IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 308 of 2017
WITH
NOTICE OF MOTION (L) NO.511 of 2017
IN
APPEAL NO. 308 of 2017.

Guruswami Ganga Naikar,]
age 50 years, Occu; Business,]
residing at 201, 2nd Floor,]
Luckystar Co-operative Housing]
Society Limited, Jerbai Wadia Road,]
Parel-East, Mumbai 400 012.] ..Appellant.
(Original Plaintiff)

Vs.

1) Ms. Vaishali Mohan Kshirsagar,]
R/at Dimple Apartment Co-op Housing]
Society Ltd. Jerbai Wadia Road, Parel]
(East), Mumbai 400 012.]

2) Dimple Apartment Co-op Housing]
Society Ltd. A registered Society]
under the provisions of Maharashtra]
Cooperative Societies Act, 1960 and]
having its address at Jerbai Wadia]
Road, Parel (East), Mumbai 400 012.]

3) The Manager, UCO Bank,]
having its office at Gala Kunj,]
Nehru Road, Opp. Vani Vidyalaya,]
Mulund (West) Mumbai 400 080.] ..Respondents.
(Original Defendants)

Mr. Sharan Jagtiani I/by Mr. Amey Deshpande for the Appellant.
Mr. Shyam Mehta, Senior Advocate for Respondent No.1 – Amicus Curiae.
Mr. S.C. Gaikwad I/by S.S.P. Legal for Respondent No.3.

CORAM : NARESH H. PATIL, CHIEF JUSTICE &
B.P. COLABAWALLA, JJ.

DATED : 3rd JANUARY, 2019.

JUDGMENT [PER: B.P. COLABAWALLA, J.]

1. Admit. By consent of parties taken up for hearing and final disposal.

2. This appeal takes exception to the judgment and order passed by the learned Single Judge dated 8th February, 2017 passed in Notice of Motion (Lodging) No. 3241 of 2016 in Suit No. 929 of 2016. This Notice of Motion (Lodg) No. 3241 of 2016 was filed by the 1st defendant (Respondent No.1 in this appeal) for rejection of the plaint under Order VII Rule 11 (d) of the Civil Procedure Code, 1908 (for short the **"CPC"**).

3. Initially, relief was claimed under Order VII Rule 11(d)

on two grounds. The first was that the suit is barred by virtue of Section 4 of the Benami Transactions (Prohibition) Act, 1988. The second was that the suit was barred in view of Section 34 of the Specific Relief Act, 1963. As far as the second contention is concerned, it no longer survives after the amendment of the Suit and which was permitted by the learned Single Judge earlier. It was in these circumstances that the Advocate appearing for the defendants did not press for rejection of the plaint on the basis of Section 34 of the Specific Relief Act.

4. Initially, a Suit was filed by the appellant (Plaintiff before the learned Single Judge), inter-alia seeking the following reliefs:

> "a. *That this Hon'ble Court be pleased to pass an order:*
>
> *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 hand over 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.*
>
> *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 heretoin favour of the plaintiff;*
>
> *c In the event the 1st defendant refuses or does not transfer the suit flat, this Hon'ble Court be pleased to appoint some*

fit and proper person as Commissioner to execute necessary transfer documents in the name of the plaintiff;

d *That this Hon'ble Court be pleased to direct the 3rd defendant not to hand over the original title deeds of the suit flat to the 1st defendant, but to the plaintiff or deposit the same in this Hon'ble Court, upon settlement of Loan Account No.10400610001516;*

e. *If this Hon'ble Court comes to the conclusion that the suit flat cannot be transferred in favour of the plaintiff due to any reason whatsoever;*

i. then this Hon'ble Court may please to direct the 1st defendant to repay the amount of Rs.84,60,849/- which is the actual amount spent on the suit flat by the plaintiff from 2010 with the interest of 18% per annum;

ii. That this Hon'ble Court be further pleased to direct the 1st defendant to pay such sum of money as may be paid by the plaintiff to the 3rd defendant towards settlement of Loan Account No. 10400610001516;

iii. In the event of default, to attach the said Flat and sell the same to recover the amount of Rs.84,60,849/- together with such sum of money as may be paid by the Plaintiff to the 3rd defendant towards settlement of Loan Account No. 10400610001516; along with 9% per annum interest or any such rate as this Hon'ble Court deem fit and proper on the said amount;

f. *That this Hon'ble Court be pleased to pass an order of mandatory injunction as against;*

i. *The 1st Defendant, her agents, servants or her family members or any other person claiming through 1st defendant from selling, mortgaging, disposing off, selling or dealing with or creating third party rights of any nature whatsoever in respect of suit flat or any part thereof;*

ii. *The 2nd defendant from entertaining or transferring the Share Certificate in the name of prospective purchaser of the suit flat;*

iii. *The 3rd Defednant from handing over the original title documents to the 1st defendant or any person claiming by or* *under her, upon settlement of their Loan Account No. 10400610001516;"*

5. In support of the aforesaid reliefs, the plaintiff averred that he is carrying on business of investigation and detecting Economic Offences for and on behalf of Banks and Financial Institutions and Insurance Companies under the name and style of a proprietary concern called "M/s Guru Systems". The 1st defendant was an employee of the plaintiff who has left her job by her own will and is also claiming ownership, right, title and interest in respect of Flat bearing No. E-5, 5th Floor, Dimple Apartment Co-operative Housing Society Limited, Jerbai Wadia Road, Parel (East), Mumbai 400 012, ad-measuring about 712 square feet (carpet) along with a terrace having an area of approximately 535 square feet (carpet). For the sake of convenience this property shall be referred to as "**the suit property".**

6. It is averred in the plaint that the plaintiff is doing business in the name and style of M/s Guru Systems, M/s Pathfinders and M/s. Balaji Financial Services from Flat No. 201, 2nd Floor, Lucky Star CHS Ltd., Jerbai Wadia Road, Parel (E), Mumbai 400 012. Originally, the plaintiff was having his business at Nashik

with around 70 to 80 people employed under him. In the year 2002, he decided to expand his business and opened a branch office in Mumbai. It was at this time that Defendant No.1 was also looking for a job and she approached the plaintiff. The plaintiff interviewed her and finding her to be suitable for the job, hired her. Accordingly, the plaintiff opened a branch office at Mulund, Mumbai.

7. As the workload of the plaintiff increased, in the year 2003, the plaintiff took an office on rent being Flat No. 106 on the first floor of Lucky Star CHS Limited, Jerbai Wadia Road, Parel (E), Mumbai-400 012. This office was taken in the same building in which his current office was situated (i.e. Flat No.201 purchased in the year 2007). Thereafter, in the year 2005, the plaintiff took the adjoining office being Flat No. 105 in the same building.

8. According to the plaintiff, his business started flourishing. Various Companies became his clients who approached him for collection of NPA, Investigation, Due Diligence, vehicle verifications, insurance claim investigations etc. It has thereafter been averred that in the year 2005-2006, some of the clients of the plaintiff required him to have a separate distinct firm other than the

existing ones (namely, M/s Balaji Financial Services and M/s Pathfinders) for doing their exclusive work. It is in these circumstances and to have an exclusive operation for his exclusive clients, the plaintiff opened a new proprietary concern in the name and style of M/s Guru Systems, in the name of the 1st defendant and who was then working with the plaintiff as a trustworthy employee. This was done in the year 2005-2006.

9. It is the case of the plaintiff that although the proprietary concern M/s Guru Systems was opened in the name of the 1st defendant, the entire operation, control, administration and management as well as the business affairs of the said concern vested in the hands of the plaintiff and this was also clearly understood by the 1st defendant. According to the plaintiff, even his mobile number was registered with the bank account opened in the name of M/s Guru Systems so as to ensure that the plaintiff was kept in the know of the entire banking financial transactions of the said concern. It has also been averred that the entire onus, liability and obligation towards the statutory authorities were borne and taken over by the plaintiff. Though the 1st defendant was a sole proprietor of M/s Guru Systems, she continued to work with the plaintiff as a

monthly salaried employee and also continued to report to the plaintiff on a regular basis. She was not permitted to take any independent decision and it was the plaintiff alone who was taking all the decisions as he was the actual owner of the said proprietary concern.

10. Thereafter, in paragraph 7 of the plaint, the plaintiff asserts and states that the 1st defendant was faithfully serving the plaintiff and therefore he had full faith and confidence in her and that is how the proprietary concern M/s Guru Systems was started in the name of the 1st defendant who was a trustworthy employee of the plaintiff. It is, thereafter, stated in Paragraph 9 that in the course of her employment, the 1st defendant worked very hard and became one of the trusted employees of the plaintiff. He gave her all confidential information about his work, his clients, confidential data, files, etc., and all business related matters. Since the 1st defendant also expressed her desire to pursue education in law, the plaintiff agreed and helped her in taking admission in Dr. Ambedkar Law College, Wadala, Mumbai for which the fees and other expenses were borne by the plaintiff. It is thereafter stated in Paragraphs 10, 11 and 12 of the plaint, as under :

"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 and 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 other 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 Mr. 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 premises in the name of Plaintiff as and when called for by the Plaintiff without any consideration or consideration."

11. It is, thereafter, averred in paragraphs 13 and 14 as to how payment was to be made for the suit property. It has also been averred that the 1st defendant was not having financial credit worthiness and it was for this reason that the plaintiff and his wife had to become co-applicants/guarantors for the housing loan that was sanctioned in respect of the suit property. It is also thereafter stated that the 1st defendant, though becoming an Advocate, was still working with the plaintiff and she herself willingly transferred the proprietary concern, M/s Guru Systems, in the name of the plaintiff. It was also submitted that she had executed an affidavit-cum-declaration dated 20th July, 2013 in the presence of the two witnesses, wherein she agreed to transfer the suit flat in the name of the plaintiff, when called upon to do so. In fact, the plaintiff has also been paying EMI of the home loan in respect of the suit property. It is on the basis of these averments that the reliefs as reproduced above were sought for.

12. In this suit, the 1st defendant filed the above Notice of

Motion under Order VII Rule 11 (d) of the CPC for rejection of the plaint on the ground that the Suit was barred by virtue of provisions of the Benami Transactions (Prohibition) Act, 1988. This Notice of Motion came to be allowed and that is how the present Appeal has come up before us.

13. In this factual backdrop, Mr. Jagtiani, learned Counsel appearing on behalf of the appellant (original plaintiff) submitted that the learned Single Judge has gone completely wrong in reading and understanding the averments in the plaint. He submitted that in the plaint and read as a whole, it was clear that the plaintiff had clearly averred that the 1st defendant was holding the property in a fiduciary capacity and for the benefit of the plaintiff. This being the case, the prohibition as contemplated under Section 4 was not attracted. In this regard, Mr Jagtiani brought to our attention Section 4 (3)(b) of the Benami Transactions (Prohibition) Act, 1988. This, of course, was the provision prior to the Benami Transactions (Prohibition) Amendment Act, 2016. In the new Act, the exception is laid down under Section 2 (9) (A) (b) (ii) which is similar to Section 4 (3) (b) as it stood before the Amendment. He submitted that under Order VII Rule 11 of the CPC, the Court has to proceed on

a demurer and on the basis of the averments made in the plaint. At that stage, the Court is not called upon to look into the merits of the averments or whether the plaintiff is likely to succeed or otherwise on the basis of those averments. He submitted that in the plaint and when read as a whole, it was sufficiently clear that the plaintiff had pleaded that the 1st defendant was holding the suit property in a fiduciary capacity for and on behalf of the plaintiff. This being the case, the learned Single Judge could not have non-suited the plaintiff and dismissed the suit on the ground that it was barred under the provisions of the Benami Transactions (Prohibition) Act, 1988. This, according to Mr. Jagtiani is, more so, when one takes into consideration that evidence would have to be led to prove that there was a fiduciary relationship between the plaintiff and the 1st defendant. Without affording that opportunity to the plaintiff, the Suit could not have been dismissed in this summary fashion, was the submission. In these circumstances, Mr. Jagtiani submitted that the appeal ought to be allowed and the impugned order be set aside.

14. On the other hand, Mr. Shyam Mehta, the learned Senior Counsel, appearing on behalf of the 1st defendant submitted that the averments in the plaint do not in any way make out a fiduciary

relationship between the plaintiff and the 1st defendant. He submitted that there was no pleading to that effect in the plaint and therefore there was no question of the plaintiff being allowed to lead any evidence with reference to the so called fiduciary relationship between the plaintiff and the 1st defendant. He therefore submitted that the learned Single Judge was fully justified in invoking the provisions of Order VII Rule 11 (d) of the C.P.C. for dismissing the suit. This being the case, Mr Mehta submitted that no interference was required in the impugned order and the appeal be dismissed.

15. We have heard the learned Counsel for the parties at some length and have perused the papers and proceedings in the appeal along with the impugned order. We have also carefully gone through the averments in the plaint and which have been adverted to by us earlier. On going through the averments in the plaint and when it is read as a whole, we are unable to agree with the submission of Mr Mehta. The plaint when read as a whole, certainly averrs that there was a fiduciary relationship between the plaintiff and the 1st defendant. This is quite clear when one reads the plaint as a whole and more particularly Paragraphs 5, 7, 9,10, 11 and 12 of the plaint. It has been averred in the plaint that it was, because of

the faith, trust and confidence that was reposed in the 1st defendant that a proprietary concern in the name of M/s Guru Systems was started in her name though it was actually a proprietary concern of the plaintiff. It has been further averred that since the plaintiff felt the need of a residential accommodation in Mumbai for himself and for employees of M/s Guru Systems, the plaintiff purchased the suit property. It has also been averred that the suit property was purchased from the funds of M/s Guru Systems and it was further agreed by the 1st defendant that she would transfer the business of M/s Guru Systems and the suit property in the name of the plaintiff as and when called upon by the plaintiff without any condition or consideration. Looking to all these averments, we do not think that the plaintiff could have been non-suited at this stage. We are not examining whether there is any merit in the factual averments made in the plaint with reference to the fiduciary relationship that the plaintiff had with the 1st defendant. That will, of course, be subject to the plaintiff proving such a relationship by adducing the necessary evidence. If he is unable to prove those facts, his suit would then fail as it would clearly be hit by Section 4 of The Benami Transactions (Prohibition) Act, 1988.

16. We must mention that the learned Single Judge himself, in the impugned order at paragraph 15, has stated that "Ordinarily, an employee is in no sense in a fiduciary relationship vis-a-vis his or her employer". This itself would indicate that in a given factual situation it can be otherwise. In fact, the Supreme Court in the case of **Marcel Martins v. M. Printer & Ors, [(2012) 5 SCC 342]**, while construing provisions of Section 4 of the Benami Tranactions (Prohibition) Act, 1988 has held that while the expression "fiduciary capacity" may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is, in fact, wider in its import for it extends to all such situations as place the parties in positions <u>that are founded on confidence and trust on the one part and good faith on the other</u>.

17. In another decision in the case of **Central Board of Secondary Education and Anr Vs. Aditya Bandopadhyay and Ors [(2011) 67 MLJ 1237 (SC)],** the Supreme Court in paragraph 21 has clearly stated that there are certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are : a partner vis-a-vis another

partner and an employer vis-a-vis an employee. The Supreme Court has further gone to state that an employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act in a fiduciary capacity and cannot disclose it to others.

18. From these decisions it is clear that it is not as if under no circumstances there can be no fiduciary relationship between an employer and an employee. Whether on the facts pleaded, such a relationship is proved is a question that will be decided at the trial after both the parties are allowed to lead their evidence in support of their respective cases. We must mention that the word "fiduciary" has not been specifically used in the plaint. However, that makes a little difference. When one reads the plaint as a whole, it is clear that such a relationship is pleaded though the specific word "fiduciary" has not been used. We, therefore, find that the learned Judge could not have rejected the plaint under Order VII Rule 11 (d) of the CPC.

19. This being the case and in view of the foregoing discussion, the Appeal is allowed and the impugned order dated 8th

February, 2017 is hereby set aside. The above Suit No. 929 of 2016 is restored back to the file of the Trial Court to be decided on merits and in accordance with law. However, in the facts and circumstances of the case, there shall be no order as to costs.

20. Considering that the appeal itself has been allowed and the impugned order is set aside, nothing survives in Notice of Motion (L) No. 511 of 2017 and the same is disposed of accordingly.

(B. P. COLABAWALLA, J) **(CHIEF JUSTICE)**