

15.

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

DATE OF DECISION: 05.12.2012

+ **FAO(OS) NO. 569/2012**

BABITA PAL AND OTHERS

..... Appellants

Through: Mr. H.S.Phoolka, Sr. Advocate with
Mr. S.M.Anis, Ms. Prabhsahay Kaur
& Mr. Gursimranjit Singh, Advs.

Versus

JAGDISH BANSAL

..... Respondent

Through: Dr. (Mr.) Surat Singh &
Ms. Esha Mazumdar, Advs.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J.

C.M. No. No. 19831/2012 (for condonation of 6 days' delay in filing the appeal) & C.M. No. No. 19832/2012 (for condonation of 23 days' in re-filing the appeal)

Notice, which is accepted by learned counsel for the respondent.

For the reasons set out in the applications, the delays in filing and re-filing the appeal are condoned subject to payment of Rs. 7,500/- as costs to the respondent.

The applications are allowed. The costs to be paid within a week.

C.M. No. 20278/2012 (under Order 6 Rule 17 CPC)

Notice, which is accepted by learned counsel for the respondent.

The appellants seek to amend the prayer clause by specifically incorporating the orders passed on different applications qua which he seeks relief in the appeal.

The application is not opposed and is, accordingly, allowed.

FAO(OS) No. 569/2012

1. Admit.
2. Learned counsel for the respondent accepts notice. With the consent of parties, we have heard learned counsels and proceed to dispose of the present appeal.
3. The appellant has preferred the present appeal to assail the order dated 07.08.2012 passed by the learned Single Judge disposing of the following applications: (i) I.A. No. 5347/2012 (under Order VI Rule XVII CPC filed by the plaintiff/respondent); (ii) I.A. No. 17345/2011 (filed by the defendant Nos. 1 and 2/appellants under Order VII Rule 11 CPC for rejection of the plaint), and; (iii) I.A. No. 18753/2011 (filed by the defendants/appellants under Order XXXIX Rule 4 CPC for vacation of the interim order dated 12.08.2011). The respondent/plaintiff filed a suit for declaration, injunction and rendition of accounts through his attorney. The respondent is a senior citizen residing in New York for the last several decades where he is a practicing doctor. The case of the respondent was that the appellant had been acquainted with him for over a decade. The appellant No. 2/defendant No.1 in the suit represented to him that if the respondent were to send

money to the appellant from the USA, the appellant No. 2 would buy properties on his behalf. Since there was appreciation in the property rates in India, particularly in the NCR, the respondent sent his own funds and also contributions made by his family members to the appellant No. 2. These funds were sent for the purpose of defendant No. 2 doing business in India as well as purchasing properties on behalf of the respondent, and on behalf of his family members. Appellant No. 2 purchased certain properties in the name of the respondent and his family members and also purchased some properties either in his own name; in the name of his family members. Subsequently, appellant No.2 turned dishonest and started purchasing properties in his own name; in the name of his own family members, and; in the name of the firms owned by him and his family members. He also took loans in the names of the firms/companies against these properties without obtaining prior concurrence of the respondent. When confronted, respondent No. 2 acknowledged having received large sums of money from the respondent and his family members and gave his admission in writing on 18.3.2011. He also executed a General Power of Attorney on 29.06.2011 in favour of the respondent in respect of eight of the properties purchased by him in his own name, or in the names of his family members/firms/companies. The case of the respondent was that in August, 2011, he came to know that despite the execution of the Power of Attorneys as aforesaid, the appellant No. 2 was planning to sell and dispose of the said properties in a hurry. Consequently, the respondent filed the aforesaid suit wherein he sought a declaration that he was the owner of the properties bought by appellant No. 2 out of the funds sent by him and his family members in trust. He also sought a mandatory injunction directing the

appellants to handover the original title deeds of the properties in question with peaceful vacant possession of the properties to the respondent and his family members. A permanent injunction was also sought against the appellants from creating any third party interest in the suit properties. Lastly, the respondent sought rendition of accounts from the appellants with the direction that they shall pay all the outstanding loans which they have taken against the said properties bought from out of the funds sent by the respondent and his family members.

4. An ex-parte order of injunction was passed on the respondent's application under Order XXXIX Rules 1 and 2 CPC being I.A. No. 12627/2011 restraining the appellants from alienating the suit properties mentioned in paragraph 26(i)(a) to (j) of the said order. The Court also passed an order of attachment before judgment in respect of property No. 153-H, Country Lane No. 5, Anupam Garden, Sainik Farms, New Delhi.

5. Upon service of summons, defendant Nos. 1 and 2, who are appellant Nos. 2 and 1 respectively in the present appeal, filed the aforesaid application under Order VII Rule 11 CPC to seek rejection of the plaint. They also sought vacation of the ex-parte order of injunction by moving the application under Order XXXIX Rule 4 CPC, as aforesaid.

6. The learned Single Judge after hearing the parties allowed the amendment application moved by the respondent and also dismissed the applications of the appellants under Order VII Rule 11 CPC and under Order XXXIX Rule 4 CPC for vacation of the interim orders of injunction. Consequently, the appellant has preferred this appeal.

7. The submission of Mr. Phoolka, learned Senior Counsel for the appellants, is that the learned Single Judge has illegally allowed the amendment application as it was moved mala fide and dishonest. It is contended that the said application was moved to delay the suit proceedings. By way of amendment, the respondent was seeking to add facts which were earlier not disclosed. The appellants allege that the respondent is guilty of concealment of material information. The appellant's contended that new pleas were sought to be introduced by the respondent for the first time which are not reflected in the unamended plaint. It is for the first time being alleged that moneys were given by the respondent to the appellants on trust and that the appellant No. 2 had promised to discharge the trust. Pertinently, it was contended by the appellants that the respondent was seeking to draw advantage from one of the exceptions carved by the legislature to the bar created by the Benami Transactions (Prohibition) Act, 1988 (for short, "The Benami Act"), by placing reliance on Section 4(3)(b) of the Benami Act. At the same time, it is contended that the amendment is worthless.

8. We have heard learned Senior Counsel for the appellants and perused the impugned order as well as the documents placed on record. We are of the opinion that there is no error in the impugned order passed by the learned Single Judge insofar as the respondent's amendment application has been allowed. In our view, the learned Single Judge has correctly applied the principles while considering the application for amendment, namely: (i) the application for amendment had been filed at the initial stage of the proceedings; (ii) the trial had not yet commenced; (iii) the defendants have not yet filed the respective written statements (except defendant No. 8/State

Bank of India whose written statement is formal in nature); (iv) the scrutiny of the unamended plaint and the amendments sought by the respondent leaves no manner of doubt that the amendments are clarificatory in nature and seek to incorporate better particulars leaving the original cause of action untouched; (v) while considering the application for grant of amendment, a liberal approach must be adopted by the court in favour of allowing amendment, unless the amendment seeks to alter the substratum of the case or is in the nature of an abuse of the process of the court.

9. In the present case, the respondent was seeking to add details of the properties purchased by defendant No. 1/appellant No. 2 and the funds generated by the respondent for the purpose. These details are contained in the document dated 18.03.2011 annexed to the unamended plaint, which had expressly been mentioned and relied upon in the plaint.

10. The learned Single Judge has not only taken note of the relevant averments made in the unamended plaint but also the documents filed by the respondent- particularly the document dated 18.03.2011 containing the admission of appellant No. 2. She has also taken note of the statement made by the respondent before the Court under Order X CPC.

11. From the aforesaid, it is clear that the learned Single Judge has threadbare examined the respondent's application for amendment and has found good justification to exercise the discretion vested in her, founded upon well settled principles. It is not for this Court to interfere with the exercise of discretion by the learned Single Judge when the same is found to have been exercised on relevant and germane considerations. Consequently,

we do not find any illegality or infirmity in the impugned order passed on the said application for amendment being I.A. No. 5434/2012. We are firmly of the view that we would have also arrived at the same conclusion, had we ourselves considered the said application on the basis of the considerations which weighed with the learned Single Judge.

12. We entirely agree with the conclusion of the learned Single Judge that it could not be said that the respondent, in the garb of carrying out amendments, is seeking to alter the basic contours of his case or is setting up a new case in consistent with the earlier pleadings.

13. In relation to the dismissal of I.A. No. 17345/2011 preferred by the appellants under Order VII Rule 11 CPC, the submission of Mr. Phoolka, is two fold. It is firstly argued that the respondent in his statement recorded under Order X CPC had admitted that as his daughter, namely, Nira Sharma was having business relationship with the appellants, whereunder the appellants used to make garments in their factory which were being sent to New York where the respondent's daughter is a Fashion Designer. The respondent admitted that he used to send money to the appellants through his daughter's company to Embex inc., Embex Exports and ND Exports through wire transfer. On this basis, it is contended that the moneys sent by the respondent were in respect of the business transactions and not for the purchase of properties by the appellants in the name of the respondent or his family members. It is secondly contended that the suit of the respondent is barred by the Benami Act.

14. Learned Single Judge has considered and rejected both these submissions at this stage, and in our view rightly so. The statement of the respondent recorded under Order X CPC would be an aspect to be considered by the Court while trying the suit. There is no statement discernible, therefrom, to the effect that all the monies sent by the respondent to the appellants were in respect of business dealings between the appellants and the respondent's daughter. All that is discernible is the channel through which the monies were sent by the respondent to the appellants. The said statement of the respondent, the admissions made by the appellant No. 2 in his communication dated 18.03.2011, and all other evidence that may be led by the parties would have to be considered before a definite conclusion can be reached with regard to the quantum of monies sent, and the purpose for which they were sent by the respondent to the appellants and the manner of the utilization of the said funds. These are all matters of trial. It is well settled that for rejection of a plaint under Order VII Rule 11 CPC, all that can be seen is the plaint, the documents filed with the plaint and the documents which ought to have been filed with the plaint but which have deliberately been withheld by the plaintiff. The defence that the appellants may set up in their written statement cannot be the basis of an application under Order VII Rule 11 CPC.

15. The submission that the suit was barred by the provisions of the Benami Act has also exhaustively been considered by the learned Single Judge and, in our view, has been rightly rejected. The learned Single Judge has taken note of Section 4(3) of the Benami Act which carves out two exceptions to the applicability of the prohibition contained in the Benami

Act. The second exception is: 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. In the present case, it is not the case of either party that the respondent purchased the property in the name of the appellants, their firms and companies. The case of the respondent is that the respondent transferred the funds to the appellants in trust for purchase of properties in the name of the appellant and his family members, but, that the appellants have breached the said trust. In this context, communication of appellant No. 2 dated 18.03.2011 assumes significance. As noticed by the learned Single Judge, the respondent nowhere in the plaint states that he had asked the appellants and, particularly appellant No. 2, to purchase the properties in the names of the appellants. The case of the respondent is that the appellants had turned dishonest and had started purchasing properties in their own name and in the name of their firms and companies. The learned Single Judge has taken note of the various authorities cited before him in this regard. After taking note of these decisions, the learned Single Judge in para 45 of the impugned order has observed as follows:

“45. From a conspectus of the above case law relied upon by Mr.Phoolka, it clearly emerges that none of the decisions relied upon have any bearing or application to the facts of the present case. The principle underlying these decisions is, however, of some import, namely, that in determining whether a property is held benami or not the Court shall have to take into consideration the facts of the case to ascertain whether there was a fiduciary relationship between the parties and for the

aforesaid purpose, the pleadings and the evidence adduced must be resorted to.

46. *In a recent pronouncement of the Supreme Court in **Sri Marcel Martins vs. M. Printer & Ors.** reported in (2012) 5 SCC 342, the Supreme Court while considering the provisions of Section 4(3)(b) of the Benami Act laid down the law as follows:-*

*‘23. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, **the Court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case.** Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-à-vis the plaintiffs-respondents.’ ”*

16. The submission of the appellants that Section 88 of the Indian Trusts Act, 1882 is applicable only to the persons listed therein i.e. to an executor, trustee, partner, agent, director of a company, legal advisor or other persons bound in fiduciary character to protect the interests of another by a written agreement binding the parties, has been considered in depth by the learned Single Judge and rejected by placing reliance on the decision of the Supreme Court in **Canbank Financial Services Ltd. Vs. Custodian and Others** (2004) 8 SCC 355. In para 48, the learned Single Judge has observed as follows:

*“48. It may be noted at this juncture that in the **Canbank Financial Services Ltd.** case (*supra*), the Supreme Court while dealing with the Benami Transactions Act emphasized that benami transactions in India were generally recognized by the*

Courts unless such transactions (a) violated the provisions of any law; or (b) defeated the rights of innocent transferees for value; or (c) when the object of the benami transaction was to defraud creditors; or (d) when it was against public policy. The Supreme Court held that benami transactions as such had not been declared to be invalid in law by any statute including the Benami Transactions Act and as a matter of fact the Benami Transactions Act was required to be strictly construed. In paragraph 66, it was stated:-

*‘66. The Benami Transactions Act is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transactions and for whom new liabilities are created by the Act. A statute which takes away the rights of a party must be strictly construed. (See **R. Rajagopal Reddy v. Padmini Chandrasekharan** (1995) 2 SCC 630 : AIR 1996 SC 238).’*

17. She has also taken note of the decision of a learned Single Judge of this Court (Hon’ble Mr. Justice Madan B. Lokur, as His Lordship then was) in **S.M.Wahi Vs. Ms. Reeta Wahi** 2006(90) DRJ 616. The learned Single Judge after considering the decision cited as aforesaid observed in para 51 as follows:

*“51. In view of the aforesaid adumbration of the law by the Supreme Court and this Court, I am unable to uphold the contention of Mr. Phoolka, the learned senior counsel for the defendants that the list of persons mentioned in Section 88 of the Trusts Act is exhaustive. I am also unable to agree with the contention of Mr. Phoolka that there must be an agreement in writing between the parties to attract the provisions of Section 88 of the Trusts Act and that a person is bound in a fiduciary capacity to protect the interest of another person if and only if there is a written agreement to this effect. In **Central Board of***

Secondary Education and Anr. vs. Aditya Bandopadhyay and Ors., (2011) 8 SCC 497, the Supreme Court explained the term “fiduciary” and “fiduciary relationship” in the following words:

‘39. The term “fiduciary” refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term “fiduciary relationship” is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.’

52. *The scope and ambit of the expression “fiduciary” cannot, therefore, in my opinion, be narrowed down to the extent canvassed by Mr. Phoolka, either in law or in equity. Law does not mandate such an interpretation; equity does not countenance it. In equity, it would tantamount to the trustee not only betraying the trust reposed in him but also taking advantage of his own wrong. Surely, this could not have been the intentment of the legislature which specifically saved fiduciary relationships from being hit by the prohibition imposed on benami transactions by culling out an exception to*

such transactions in the form of Section 4(3)(b) of the Benami Transactions Act.

53. For the aforesaid reasons, I am not inclined to reject the plaint at this preliminary stage as being hit by the Benami Transactions Act. The result is that the application for rejection of the plaint must be rejected and is accordingly dismissed albeit with the caveat that the course of evidence must be left to determine the real nature of the relationship between the parties and the real import of the transactions emanating from such relationship.”

18. Once again, we find absolutely no infirmity with the reasoning and the approach adopted by the learned Single Judge while dealing with the appellant's application under Order VII Rule 11 CPC. It is noteworthy that while dismissing the said application, the learned Single Judge has observed that the course of evidence must be left to determine the real nature of the relationship between the parties and the real import of the transactions emanating from such relationship. This implies that a definite view in the matter can be arrived at only post trial and, consequently, the application under Order VII Rule 11 CPC cannot be allowed at this stage.

19. In view of the above, we are not inclined to interfere with the impugned order passed in I.A. No. 5347/2012 (under Order VI Rule XVII CPC filed by the plaintiff/respondent); and I.A. No. 17345/2011 (filed by the defendant Nos. 1 and 2/appellants under Order VII Rule 11 CPC for rejection of the plaint). The order passed in I.A. No. 18753/2011 (filed by the defendants/appellants under Order XXXV Rule 4 CPC for vacation of the interim order dated 12.08.2011) has also rightly been rejected on the basis of the same reasoning as contained in the order passed in the earlier two I.As and, consequently, we do not find any reason to interfere with the

same. The Supreme Court in **Wander Ltd. and another Vs. Antox India P. Ltd.** 1990(Supp) SCC 727 has observed that the appellate court should not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions.

20. Accordingly, we dismiss the present appeal with costs quantified at Rs.15,000/- to be paid to the respondent within four weeks.

C.M. No. 19829/2012 (for stay)

In view of the aforesaid, no orders are called for in the present application. The same is, accordingly, dismissed.

**(VIPIN SANGHI)
JUDGE**

**(SANJAY KISHAN KAUL)
JUDGE**

DECEMBER 05, 2012
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