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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO. 3241 OF 2016
IN
SUIT NO. 929 OF 2016

Guruswami Ganga Naikar ...Plaintiff
Versus
Vaishali Mohan Kshirsagar & Ors ...Defendants

Mr Simil Purohit, *i/b Mr Amey Deshpande, for the Plaintiff.*
Mr Shyam Mehta, Senior Advocate, *with Mr S Shaikh, legal aid for Ms Vaishali M Kshirsagar, in person.*

CORAM: G.S. PATEL, J
DATED: 8th February 2017

PC:-

1. This is the Defendants' application for rejection of the plaint under Order VII Rule 11(d) and under Order VII Rule 11(a) of the Code of Civil Procedure 1908 (**"CPC"**). The relief claimed under Order VII Rule 11(d) is on two grounds. The first is that the Suit is barred by Section 4 of the Benami Transactions (Prohibition) Act 1988. The second is the Suit is barred in view of Section 34 of the Specific Relief Act 1963. The second no longer survives after the recent amendment to the suit, one I permitted earlier. Mr Mehta for the Defendants does not in fact press the application on the ground under Section 34 of the Specific Relief Act.

2. The reliefs sought are in respect of a flat bearing No. E-5, 5th Floor, Dimple Apartment Cooperative Housing Society Limited, Jerbai Wadia Road, Parel (East), Mumbai 400 012. This is about 712 sq ft in carpet area with an appurtenant terrace of 535 sq ft.

3. The first prayer is for a declaration that the Plaintiff is the owner of the flat and for a direction to the 1st Defendant to deliver possession of it to the Plaintiff. The second prayer is for an order directing the 1st Defendant to transfer the ownership of flat to the Plaintiff and to deliver possession — and this is important — "as per the MoU dated 21st September 2010". Prayer (c) relates to the appointment of a Commissioner. Prayer (d) seeks a restraint in relation to the title deeds. Then in prayer (e), cast in the alternative, the Plaintiff seeks repayment of Rs. 84,60,849/-, payment of a further amount towards settlement of a specified loan amount, and in default attachment of the flat to secure the repayments of these amounts.

4. In an application such as this, I must, of course, look at the plaint as it stands and see whether it is barred by law.

5. The Plaintiff says the 1st Defendant was his employee. The Plaintiff had a number of proprietorship firms. Through these firms the Plaintiff investigates bank and insurance fraud. The Plaintiff says that he used to do business in Nashik with about 70 to 80 employees. In 2012, he decided to expand his business. He opened a branch office in Mumbai. He hired the 1st Defendant. In 2003, the Plaintiff found an office. This was Flat No. 106, Lucky Star CHS

Ltd, Jerbai Wadia Road, Parel (East), Mumbai 400 012. It was in the same building as his earlier office, in Flat or Unit No. 201. The Plaintiff's business grew. In paragraph 5, the Plaintiff says:

> "5. ... In the year 2005-2006, it was required by some of the clients of the Plaintiff to have separate distinct firm/Firm other than the existing companies namely M/s. Balaji Financial Services and M/s. Pathfinders for doing their exclusive work. **Therefore, to have effective and exclusive operation for his exclusive clients, the Plaintiff opened a new firm/Firm under name an style of M/s. Guru Systems in the name of 1st Defendant who was then working with the Plaintiff as a trust worthy employee of the Plaintiff.**"
>
> (*Emphasis added*)

6. According to the Plaintiff although the 1st Defendant was shown as the sole proprietor of M/s Guru Systems, it was he who managed its business affairs. The 1st Defendant was still only his monthly salaried employee. She took no independent decisions. Yet she was trustworthy, and, over time, her salary increased to a fairly substantial amount. The Plaintiff says that the 1st Defendant had access to his confidential information.

7. In paragraphs 10, 11 and 12, the Plaintiff says:

> 10. In the year 2009, the Plaintiff had shifted the entire business operation, administration of all his businesses including that of M/s. Guru Systems from rented Flat No. 105/106 to Office No. 201 and all the clientele, customers were accordingly communicated about shifting of office. In the year 2010, the Plaintiff felt the need of residential

accommodation in Mumbai himself and for employees of M/s. Guru Systems for handling his business affairs and fortunately, the Plaintiff was given to understand that there are two flat being Flat No. E-4 & E-5 which are put for sale in the adjoining building of the office.

11. The Plaintiff therefore approached the Owner, Mr Anis Ebrahim Nizami of the Flat No. E-4 and E-5 of the building, namely, Dimple Apartment Co-operative Housing Society Limited (i.e. 2nd Defendant) and after inspecting both the Flats, the Plaintiff expressed his desire to purchase suit flat for himself and his friend, Mr Vikas Salvi. The Plaintiff called the seller of both the Flat No. E-4 and E-5 for discussion at his office and negotiated with him. The Suit Flat was agreed to be purchased by the Plaintiff for a lump sum consideration of Rs 84,00,000/- and whereas the Flat No. E-4 was to be purchased by Mr Vikas Salvi. The Plaintiff states that he paid a token amount of Rs 3,50,000/- in cash to Mr Anis Ebrahim Nizami on or about 24th May 2010. At that time, the Plaintiff took a sum of Rs 1,50,000/- by cheque from Rm Vikas Salvi as a friendly loan which is reflected in the books of account of M/s. Guru Systems. Thereafter, M/s Guru Systems issued a cheque No. 487050 of Rs 1,50,000/- to the seller- Mr Anis Ebrahim Nizami. In this fashion, an amount of Rs 5,00,000/- was paid to the owner- Mr Anis Ebrahim Nizami.

12. The Plaintiff states that it was decided that all the monies payable for purchase of the suit flat will be paid from the business of Guru Systems. **Since, the business was in the name of Defendant No. 1 as a proprietor the suit premises was purchased in her name and all the payment to be made from the business income of Guru Systems and through Plaintiff.** Since the Plaintiff was residing permanently in Nashik, therefore it was decided that this flat will be used by the employees of the Plaintiff

> for their temporary stay in Mumbai. **The Plaintiff further states that while purchasing the suit premises it was the understanding between Plaintiff and Defendant No. 1 that the said suit property to be purchased from the funds of M/s Guru Systems and Plaintiff, further it was agreed that the Defendant No. 1 will transfer the business of M/s Guru Systems and the suit premised in the name of Plaintiff as and when called for by the Plaintiff without any condition or consideration.**"

(*Emphasis added*)

8. In paragraph 13, the Plaintiff says that this understanding was written out in a Memorandum of Understanding dated 21st September 2010. Both he and the 1st Defendant signed it, the Plaintiff says. This flat was refurnished and after this work was over the 1st Defendant began living in the flat. This is admitted in paragraph 20. Here the Plaintiff also says that he occasionally resided in the flat himself. The Plaintiff also says that there is a later Affidavit-cum-declaration dated 20th July 2013 in which the Defendant "*has acknowledged that the Plaintiff was the true owner of the flat*".

9. In December 2014, the Plaintiff asked the 1st Defendant to transfer the flat to his name. There was a great deal of disagreement between the 1st Defendant and the Plaintiff at this time, or so the Plaintiff says. In paragraph 31 the Plaintiff says that between December 2014 and January 2015 the 1st Defendant stole several of his documents, cheque books, papers etc, including the MoU and Affidavit-cum-declaration referred to earlier. The Plaintiff filed a criminal complaint.

10. Mr Purohit for the Plaintiff argues that the Suit is not hit by Section 4 of the Benami Transactions (Prohibition) Act 1988. According to him, it is saved by Section 4(3)(b). Section 4 of the Benami Act reads:

> "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."

(*Emphasis added*)

11. In the Act, 'Benami transaction' and 'property' are defined in Section 2.

> "**2. Definitions**—In this Act, unless the context otherwise requires,—
>
> (a) *benami transaction* means any transaction in which property is transferred to one person for a consideration paid or provided by another person;
>
> (b) ………
>
> (c) *property* means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property."

12. Section 3 prohibits, subject to the exceptions contained in sub-section 2, all benami transactions.

13. Mr Purohit would have it that the 1st Defendant stood in fiduciary relationship *vis-à-vis* the Plaintiff. The difficulty with this argument is that it runs precisely afoul the prohibition under Section 4. The only manner in which the 1st Defendant could have ever stood in fiduciary relationship in relation to the Plaintiff was if the flat was found to be held benami in the first place. The only asset involved in this "fiduciary" relationship is the flat.

14. As Mr Mehta, learned Senior Advocate appointed by Kathawalla J to represent the 1st Defendant submits, the prohibition in Section 4(1) applies exactly to the facts of the present case.

15. I find Mr Purohit's reliance on the decision of the Supreme Court in *Marcel Martins v M Printer & Ors*[1] to be inappropriate. The Supreme Court on the contrary clearly emphasized that under the Benami Act no suit, claim or action to enforce a right in respect of any property held benami lies against the person in whose name the property is held. Mr Purohit relies on this decision for its observation in paragraph 22 where it is said the words 'fiduciary capacity' admit of no precise definition, being wide in import. They extend to all situations as place the parties in a position of confidence and trust. He submits on reading of paragraph 23 that a Court must take into account the factual context to see if a fiduciary relationship can be reduced. For this, he says, evidence is necessary. Therefore the plaint cannot be rejected. On the face of it, this does not assist Mr Purohit in the least. Ordinarily, an employee is in no sense in a fiduciary relationship *vis-à-vis* his or her employer. In any case, as I have noted above, the only fiduciary relationship that arises on the Plaintiff's showing is on account of a statutorily forbidden holding of a property benami and in no other way.

16. There is no prayer for production of the documents on which the claim is based. There is no specific prayer for a declaration that the MoU is valid, subsisting and binding. There is also no averment that the MoU, although it pertains to immovable property in Mumbai, was ever registered. Mr Purohit submits that the Plaintiff is nonetheless entitled to give evidence of the contents and terms of a contract that is not produced or is withheld by the Defendant. That does not began to explain the lack of the necessary averments in the plaint itself, and that is my limited concern while considering

1 AIR 2012 SC 1987.

an application under Order VII Rule 11. I am not concerned with what the Plaintiff might or might not be able to prove. I have to see whether there is a bar to the plaint even proceeding to the stage of trial or whether there is an absence of cause of action or both.

17. On Mr Purohit's formulation every application under Order VII Rule 11 could otherwise be defeated by saying that what is necessary will be proved at the time of the trial. That would wholly defeat the purpose of Order VII Rule 11.

18. Merely by pleading a missing MoU (or for that matter even pleading an oral agreement), the provisions of Section 4 of the Benami Act cannot be bypassed. In this context, prayers (a) and (b) are worth reproducing in full with their amendments.

> "(a) That this Hon'ble Court be pleased to pass an order:
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> i. Declaring that the Plaintiff is the owner of the suit flat as more particularly described in **Exhibit - "A"** annexed hereto; and directing the Defendant No. 1 to handover peaceful possession of the Suit Flat to the Plaintiff.
>
> ii. declaring that the 1st Defendant has absolutely no right, title and interest in the suit flat as more particularly described in **Exhibit – A** to the Plaint;
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> (b) That this Hon'ble Court be pleased to pass and order against the 1st Defendant directing her to transfer the ownership of the suit flat as more particularly mentioned in **Exhibit – A** annexed hereto in favour of the Plaintiff; and to handover the peaceful possession of the suit flat to the

> Plaintiff as per the Memorandum of Understanding dated 21st September 2010."

19. Prayers (a)(i) and (a)(ii) are squarely within the frame of a relief regarding a property said to be held benami. They are hit by the Benami Act. On prayer (b), Mr Purohit would have me hold that it is in sum and substance a prayer for specific performance: it says "as per the MoU dated 21st September 2010". It is in fact nothing of the kind. It is simply a prayer asking for possession of a flat on the basis that the 1st Defendant only ostensibly held the flat and the Plaintiff is the true owner — i.e., the 1st Defendant held the flat benami. Even according to the Plaintiff himself, the MoU as also the Affidavit-cum-declaration confirmed this. To put it in another way, even if the MoU is produced and proved, the entire Suit would still be hit by the provisions of Benami Act. The wording of Section 4 is absolute and not subject to a contract to the contrary.

20. As regards prayer (e), this is for return of the purchase price of the flat. Again, this prayer is entirely founded on the Plaintiff's premise that it is he who is the true owner of the flat and spent for it although it was bought in the 1st Defendant's name.

21. Mr Purohit also relies on the decision of the Supreme Court in *D Ramachandran v RV Janakiraman & Ors*[2] for the proposition that it is not the duty of the Court to see which part of the plaint does or does not disclose a cause of action. A plaint cannot be rejected in part. It must be either rejected fully or not at all. There is no quarrel with this proposition. What the argument overlooks is

2 AIR 1999 SC 1128.

that I am not considering only an application under Order VII Rule 11(a) (as to want of a cause of action) but also an application made simultaneously under Order VII Rule 11(d) saying that the Suit itself is barred by statute.

22. Viewed from any perspective, the suit is barred by the Benami Act. It seeks reliefs that cannot be granted because of that Act. The plaint is rejected under Order VII Rule 11(d) as barred by the provisions of Benami Transactions (Prohibition) Act 1988.

23. The Notice of Motion is made absolute in terms of prayer clause (a)(i). No costs.

24. Mr Purohit says that on 21st June 2016, the 1st Defendant agree not to create third party rights in respect of the suit flat and confirmed that she was in sole occupation of the flat. That statement will continue for a period of four weeks from today.

(G. S. PATEL, J.)