule 11 (d), CPC.

18. With regard to the argument that the plaint does not disclose a cause of action, it may be noted that, if it is for the time being assumed that Section 92, CPC does not apply, the plaint does not disclose any cause of action in favour of the plaintiffs. The entire suit is based on the allegation of breach of trust and conversion of a society having public charitable objects into a company with objects of private gain and profitability. No relief personal to the plaintiffs have been claimed in the plaint. The question that may be asked is - how are the plaintiffs affected? Why have they filed this suit? Obviously, they have not sought any personal relief. Therefore, they are not personally affected. Then, what have they sued for and for whom? These questions and answers indicate and reinforce the conclusion that the suit cannot, but be one which falls within the four corners of Section 92, CPC. Because, the moment one tries to bring it out of the folds of Section 92, CPC, it does not appear to have the oxygen to survive. The suit has also not been filed in a representative capacity under Order 1 Rule 8, CPC. Can one bring a suit in which a relief is claimed for another person? Certainly not. Since the plaintiffs do not claim any reliefs for themselves, it is apparent that they do not have any cause of action. The plaint is, therefore, also liable to be rejected on the

ground that it does not disclose a cause of action in favour of the plaintiffs”.

(emphasis supplied)

4. Mr. S. Ganesh, learned Senior Counsel appearing for the Appellants contended that the Appellant No. 2 had made a contribution of Rs. 1.5 Crores to the corpus of Escort Heart Institute and Research Center, Delhi Society (hereinafter to be referred as ‘EHIRC’) on the footing that it was a purely charitable body, whose income would be utilized solely for charitable purposes. He referred to Clause 3(s) of the Memorandum of Association of EHIRC-Delhi which states, *“that this Society is charitable one and has not been started with a view to earn any profits. All income of the Society shall be utilized towards the promotion of the aims and objects of the Society.”*

5. Therefore, Mr. Ganesh submitted that Appellant No. 2 had a vital interest in ensuring that the said charitable society remains engaged only in charitable activities and that its assets and funds including the contribution made by Appellant No. 2 are not fraudulently diverted for private benefit of any person.

6. Mr. Ganesh further stated that Appellant No. 1 was on the governing body of EHIRC-Delhi Society and was representing

Appellant No. 2. He referred to para-7 of the plaint wherein it has been stated that the moving force behind the formation of the charitable society was late Mr. H.P. Nanda who was the father of Plaintiff No. 1 and who conceived the idea of setting up a charitable institution of world fame to help the weaker sections of the Society. According to Mr. Ganesh, Plaintiff No. 1 was not a stranger to the trust. Mr. Ganesh stated that the Appellants were aggrieved by amalgamation of charitable EHIRC-Delhi Society with a non charitable Chandigarh society and then the subsequent incorporation of the amalgamated society as a company. He further stated that after incorporation of the charitable society as a company, shares had been issued and the said shares had been transferred for huge consideration to individuals other than those involved in the institution of the initial charitable society. He further stated that Appellant No. 1 had a direct and personal interest in ensuring that the said charitable society and the hospital operated by it retains its purely charitable character and is not converted into a private profit making business for the benefit of certain individuals. Consequently, according to him, the Appellants have a cause of action founded not only on a contract but also on torts of fraud, deceit, misrepresentation and conversion against the Defendants in the suit.

7. Mr. Ganesh further submitted that under Section 9 of CPC, a suit can be filed by any party raising a civil dispute against the Defendants and the Civil Courts would have jurisdiction to determine all disputes of a civil nature unless and until the same are barred under a statute so as to subsequently oust the jurisdiction of a Civil Court in that regard. In this connection he relied upon the observations of the Hon'ble Supreme Court in ***Nagri Pracharini Sabha and Another. v. Vth Additional District and Sessions Judge, Varanasi and Others*** reported in ***1991 Suppl. (2) SCC 36***, wherein it has been held, *"A litigant having a grievance of a civil nature has, independently of any statute, a right to institute a suit in the civil court unless its cognizance is either expressly or impliedly barred. The position is well settled that exclusion of jurisdiction of the civil court is not to be readily inferred and such exclusion must be either express or implied."*

8. He further relied upon the judgment of the Apex Court in ***Dwarka Prasad Agarwal v. Ramesh Chandra Agarwala*** reported in ***AIR 2003 SC 2696***, wherein it has been held, *"The dispute between the parties was eminently a civil dispute and not a dispute under the provisions of the Companies Act. Section 9 of the Code of Civil Procedure confers jurisdiction upon the civil courts to determine all dispute of civil nature unless the same is barred under a statute either expressly or by*

necessary implication. Bar of jurisdiction of a civil Court is not to be readily inferred. A provision seeking to bar jurisdiction of civil Court requires strict interpretation. The Court, it is well-settled, would normally lean in favour of construction, which would uphold retention of jurisdiction of the civil Court. The burden of proof in this behalf shall be on the party who asserts that the civil Court's jurisdiction is ousted. (See Sahebgouda (dead) by LRs. and others v. Ogeppa and others. (2003 (3) Supreme 13). Even otherwise, the civil Court's jurisdiction is not completely ousted under the Companies Act, 1956.

9. He further submitted that the provisions of Section 92 of CPC are not at all attracted to the present case. According to him, the reliefs prayed for in the instant suit are completely outside the ambit of Section 92 of CPC. According to him, Section 92(h) of CPC cannot be construed in a manner which is not related to Clauses (a) to (g) of Section 92(1) of CPC. In this connection, he relied upon a judgment of Privy Council in the case of ***Abdur Rahim and others v. Syed Abu Mahomed Barkat Ali Shah and others*** reported in ***AIR 1928 Privy Council 16***, wherein it has been held as under:-

“ Two questions only have been argued before this Board. The first is whether the suit is maintainable in view of the provisions of Sub-S. (2), S.92, Civil P. C., 1908; and the second is whether the suit is barred by the rule of res judicata under Expl. 6 S. 11, Civil P.C.

It is urged broadly on behalf of the respondents that all suits founded upon any breach of trust for public purposes of a charitable or religious nature, irrespective of the relief sought, must be brought in accordance with the provisions of S. 92, Civil P.C.

The short answer to that argument is that the Legislature has not so enacted. If it had so intended, it would have said so in express words, whereas it said, on the contrary, that only suits claiming any of the reliefs specified in sub-S. (1) shall be instituted in conformity with the provisions of S. 92, sub-S (1).

The reliefs specified in sub-S. (1) (a) to (h) do not cover any of the reliefs claimed in this suit unless the words “ further or other relief” in Cl. (h) can be held to cover them. It is argued that the words

Such further or other relief as the nature of the case may require

must be taken, not in connection with the previous Cls. (a) to (g) , but in connection with the nature of the suit, viz., any relief other than (a) to (g) that the case of an alleged breach of an express or constructive trust may require in the circumstances of any particular case. Their Lordships are unable to accept this argument. First, because the words “further or other relief” must on general principles of construction be taken to mean relief of the same nature as Cls. (a) to (g). Secondly, because such construction would cut down substantive right which existed prior to the enactment of the Code of 1908, and it is unlikely that in a Code regulating procedure the Legislature intended without express words to abolish or extinguish substantive rights of an important nature which admittedly existed at that time.

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Their Lordships see no reason to consider that S. 92 was intended to enlarge the scope of S.539 by the addition of any relief or remedy against third parties, i.e., strangers

to the trust. They are aware that the Courts in India have differed considerably on the question whether third parties could or should be made parties to a suit under S. 539, but the general current of decisions was to the effect that even if such third parties could properly be made parties under S. 539, no relief could be granted as against them. In that state of the previous law, their Lordships cannot agree that the Legislature intended to include relief against third parties in Cl. (h) under the general words "further or other relief."

The conclusion is that, inasmuch as the suit out of which this appeal arises did not claim any such relief as is specified in sub-S. (1), S.92, that section was no bar to the maintainability of the suit without the sanction of the Advocate-General and in the Court of the Subordinate Judge."

(emphasis supplied)

10. Mr. Ganesh submitted that the suit instituted by the Appellants seeks relief against the third parties and various reliefs of declaration and mandatory injunction in restoration of the assets, properties as well as the character and structure of EHIRC- Delhi to its original status of a public charitable trust. He submitted that none of these reliefs are covered by Section 92 of CPC.

11. According to him, filing of an application under Order VII Rule 11 CPC by the Defendants/Respondents was nothing but a gross abuse of process of Court and the same was done with mala fide object of perpetuating a fraud which prima facie had been found to be committed by the Defendants as would be

apparent from the interim order dated 30th September, 2005 passed by another learned Single Judge of this Court. The relevant portion of the said order is reproduced hereinbelow for ready reference:-

“IANo.7817/2005

Issue notice for same date. Counsels for defendant nos.1 and 2 accept notice. The plaintiffs contended that Escort Heart Institute and Research Centre, Delhi (also referred to as EHIRC, Delhi) was the Society which was registered in 1981 with the object of running a world-class specialist heart institute for the general public and to carry out research and development work in the field of medicine which categorically stipulated in its memorandum of association that it is a charitable institute and has not been started with a view to earn profits. All income of the society was to be utilized towards the promotion of aims and objects of the society. On account of the society being a charitable society, the Authorities allotted land measuring about two acres for a paltry sum of Rs.10,000/- per acre and gave other concessions and benefits, e.g., recognition under Section 35 of the Income Tax Act, 1961 entitling deduction under the Income Tax Act, 1961; a complete tax exemption under Section 10(21) of the Income Tax Act, 1961 as a charitable institute; recommendation under Section 80G of Income Tax Act, 1961 entitling the donors to tax deductions on donations made to EHIRC, Delhi and import of medical and other equipments at concessional rates of customs and excise duty. EHIRC, Delhi accumulated reserves of Rs.110/- crores by way of donations and income. After the demise of Shri H.P. Nanda in April 1999, another society, EHIRC, Chandigarh was created which was not for charitable purpose. The society, EHIRC, Delhi which was a charitable society, was merged with the Society at Chandigarh resulting into surpluses and assets of

charitable society becoming available for non-charitable purpose. At the time of merger, EHIRC, Chandigarh had assets worth Rs.7,000/-only. Subsequently, EHIRC, Chandigarh was registered as a company with limited liability under part IX of the Companies Act with effect from 30th May, 2000 and thereafter assets of more than Rs.100 crores were transferred to EHIRC Ltd (Defendant No.2). The plaintiff contended that when the application for registration as a limited company was made, the paid up share capital of the new society was Rs.20.06 lakh which within a period of six days and just two days prior to formal incorporation was raised to Rs.200 lakh by allotting/transferring shares to defendant No.1 and other persons and companies and in the process, EHIRC, Delhi, a charitable society with charitable objects and reserves of over Rs.100 crores, was converted into a limited company and the defendant No.1 became 80% owner of EHIRC Ltd, defendant no.2. The newly formed company EHIRC Ltd., defendant no.2, also gave inter corporate deposits of Rs.13.15 crores to defendant No.1 and pledged its assets in favor of ICICI Bank Limited as security for a loan of Rs.75 crores given to the defendant No.1. In addition, defendant no.1 took a loan of Rs.100 crores from LIC by pledging the shares of defendant no.2.

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Foremost submission of the learned Counsel for the Defendant no.1 is that the shareholding and assets of defendant no.2 have already been transferred and therefore, no restrain order can be passed. In my view this amounts to that since alleged grabbing of assets of Charitable Society, illegality and fraud of defendants have already been done which started about four year back and since no action was taken by the plaintiffs since then, therefore the defendants be allowed to perpetuate this alleged illegality and fraud. This contention seems to be devoid of any legal and equitable rational. There was no satisfactory answer from the defendants as to how the Charitable purpose for which the

institution EHRIC, Delhi was created could be thwarted completely by creation of a new society without charitable purpose and merger with that of charitable society and thereafter creation of a new company and transfer of all the assets which were meant for Charitable purposes, for personal gains of Defendants no.1 to 5, except the interpretation of provisions of Societies Registration Act and Companies Act and the plea that no illegality and violation of any enactment has been committed. The interpretation of provisions of Society Registration Act and Companies Act as given by the counsel for the defendant no.1 has been specifically and very emphatically refuted by the plaintiffs' counsel. The counsel for defendant no.1 has not given any justifiable reason for appropriating the corpus of charity for personal use of defendant nos.1 to 5. In the facts and circumstances as has been laid before me it cannot be inferred that Charity which was perceived by Late Shri H.P.Nanda and for which Charitable Society was created, was ultimately to enure only for his selective progeny and not for the public at large. The counsel for the defendant no.1 very emphatically contended that the plaintiff no.1 has initiated the present legal proceedings to take his share and not for any other reason. Mr. Singh, Learned Counsel for Plaintiff no.1 has strongly refuted it and contended that his client does not want even a paisa from this as it was meant for Charity and he can not and will not be a part of this illegal appropriation. Even if the shareholding and assets of defendant no.2 have been transferred in favor of a third party, the corpus which was for Charitable purpose has not been completely wiped out and is with defendant nos.1 to 5 in some form or other. To protect whatsoever is left with the defendants, it will be just and appropriate to direct the defendant nos.1 to 5 not to do anything further to dilute and wipe out this corpus which was meant only for Charitable purpose. The defendants have converted a society which was for charitable purpose and which was started with a view not to earn profits and for charities of public at large, into other entities which are profit making and have appropriated the assets.

There are serious allegations of fraud against the defendants. The acts committed by the defendants in creation of another society, merger of two societies and thereafter floating a company with limited liability and the new company giving loans to defendant no.1 and pledging its assets for the loans given to defendant No.1 and thereafter transfer of shareholding and assets to third parties, require adjudication and investigation. If the defendants further appropriate the amounts or dilute the corpus of charitable society in whatsoever form it is with the defendants or do anything this may lead to multiplicity of proceedings which will also have irreversible consequences which must be checked. The argument of the learned counsel of the defendant No.1 that since assets of defendant No.2 have already been transferred and the transferee company is not impleaded as a party and transferee will be impacted in case any interim order is passed, in my opinion is devoid of any rationale nor shall dissuade this Court from protecting from alleged fraud and curbing the alleged illegalities of defendant no.1 to 5. In the circumstances the acts of defendant Nos.1 to 5 which are alleged to be fraudulent, can not be allowed to be perpetuated, on the ground that the transfer of shareholding and assets have already been concluded. For the reasons stated hereinabove, I am of the opinion that the plaintiffs have been able to make a prima facie case and balance of convenience and irreparable loss in their favor and thus a case for interim order in their favor. Considering the facts and in totality of circumstances, I, therefore, direct defendants No. 1 to 5 to maintain status quo in the facts and circumstances till next date of hearing. Plaintiffs to comply with the provision of Order 39 Rule3 within one week. Defendants shall file reply before the next date of hearing. Any thing stated herein shall not be construed as final expression of opinion on the merits of the case. List the application for interim injunction for hearing on 22nd November, 2005.

(emphasis supplied)

12. Mr. Arvind Nigam, learned counsel appearing for Respondents 1, 3, 4 and 5, after referring to the reliefs prayed for in the suit, submitted that the Plaintiffs had claimed no relief, personal to them. He further submitted that a civil suit, unlike a writ petition under Article 226 of the Constitution of India, cannot be instituted for protection of public interest. According to him, a civil suit cannot be instituted for redressing some third parties' grievances, unless and until the said suit was instituted with leave under Order I Rule 8 of CPC, that means a representative suit. According to Mr. Nigam, even in a representative suit, the Plaintiff's rights must be affected, that is to say, he must have the same right as that of other persons affected and on whose behalf he seeks to sue. Thus, according to Mr. Nigam, in the civil suit a cause of action has to be in favour of the Plaintiff and against the Defendants, that means the suit has to seek redressal of the Plaintiff's rights and grievances that the Defendant has violated. In this connection, he referred to the judgments of the Hon'ble Supreme Court in the cases of ***Y. Abraham Ajith and others v. Inspector of Police, Chennai and another***, reported in ***(2004) 8 SCC 100*** and ***Om Prakash Srivastava v. Union of India and another***, reported in ***(2006) 6 SCC 207***. In ***Omprakash Shrivastava's*** case (supra), the Hon'ble Supreme Court has held, "By "cause of action" it is meant every fact, which, if traversed, it would be necessary for the plaintiff to prove in order to support his right

to a judgment of the Court. In other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. (See Bloom Dekor Ltd. v. Subhash Himatlal Desai (1994) 6 SCC 322.”

13. At the outset, Mr. P.V. Kapoor, learned senior counsel appearing for Respondent No. 2 contended that Appellant No. 1 has filed the present legal proceedings just to extract money which the said Appellant thinks had been unjustly denied to him on conversion of the society into a company. Mr. P.V. Kapoor further submitted that in law there can be no cause of action that makes a grievance of a lawful act of the Defendant. He referred to Section 12 of the Societies Registration Act which permits a charitable society to change its object or to merge with a non-charitable society. He stated that assuming that the Appellant No. 1 had objected to said conversion, he being in minority could not have prevented the merger and subsequent conversion. He contended that the charitable society had only got some land from the Government on concessional basis because it was a charity and the Government had already initiated action for its recovery and the matter was subjudice. Mr. Kapoor also contended that the Appellant was the moving force behind a Public Interest Litigation claiming similar reliefs, which had already been dismissed by this Court. He further

submitted that the Plaintiffs had no cause of action to file the present suit.

14. Mr. Kapoor further submitted that none of the reliefs prayed for by the Appellants/Plaintiffs in their suit could be granted in a civil proceeding. In this connection, he relied upon the following judgments:-

(A) ***Salim Akbarali Nanji and others v. Union of India and others*** reported in **2003, Vol. 113, Company Cases, 141**, wherein it has been held, *“Moreover, the position of law is very clear that once a company is born, the only method to get it extinguished is not by assailing its incorporation, since the certificate of incorporation is conclusive, but by resorting to the provisions of the Companies Act which provide for winding up of companies. The petitioner cannot, therefore, be said to have no remedy.”*

(B) ***In. Walvis Flour Mills Co. Pvt. Ltd., In Re.*** reported in **(1993) 76 CompCas 376(Bom)**, wherein it has been held, *“After due compliance with the orders and service to the Registrar of Companies, Goa, and the Regional Director of Company Affairs, Bombay, the matter came up on board. The scheme for amalgamation has been opposed by Shri R. Aghoramurthy, Regional Director of Company Affairs, having his*

office at Bombay. The gravamen of the objection appears to be that the companies sought to be brought within the scheme for amalgamation are trading companies carrying on commercial activities whereas the transferee company is a charitable institution incorporated under section 25 of the Companies Act and its main object is restricted to providing for charities and not doing any commercial activities. It has been, therefore, contended that if the commercial trading companies are amalgamated with the transferee company, the very character of the transferee company will be lost and that would in terms violate the terms and conditions of the licence granted under the relevant provisions of the Companies Act.

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7. The learned single judge, while disposing of the case relating to the scheme for amalgamation of four companies earlier referred to, held that objections raised by the Regional Director, Bombay, are misconceived and unfounded and that too by assigning reasons and after having looked into a few authorities as mentioned therein, reached the conclusion that the objections raised cannot be sustained. The question as to there being no provision for amalgamation in the objects clause of the memorandum of association we also considered and it was held that even in the absence thereof, sanction can be obtained from the court for a scheme of amalgamation and that such scheme

can yet be granted provided the court is satisfied about the reasonableness of the scheme. In my view, there can be no doubt that if the transferee company does not carry on business strictly in accordance with the terms of its memorandum of association and/or the terms of the licence issued by the Government under the relevant provisions of the Companies Act, such a contravention can be taken care of and needless to say it is open to the authorities under the Companies Act to take appropriate action including the revocation of the licence. Once I come to this position, I find no difficulty in sanctioning the scheme as prayed for. The transferee company is directed to file an undertaking that it shall carry on its activities strictly in accordance with the terms of its own memorandum of association.”

15. Mr. Kapoor also submitted that Order VII Rule 11(a) of CPC would be attracted where litigation is doomed to fail. In this connection, Mr. Kapoor relied upon the judgment of the Supreme Court in ***Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I and another*** reported in **(2004) 9 SCC 512** which reads as under:-

“133. The idea underlying Order 7 Rule 11(a) is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried

*out in the Code of Civil Procedure, the courts would interpret the provisions in such a manner so as to save expenses, achieve expedition and avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of the court is doomed to fail would not further be allowed to be used as a device to harass a litigant. (See *Azhar Hussain v. Rajiv Gandhi SCC at pp. 324-35*)."*

(emphasis supplied)

16. Lastly, both Mr. P.V. Kapoor and Mr. Nigam submitted that the bar of Section 92(1) CPC would apply. They submitted that though the Appellants had claimed no relief under clauses (a) to (g) of Section 92(1) of CPC, but clause (h) of the said Section was an independent residual clause and had not to be read *ejusdem generis* with clauses (a) to (g). They submitted that clause (h) which stipulated such further or other reliefs, as the nature of case may require, was a wide clause and it would be attracted if the plaint contained allegations of breach of trust and violation of duties as well as powers by the trustees. According to them the said test was satisfied in the present case. They further submitted that Mr. Ganesh's reliance on the Privy Council judgment in ***Abdur Rahim's case (supra)*** was no longer good law in view of the observations of the Hon'ble Supreme Court in the case of ***Charan Singh and another v. Darshan Singh and others*** reported in ***(1975) 1 SCC 298***, wherein it has been held as under:-

"8. Lord Sinha delivering the judgment of the Judicial Committee of the Privy Council in *Abdur Rahim v. Syed Abu Mahomed Barkat Ali Shah* AIR 1928 PC 16 : 55 IA 96: 108 IC 361 rejected the argument that the words "such further or other relief as the nature of the case may require" occurring in clause (h) must be taken, not in connection with the previous clauses (a) to (g) but in connection with the nature of the suit. The argument was that any relief other than (a) to (g) in the case of an alleged breach of an express or constructive trust as may be required in the circumstances of any particular case was covered by clause (h). It was repelled on the ground that the words "further or other relief" must on general principles of construction be taken to mean relief of the same nature as clauses (a) to (g). It would be noticed that the word used after clause (g) and before Clause (h) is "or". It may mean "and" in the context, or remain "or" in the disjunctive sense in a given case. If any further relief is asked for in addition to any of the reliefs mentioned in clauses (a) to (g) as the nature of the case may require, then the word "or" would mean "and". But if the relief asked for is other relief which is not by way of a consequential or additional relief to any of the reliefs in terms of clauses (a) to (g), then the word "or" will mean "or". The other relief however, cannot be of a nature which is not akin to or of the same nature as any of the reliefs mentioned in clauses (a) to (g). According to the plaintiffs' case one of the objects of the religious trust was the worship of Granth Sahib and its recital in congregations of the public. In the suit a decree declaring what portion of the trust property should be allocated to the said object could be asked for under clause (e). The plaintiffs could also ask for the settling of a scheme under clause (g) alleging mismanagement of the religious trust on the part of the trustees. In the settlement of the scheme could be included the worship and recital of Granth Sahib-the holy Granth. The plaintiffs in their plaint did not in terms ask for the one or the other. They, however, alleged acts of breach of trust, mismanagement, undue interference with the right of the public

in the worship of Granth Sahib. They wanted a decree of the Court against the appellant to force him to carry out the objects of the trust and to perform his duties as a Trustee. Reading the plaint as a whole it is not a suit where the plaintiffs wanted a declaration of their right in the religious institution in respect of the Granth Sahib. But it was a suit where they wanted enforcement of due performance of the duties of the trustee in relation to a particular object of the trust. It is well-settled that the maintainability of the suit under Section 92 of the Code depends upon the allegations in the plaint and does, not fall for decision with reference to the averments in the written statement."

(emphasis supplied)

17. In rejoinder, Mr. Ganesh submitted that the Respondents' argument that the reliefs prayed for in the plaint cannot be granted by a Civil Court is devoid of merit. He stated that the Appellants as Plaintiffs have challenged the conversion of a charitable society into a non-charitable society and thereafter converting the said non-charitable society into a company on the specific ground of fraud which had been set out in detail in the plaint. He submitted that in such a situation, the only remedy available to the Appellant was to file a civil suit and there is no remedy, whatsoever, under the Companies Act.

18. Mr. Ganesh submitted that the case of **Walvis Flour Mills Co. Pvt. Ltd** (supra) was totally irrelevant as in the said case certain commercial companies were amalgamated with a charitable company which is the exact opposite of the present

case. He pointed out that the Court did not interfere with the said amalgamation as it directed the transferee company to file an undertaking that it would carry on its activities strictly in accordance with its own Memorandum of Association. The Court further observed that in case the transferee company did not comply with its Memorandum of Association, the Government was at liberty to take appropriate action including revocation of its license.

19. He further pointed out that judgment in the case of ***Salim Akbarali Nanji*** (supra) only dealt with the conversion of cooperative society into a company without any issue of conversion of any property dedicated to charity into a property of private profit making business. According to him, the case did not deal with amalgamation of a charitable society with a non-charitable society. According to him, the observations of the Court with regard to conclusiveness of Certificate of Incorporation, as provided for by Section 35 of the Companies Act, 1956 operates in an extremely limited sphere and only raises presumption that all procedural requirements of the Companies Act for the incorporation of a company have been duly complied. He submitted that the said presumption does not at all operate in the context of the challenge made and the questions raised in the suit filed by the Appellants.

20. Before we deal with the rival submissions, it would be relevant to reproduce hereinbelow the relevant portion of Order VII Rule 11 CPC:-

“11. Rejection of plaint.- The plaint shall be rejected in the following cases:—

(a) where it does not disclose a cause of action;.....

(d) where the suit appears from the statement in the plaint to be barred by any law;.....”

21. The approach of a Court while dealing with an application under Order VII Rule 11 of CPC application has been settled by a number of judgments of the Hon’ble Supreme court as well as this Hon’ble Court. In ***Raj Narain Sarin through LRs and others v. Laxmi Devi and others***, reported in ***(2002) 10 SCC 501***, it was held that, “ it is a well-settled principle of law that the law court should be rather hesitant to exercise the jurisdiction under Order 7 Rule 11 unless the factual score warrants such exercise and the matter in issue falls within the four corners of the requirement of the statute.....”. In ***Popat and Kotecha Property v. State Bank of India Staff Assn.***, reported in ***(2005) 7 SCC 510***, the Hon’ble Supreme Court held that, “ *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 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. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. The intention of the party concerned is to be gathered primarily from the tenor and terms of his pleadings taken as a whole. At the same time it should be borne in mind that no pedantic approach should be adopted to defeat justice on hair-splitting technicalities.” In ***Inspiration Clothes & U v. Colby International Limited***, reported in **88 (2000) DLT 769**, a Division Bench of this Court held that, “.....A distinction must always be drawn between a plea that plaint does not disclose a cause of action and the plea that the plaintiff has no cause of action to sue. The grounds on which plaint can be rejected are enumerated in clauses (a) to (d) of Rule 11 of Order 7 C.P.C. The first ground on which plaint can be rejected is that it does not disclose a cause of action. While considering the prayer to reject the plaint on ground (a) of Order 7 Rule 11 C.P.C. that the plaint discloses no cause of action, which is essentially a demurrer, the defendant must be taken to admit for the sake of argument that the allegations of the plaintiff in the plaint are true in manner and form. The power to reject the plaint on this can be exercised only if the Court comes to the conclusion that even if all the allegations are

taken to be proved, the plaintiff would not be entitled to any relief whatsoever. A distinction must always be drawn between a case where the plaint on the face of it discloses no cause of action and another in which after considering the entire material on the record the Court comes to the conclusion that there is no cause of action. In the first case the plaint can be rejected but in the latter case the plaint cannot be rejected. The suit has to be dismissed. Learned Single Judge adopted the second approach. This was not the stage where the Court was expected to enter into this controversy that whether there was a cause of action to the plaintiff against the defendant or not. No doubt that where the plaint is based on a document, the Court will be entitled to consider the said document also and ascertain if a cause of action is disclosed in the plaint, but validity of the document cannot be considered at this stage. To enable a Court to reject a plaint on the ground that it does not disclose a cause of action, it should look at the plaint and documents accompanying the plaint only and nothing else. The Court, however, cannot look at the defence of the defendant or the documents relied upon by the defendant.....”

22. Upon a reading of the plaint and believing the averments therein to be correct, as the law mandates at this stage, we are of the view that the suit filed by the Appellants is not a Public Interest Litigation. In fact, Appellant No. 2 had not

only contributed a sum of Rs. 1.5 crores to the corpus of the trust on the footing that it was a purely charitable body but Appellant No. 1, an erstwhile Trustee, also had a strong personal interest in ensuring that the charitable body created by his father was not subverted and diverted for private profit of some individuals. Thus, the plaint on the face of it discloses a cause of action in favour of the Plaintiff.

23. In our opinion, the Appellants in the suit have articulated their own grievances and seek relief in respect thereof. The Appellants are neither strangers to the Trust nor suing on behalf of any other person and, therefore, even the issue of complying with the provisions of Order I Rule 8 CPC did not arise.

24. As far as the allegations of the Respondents that the Appellants had filed the present proceedings just to extract their share of money or that a Public Interest Litigation claiming similar reliefs had been dismissed are concerned, we are of the view that these are defences on merits of the case, which cannot form the basis at this stage for rejection of a plaint in Order 7 Rule 11 CPC proceedings.

25. The relevant portion of Section 92 CPC is reproduced hereinbelow for ready reference:-

“ 92. Public charities.- (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the [leave of the Court] may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree-

(a) removing any trustee;

(b) appointing a new trustee;

(c) vesting any property in a trustee;

[(cc) directing a trustee who has been removed or a person who has ceased to be a trustee, to deliver possession of any trust property in his possession to the person entitled to the possession of such property];

(d) directing accounts and inquires;

(e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged;

(g) settling a scheme; or

(h) granting such further or other relief as the nature of the case may require.

(2) Save as provided by the Religious Endowments Act, 1863 (20 of 1863) [or by any corresponding law in force in [the territories which, immediately before the 1st November, 1956, were comprised in Part B States]], no

suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with provisions of that sub-section."

26. In our view the bar of Section 92 CPC would be attracted only if the following three conditions are satisfied, namely,:-

(a) the suit relates to a public charitable or religious trust;

(b) the suit is founded on a allegation of breach of trust and the direction of the Court is required for administration of the trust; and

(c) the reliefs claimed in the suit are those mentioned in sub-Section (1) of Section 92 CPC.

27. Though the learned Single Judge in the impugned order has concluded that the reliefs prayed for in the suit, *"may be covered under Clause (c)"* but, *"definitely under Clause (h)"*, but both the learned counsel appearing for the Respondents admitted that the reliefs asked for in the Appellants' plaint did not fall under Clauses (a) to (g). Even otherwise, we are of the view that the reliefs claimed in the plaint do not fall in Clauses (a) to (g) of Section 92 of CPC.

28. We also do not agree with the submission of learned counsel for the Respondents that the Privy Council judgment in ***Abdur Rahims'*** case (*supra*) is no longer good law. Even in the Hon'ble Supreme Court's judgment in the case of ***Charan Singh*** (*supra*), ***Abdur Rahim's*** case (*supra*) has been referred to and relied upon. In fact, in no judgment of the Hon'ble Supreme Court, ***Abdur Rahim's*** case (*supra*) has been overruled. Even in ***Charan Singh's*** case (*supra*), the Hon'ble Supreme Court concluded that the bar of Section 92 CPC would apply as the reliefs sought for in that case though not strictly falling within Clause (e) or (g) of Section 92(1) of CPC, were very much akin to either and hence covered by the residuary clause (h). The relevant observation of the Hon'ble Supreme Court in ***Charan Singh's*** case (*supra*) is reproduced hereinbelow for ready reference:-

" In our judgment the relief sought for in this case does not strictly or squarely fall within clause (e) or (g) but is very much akin to either and hence is covered by the residuary clause (h)."

(emphasis supplied)

29. Therefore, we are of the view that Clause (h) of Section 92(1) of CPC is not an independent residual clause as contended by the Respondents. We are of the opinion

that to attract the bar under Section 92 of CPC the reliefs claimed for must either fall in Clauses (a) to (g) or must be akin to Clauses (a) to (g) to fall in Clause (h). Since, in our opinion, the reliefs claimed for in the present suit neither fall in Clause (a) to (g) nor are akin to any of the said Clauses, mandatory leave under Section 92 of CPC had not to be obtained by the Appellants prior to the institution of the suit. We are further of the view that the primary prayer in the suit filed by the Appellants was for a declaration that amalgamation of EHIRC-Delhi with EHIRC-Chandigarh and the subsequent conversion of amalgamated society with a company was void, is an issue which is not covered by Section 92 of CPC.

30. In any event, a suit by a trustee against a co-trustee is certainly not covered by Section 92 of CPC (See ***Sri Vedagiri Lakshmi Narasimha Swami Temple Vs. Induru Pattabhirami Reddi*** reported in ***AIR 1967 SC 781*** at **786** and ***Tirumalai Tirupati Devasthanams Committee Vs. Udiavar Krishnayya Shanbhaga & Ors.*** reported in ***AIR 1943 Madras 466 at 469***). Further a suit praying for declaration that certain properties were trust properties is also outside the ambit of Section 92 as held in ***Pragdasji Guru Bhagwandasji v. Ishwarlalbhai Narsibhai and others*** reported in ***AIR 1952 SC 143 at 144***, ***Bishwanath***

and another v. Sri Thakur Radha Ballabhji and others,
reported in AIR 1967 SC 1044 at 1046 and ***Harendra***
Nath Bhattacharya and others v. Kaliram Das (Dead)
by his Heirs and Lrs. And others, ***reported in AIR 1972***
SC 246 at 250. Consequently, in the present instance bar
of Section 92 of CPC to the maintainability of suit would not
apply.

31. We are also not impressed by the Respondents' arguments that none of the reliefs prayed for by the Appellants/Plaintiffs in their suit could be granted. In fact, the first transaction impugned in the plaint is the amalgamation of the Delhi charitable society with Chandigarh non-charitable society purportedly carried out under Section 12 of the Societies Registration Act. It is pertinent to mention that it is the Appellants' case that Section 12 of the Societies Registration Act permits amalgamation of two societies with similar objects but does not at all permit amalgamation of a charitable society with a non-charitable or an alleged fraudulent conversion of a charitable institution into a private property. Admittedly, against the said amalgamation, there is no statutory remedy available under the Societies Registration Act and, therefore, the same can only be challenged by way a civil suit. We are of the view that the case law cited by the Respondents is not

applicable to the present facts for the reasons advanced by Mr. Ganesh.

32. In our opinion, the scope and ambit of Section 9 of CPC is extremely wide and by virtue of this provision, a civil suit can be filed in respect of any civil dispute, whatsoever, unless specifically barred by law or by clear intendment arising from such law. In ***Dhula Bhai and others v. State of Madhya Pradesh and Another***, reported in ***AIR 1969 SC 78***, the Constitution Bench of the Hon'ble Supreme Court observed that the exclusion of jurisdiction of a Civil Court is not to be lightly inferred and can only be established if there is an express provision of law or if the same is clearly implied. The relevant observations of the Hon'ble Supreme Court are reproduced hereinbelow for ready reference:-

"32. The result of this inquiry into the diverse views expressed in this Court may be stated as follows :-

(1) Where the statute gives a finality to the orders of the special tribunals the Civil Court's jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

(emphasis supplied)

33. In ***State of Tamil Nadu v. Ramalinga Samigal Madam***, reported in ***(1985) 4 SCC page 10 in paragraph 14***, it has been held that, “.....even where finality is accorded to the orders passed by the special tribunal one will have to see whether such special tribunal has the power to grant reliefs which Civil Court would normally grant in a suit and if the answer is in the negative it would be difficult to imply or infer exclusion of Civil Court’s jurisdiction.” In fact, the Company Court and the Company Law Board follow a summary procedure and they neither go into disputed or complicated questions of fact which require investigation or evidence in depth – as required in the present case (refer to ***T. Srinivasa Vs. Flemming (India) Apotheke Private Ltd.*** reported in ***1990 (68) Com. Cases 506, Karnataka***). Thus in our view, Civil Court has the jurisdiction to hear and decide the Appellants’ suit.

34. It is pertinent to mention that in case concessional land had not been allotted by DDA, the Trust would have had to purchase the land at a huge cost which could have meant borrowing money at high rates of interest. This in turn would have prevented the Trust from accumulating reserves which are now being sought to be transferred to a third party. In any event, the gravamen of the plaint is that a charitable institution has been converted into a commercially

run hospital whereby not only its corpus, funds and management have been transferred to outsiders but also its assets including concessional land, cash reserves, donations and goodwill have been encashed, by some of the family members of the promoter of erstwhile charitable society. It is well settled that "fraud unravels all" and that "charity never dies". In ***S.P. Chengalvaraya Naidu (dead) by LRs. V. Jagannath (dead) by LRs and others***, reported in ***(1994) 1 SCC Page 1***, it has been held "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non-est in the eyes of law. Such a judgment/decreed - by the first court or by the highest court - has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.....

35. In our opinion, if the allegations made in the plaint are true and correct then the Respondents have indulged in a fraud of egregious nature by converting a charitable

society and its properties into a private profit making company. In ***Ram Preeti Yadav v. UP Board of High School and Intermediate Education and Ors.***, reported in ***(2003) 8 SCC 311***, it has been held that once fraud is proved it will deprive the person of all advantages or benefits obtained thereby.

36. Consequently, the present appeal is allowed and the impugned order dated 3rd July, 2008 is set aside but with no order as to costs. The suit is restored to its original position and the interim order dated 30th September, 2005 is also restored. Needless to say that our observations are prima facie in nature and would not bind the learned Single Judge while finally deciding the suit on merits. The parties are directed to appear before the appropriate Single Judge on 2nd March, 2009 for further proceedings subject to orders of the Judge-in-Charge (Original Side).

MANMOHAN, J

MUKUL MUDGAL, J

January 16th, 2009
sb/rn