In the High Court at Calcutta
Civil Appellate jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

F.M.A.T No. 543 of 2023
With
CAN 1 of 2022
With
CAN 2 of 2024

Santosh Kumar Agarwala & Ors.
Vs.
Sajjan Kumar Agarwala & Ors.

For the appellants	:	Mr. Debnath Ghosh, Mr. Sarosij Dasgupta, Mr. Bimalendu Das
For the Respondents No.3	:	Mr. Srijib Chakrabarty, Ms. Oindrila Ghosal
For the Respondent Nos. 12 & 13	:	Mr. Sourajit Dasgupta, Mr. Shomrik Das
For the Respondents Nos. 6 to 11, 29 & 30	:	Mr. Anirban Kar, Mr. Munshi Ashiq Elahi
For the Respondent Nos. 17 & 18	:	Mr. Biswaroop Mukherjee, Ms. Shomrita Das
For the Respondent No. 25	:	Mr. Partha Pratim Roy, Mr. Aditya Mondal
Hearing concluded on	:	26.11.2024
Judgment on	:	23.12.2024

Sabyasachi Bhattacharyya, J.:-

1. The present challenge has been preferred against an order whereby, while deciding an application of the defendant/respondent no.25 under

Order VII Rule 11 of the Code of Civil Procedure, the learned Trial Judge treated the same to be one under Order VII Rule 10 of the Code and directed return of the plaint to be presented before the appropriate forum.

2. The appeal arises out of a suit filed by the plaintiffs/appellants *inter alia* for declaration that the plaintiff are entitled to 1/3rd of all the family assets and properties including business, assets and property of defendant nos.19 to 37-companies (except defendant nos.29 and 30), a residential building at Kolkata and a land and building at Siliguri, together with land and building at Simultala, for partition of the joint family business, assets and properties as described in the Schedule of the plaint, and consequential reliefs in respect of the management of the defendant nos. 19 to 37-Companies and their assets as well as the ancillary relief of permanent injunction.

3. As per the plaint case, the petitioners and the respondent nos. 1 to 18 are descendants of one Sukhdeo Prasad Agarwala. The said Sukhdeo came from Haryana to Calcutta (now Kolkata) in the year 1950 with small personal funds obtained in course of service and odd businesses undertaken by Sukhdeo Prasad. In or around the year 1954, Sukhdeo started a business under the name and style of SP Agarwala and Company. The said business was initially a proprietorship concern supplying tea stores and tea chest fittings.

4. As per the plaint case, the respondent nos. 19 to 37-Companies are family companies, the shareholding of which are owned, controlled and managed by the family of Sukhdeo Prasad. Such shareholdings in the different companies are, as per the plaint, interlocked to ensure the least incidence of tax. Accordingly, the plaintiff/petitioners claim that the entire assets and businesses, which are the subject-matter of the suit, emanate from the joint family funds, which can be traced back to the family patriarch Sukhdeo.

5. The defendant/respondent no.25-Company took out an application under Order VII Rule 11 of the Code, seeking rejection of the plaint primarily on the ground that the reliefs sought in the suit cannot be granted by a Civil Court but have to be urged before the National Company Law Tribunal (NCLT). The learned Trial Judge agreed with the said contention and returned the plaint.

6. Learned senior counsel appearing for the appellant contends that the primary reliefs sought in the suit are declaration of title and partition, which are exclusively within the domain of the Civil Court to grant, particularly if complicated questions of title are involved.It is argued that the NCLT does not have jurisdiction to decide the same.

7. The reliefs sought in respect of the affairs of the respondent-Companies are consequential to such main reliefs and, as such, cannot be a determinant of jurisdiction.

8. It is next argued that there cannot be a partial return or rejection of plaint.Even if the Civil Court is ultimately of the opinion that some of the reliefs cannot be granted, those can then be relegated to the appropriate forum. However, such anticipation cannot deter the Civil Court from adjudicating on the title and partition as claimed by the plaintiffs/appellants.

9. Learned senior counsel appearing for the appellants next argues that by an order dated July 15, 2017, the learned Trial Judge had rejected a similar application under Order VII Rule 11 of the Code filed by the defendant/respondent no.19-Company on the self-same grounds. Hence, the present application for rejection of plaint is barred by the principle of *res judicata*. It is argued that it is well-settled that *res judicata* applies at different stages of the same suit.

10. It is next contended by the appellants that the principles governing *quasi*-partnerships are to be read into the present context, since all the respondent-Companies are family companies where the family members of Sukhdeo hold shares and have controlling interest. The cross-shareholdings of the family-members of Sukhdeo Prasad in the Companies clearly indicate that the concept of *quasi*-partnership governs those. The directorships of the companies are primarily distributed between the joint family-members and the control and majority shareholding in the companies vests with the family members of Sukhdeo. The family companies were formed with the common funds of the family and, as such, the declaratory and partition suit is very much maintainable.

11. It is argued that a combined reading of Sections 241 and 242, along with Section 430, of the Companies Act, 2013 (hereinafter referred to as the "2013 Act") would show that the said provisions were incorporated with effect from June 1, 2016 whereas the suit was filed on June 26, 2006. As such, the bar incorporated therein is not attracted to the present suit.

12. Section 465 of the 2013 Act provides that prosecution under repealed enactments pending before the 2013 Act are to continue to be heard and disposed of by the court which is in *seisin* of the matter.

13. Learned senior counsel cites *Ammonia Supplies Corpn. (P) Ltd. v. Modern Plastic Containers (P) Ltd.*, reported at *(1998) 7 SCC 105* and *Sangramsinh P. Gaekwad and Others v. Shantadevi P. Gakewad (dead) through Lrs. and Others*, reported at *(2005) 11 SCC 314*, in support of the proposition that if disputed questions of title are involved, it is the Civil Court which has to adjudicate such issues.

14. Learned senior counsel next cites *Aruna Oswal v. Pankaj Oswal*, reported at *(2020) 8 SCC 79*, on the proposition that the questions of inheritance of shareholding in companies can only be decided by a Civil Court.

15. By placing reliance on *Dwarka Prasad Agarwal (D) by LRS. and another v. Ramesh Chander Agarwal and others*, reported at *(2003) 6 SCC 220,* it is argued that the jurisdiction of the Civil Court is not completely ousted by the Companies Act, 1956. The same principle ought to apply to the 2013 Act as well.

16. The concept of *quasi*-partnership, it is argued, is not alien to the Companies Act and for such purpose the courts can lift the corporate veil. For such proposition, learned senior counsel cites *HindOverseas (P) Ltd. v. Raghunath Prasad Jhunjhunwalla and others,* reported at *(1976) 3 SCC 259.*

17. It is argued that in *Sardar Khan and others v. Syed Najmul Hasan (Seth) and others*, reported at *(2007) 10 SCC 727*,the Supreme Court held that suits pending at the commencement of the Companies Act, 2013 cannot be dismissed or transferred to the NCLT.

18. Insofar as the argument made by the respondents that the suit is barred by the provisions of the Prohibition of Benami Property Transactions Act, 1988 (for short, "the Benami Act"), as amended, are not applicable. The Benami argument, it is contended, is urged for the first time by the respondents in the appeal and, having not been taken in the Trial Court, ought not to be entertained by this Court.

19. Learned senior counsel cites Section 2(9)(A)(b) of the Benami Act to argue that sub-clauses (i) and (iv) of the same stipulate exceptions to the bar under the Benami Act, which are attracted in the present case.As such, the suit is not hit by the bar provided under the Benami Act.

20. It is further argued that the amendments brought to the Benami Act in the year 2016 are not applicable to the present suit, which was instituted in the year 2006, as the 2016 amendments do not have retrospective operation.

21. It is further argued that under the amended Section 65 of the 2016 Act, there cannot be a dismissal of a suit but the same can merely be transferred to the Adjudicating Authority or the Appellate Tribunal. Learned senior counsel takes the court through Sections 21, 24 and 26 of the 2016 Amending Act to argue that the Initiating Authority can call for information and impound documents as well as issue notice for attachment of a benami property. Only on receipt of a reference from the Initiating Officer, the Authority may adjudicate a property to be a

Benami property. Hence, the process of returning the plaint in a suit is not contemplated under the Benami Act, as amended in 2016.

22. It is further argued that the non-joinder of other shareholders in the defendants/respondent-Companies cannot be a ground for return of the plaint, since in view of the frame of the suit, which is for declaration and partition primarily, the other shareholders of the respondent-Companies are not necessary or proper parties. Moreover, the appellants do not claim merely as shareholders of the said Companies but claim title to the assets of the Company, which were formed from the joint family nucleus of the larger family of Sukhdeo.

23. Learned counsel for the respondent no.25, supported in substance by the other respondents, controverts the submissions of the appellants and argues that the bulk of the reliefs claimed in the suit pertain to the affairs and management of the respondent-Companies and as such, the NCLT has exclusive jurisdiction under Sections 241 and 242 of the 2013 Act, read with Section 430 of the said Act, to decide such issues.

24. It is argued that a shareholder in a company acquires merely a right to participate in the profits of the company but does not have any interest in the assets of the company. In support of such proposition, learned counsel relies on *Bacha F. Guzdar v. Commissioner of Income Tax, Bombay*, reported at*(1954) 2 SCC 563.*

25. Learned counsel next cites *Delhi & District Cricket Association v. Sudhir Kumar Aggarwal and others*, reported at *2020 SCC OnLine Del 1223*, where it was held that the bar under Section 430 of the 2013 Act is to be strictly construed.

26. Learned counsel next cites *T. Arivandandam v. T.V. Satyapal and another*, reported at *(1977) 4 SCC 467*, for the proposition that if clever drafting has created the illusion of a cause of action, the court must nip it in the bud at the first hearing.

27. Learned counsel for respondent no. 25 thereafter places reliance on *Ammonia Supplies (supra)*, in support of the proposition that the disputes involved in the present suit ought to have been decided by the NCLT. Learned counsel also cites *Shashi Prakash Khemka (Dead) by LRS and another v. NEPC Micon (Now NEPC India Limited) and others*, reported at *(2019) 18 SCC 569* to support his arguments on the jurisdiction of NCLT qua disputes regarding transfer of shares, etc., in the context of Section 430 of the 2013 Act.

28. Learned counsel also relies on a Division Bench Judgment of this Court in *Shyamlal Purohit and another v. Jagannath Ray and another*, reported at *AIR 1969 Cal 424*, where it was held that the interest of the shareholder does not amount to more than a right to participate in the profits in the company. The company is a juristic person and is distinct from its shareholders and it is the company which owns the property and not the shareholders.

29. Learned counsel thereafter places reliance on another Division Bench Judgment of this Court in *Purna Investment Ltd. v. Bank of India Ltd. and others*, reported at *1982 SCC OnLine Cal 296*, for the same proposition, followed by *Chalasani Udaya Shankar and Others v. Lexus Technologies Pvt. Ltd. and Others,* reported at *2024 SCC OnLine SC 2451*, where the Supreme Court observed that the jurisdiction of the

Civil Courts or for that matter any other forum would be barred when the subject-matter of the dispute squarely falls within the domain and jurisdiction of the courts/forum constituted under the provisions of the Act of 1956/Act of 2013.

30. Learned counsel next cites *Chittoori Subbanna v. Kudappa Subbanna and Others*, reported at *AIR 1965 SC 1325*, for the proposition that a pure question of law can be raised at any stage of the proceeding. Thus, it is argued, the question of the suit being barred under the Benami Act can very well be raised for the first time in the present appeal.

31. The respondents also cite a Division Bench judgment of this Court, reported at *AIR 2008 Cal 98 [Allahabad Bank v. Shank's (Steel Fab Pvt. Ltd. & Ors.)]*, for the proposition that a plaint can be rejected where the suit appears from the statements made in the plaint to be barred by any law, upon a scrutiny only of the averments made in the plaint. If it appears from the averments made in the plaint itself that the court cannot entertain the suit because of any bar created by law, the court is left with no other alternative but to reject the plaint by taking recourse to Rule 11(d) of Order VII. It was held that such a provision is mandatory and no discretion is left with the court in that regard.

32. Learned counsel reiterates the same proposition by citing *Prem Lala Nahata and another v. Chandi Prasad Sikaria*, reported at *(2007) 2 SCC 551*.

33. Lastly, learned counsel cites a judgment of a learned Single Judge of this Court in *Sri Tapan Prakash Bose v. Sri Arun Kumar Bose &Ors.*, reported at *2008 SCC OnLine Cal 227*, where it was held that the plaintiffs are to elect which of the causes of action they want to pursue if there is a misjoinder of causes of action. Hence, it is argued, the plaintiffs in the present case are required to opt out of the reliefs sought against the Companies if they want the suit to be continued before the Civil Court.

34. After going through the materials on record as well as considering the arguments of the parties, we come to the following conclusions:

35. There are several aspects of the issues involved herein and we propose to discuss those under separate heads.

Res Judicata

36. By an order dated July 15, 2017 passed in the suit from which the present appeal emanates, we find that the Trial Court rejected an application filed by the defendant/respondent no.19-Company under Order VII Rule 11 of the Code of Civil Procedure. The grounds for rejection of plaint raised in the said application were identical as the present application of the respondent no.25 inasmuch as it was contended by the defendant/respondent no. 19 in the said application that the suit is not maintainable before a Civil Court due to the bar contemplated under the Companies Act, 2013. The court, by relying upon a previous refusal of injunction where a similar point arose, elaborately discussed the issue and turned down the contention of the defendant no.19 as to the suit being barred by law.

37. It is well-settled that the principle of *res judicata* operates at different stages of the same suit. Since both the applications have been filed under Order VII Rule 11 of the Code, no distinction can be drawn between the powers of the court or the competence of the court to decide the issues involved, which were similar in the present case as that on the earlier occasion, when a similar prayer was rejected by the order dated July 15, 2017. The said order has attained finality, having not been assailed successfully. Hence, the present application of respondent no.25 is barred by the principle of *res judicata.*

Partial rejection/return of plaint

38. We find from the reliefs sought in the plaint that the argument as to the NCLT having jurisdiction applies only to certain consequential reliefs sought in the suit in respect of alleged mismanagement of the funds of the defendant-Companies. Even if the said reliefs are held to be barred at the final hearing of the suit, the primary relief of declaration and partition cannot be held to fall within the domain of the NCLT's jurisdiction. As held in *Ammonia Supplies (supra)* and *Sangramsinh P. Gaekwad (supra)*, disputed questions which are pure questions of title cannot be adjudicated under the Companies Act. As held in *Dwarka Prasad Agarwal (D) by LRS. (supra)*, the jurisdiction of the Civil Court is not completely ousted by the Companies Act, 1956.

39. The plinth of the plaint case is inheritance of the shareholding and assets of the defendant-Companies by the plaintiffs. What has been claimed in the suit is a declaration of their title in the assets which are the subject-matter of the suit vis-a-vis the Companies involved, on the strength of shareholding and cross-shareholdings which *prima facie* indicate that it is the joint family, comprised of the successors of late Sukhdeo Prasad, who have pervasive control over the Companies. The

Directorship of the Companies are primarily held by the family-members of Sukhdeo Prasad. Thus, going by the averments made in the plaint, the Companies are joint family companies to which the concept of *quasi*-partnership is squarely applicable. Since allegations of mismanagement have been made, which are consequential to the reliefs of declaration and partition sought in the suit, the principle laid down in *Hind Overseas (P) Ltd. (supra)* is squarely applicable as per the plaint case. It is only the plaint case which has to be looked into for the purpose of deciding an application under Order VII Rule 11.

40. The plinth of the plaint case is that the entire assets of all the defendants, be them juristic/corporate entities or biological persons, emanate from the joint family nucleus of the family patriarch Sukhdeo Prasad. Thereafter the plaint goes on to plead that such joint family nucleus was used for the purchase of assets and to gain control over the family companies, which all started from the sole proprietorship of late Sukhdeo Prasad. Again, at least three of the joint assets which are the subject-matter of the suit are immovable properties not belonging to any of the Companies and as such, were rightly brought within the hotchpot of the partition suit.

41. It is well-settled that there cannot be any partial rejection of plaint, as held in *Sejal Glass Limited v. Navilan Merchants Private Limited*, reported at *(2018) 11 SCC 780*. In any event, if the Civil Court is of the opinion at the final hearing of the suit, upon taking evidence and hearing arguments of the parties, that a part of the claims do not fall within its domain but are to be decided by the NCLT, it is always open for the court to relegate the parties for such reliefs to the appropriate forum, while granting decrees in respect of the primary reliefs.

42. Importantly, the reliefs pertaining to the management of the affairs of the Companies are only consequential to the primary reliefs of declaration of the shares of the parties in respect of the subject-matter of the suit, flowing from the claim that those can be traced back to the joint family nucleus, and partition of such joint assets. The said primary reliefs cannot be granted by the NCLT but comes squarely within the purview of the Civil Court. Even as per the judgments cited by the respondents, if the disputes pertain to questions of title and squarely fall within the domain of the Civil Court, the exclusion of the jurisdiction of the Civil Court under Section 9 of the Code of Civil Procedure is not readily inferred. Thus, if at all, the plaint would have to be rejected/returned partially. Such split being not permissible in law, the impugned order returning the plaint as a whole is bad on such count as well.

Jurisdiction of the NCLT

43. A careful perusal of the reliefs claimed in the plaint against the defendant-Companies shows that they are ancillary reliefs flowing from the primary reliefs of declaration and partition. Consequential reliefs cannot be the determinant of the jurisdiction of the court. Importantly, the NCLT does not have jurisdiction under Sections 241 or 242 of the 2013 Act to decide the title of parties either to shares or to the assets of Companies. The plaintiffs do not claim merely in the capacity of shareholders but seek a declaration of the joint ownership on the strength of title derived from the fact that the entire assets of the Companies involved were also purchased from the joint family nucleus of the family and can be sourced back to such nucleus.

44. Thus, the reliefs do not confine themselves to mismanagement of the affairs of the Company standing on an independent footing. The plaintiffs claim over the entire subject-matter of the suit, including in the assets of the Company and the shares of the Companies, apart from certain other immovable properties which do not belong to the Companies. Such claim of title by inheritance to the shareholding and other assets is entirely beyond the jurisdiction of the NCLT to adjudicate upon under Sections 241 and 242 of the 2013 Act.

45. The bar in Section 430 of the 2013 Act is only applicable in respect of reliefs which come within the exclusive jurisdiction of the NCLT and cannot be stretched beyond the same. Reliefs which can be granted exclusively by the Civil Court, thus, cannot be covered by Section 430 of the 2013 Act. Hence, the NCLT does not have jurisdiction to grant the primary reliefs claimed in the suit.

Concept of quasi-partnership

46. The cross-holdings in the shares of the different Companies as pleaded in the plaint indicate pervasive control over the Companies by the descendants and family-members of Late Sukhdeo Prasad. The Directorship in most of the Companies is substantially held between the family-members and the plaint case is that the Companies were formed from the joint funds of the family. The cross-shareholdings averred in the plaint clearly show that control over all the assets of the defendants-Companies vests in the joint family. Hence, the concept of *quasi*-partnership can definitely by borrowed in the backdrop of the plaint case.

47. It is to be noted that the decisions in *Ammonia Supplies (supra)* and *Shashi Prakash Khemka (Dead) by LRS (supra)* highlight the fact that the NCLT has jurisdiction only in cases covered by the Companies Act, 2013. In the said judgment, the Supreme Court also noted that Section 430 of the 2013 Act bars the jurisdiction of the Civil Courts only in matters in respect of which exclusive power has been conferred on the NCLT and not otherwise. Unless the remedy of a Civil Suit is completely barred, Section 430 is not attracted at all.

48. In the judgments cited by the respondent, the questions pertained to rectification and other reliefs sought in respect of shares as well as mismanagement of Companies exclusively. As opposed thereto, in the present case, the primary reliefs sought are declaration of title and partition. In view of the cross-shareholdings and pervasive control over the defendants-Companies by the joint family-members, we are thus of the opinion that the concept of *quasi*-partnership can be applied to the present case in view of the plaint averments.

<u>Benami</u>

49. Although it is pleaded by the appellant that benami is a new ground argued for the first time in the appeal, since the court can *suo moto* reject the plaint under Order VII Rule 11 of the Code and/or return a plaint under Order VII Rule 10 thereof, and the argument of benami has been made on the basis of the averments in the plaint itself and no new facts are required to be decided, we are of the opinion that the said ground can be validly urged by the defendants/respondents even for the first time in the present appeal.

50. The argument of the plaintiffs/appellants that since the latest amendments to the Benami Act came in 2016, ten years subsequent to the institution of the suit, the same cannot be applied, is not acceptable, since as on the date when the application under Order VII Rule 11 of the Code was filed, the 2016Amendment had already come into force. The relevant juncture for deciding the applicability of the bar incorporated in the Benami Act by the 2016 Amendment is the date when the decree is passed. Hence, the said defence of the plaintiffs is not tenable in the eye of law.

51. Even considering from such angle, Section 2(9)(A)(b) of the Benami Act, in sub-clauses (i) and (iv) thereof, incorporates certain exceptions to the bar of benami. Sub-clause (i) contemplates, as one of such exceptions,a scenario when the property is held by a Karta or a member of a Hindu Undivided Family (HUF), if the property is held for his benefit or for the benefit of the other members in the family and the consideration for such property has been provided or paid out of the known sources of the HUF. In the present case, the said exception is very much applicable at a glance, since the entire title to the suit properties and the shares of the parties in the suit properties are claimed on the premise of the joint family nucleus which allegedly forms the basis of acquisition of the properties.

52. Again, under sub-clause (iv), where the names of the lineal ascendants or descendants and the individual appear asjoint owners and the consideration for the property has been provided or paid out of known sources of the individual, it is very much arguable that the exception to the bar envisaged in the Benami Act is attracted.

53. Such exceptions cannot be ruled out at the threshold,in the preliminary stage when the court adjudicates on an application for rejection/return of plaint. Such questions are to be decided upon taking detailed evidence and, as such, can only be finally adjudicated at the hearing of the suit upon a full-fledged trial on evidence; not at the inception under Order VII Rule 11 or Order VII Rule 10 of the Code.

54. Thus, we are of the opinion that the bar under the Benami Act is, to say the least, an arguable issue and required to be decided upon adduction of detailed evidence on facts. Hence, no occasion arises at this premature stage for the court to return the plaint or reject the plaint on the ground of benami.

Conclusion

55. In view of the above discussions, we are of the considered opinion that the learned Trial Judge committed a patent error of law and fact in entertaining and deciding the application under Order VII Rule 11 of the Code at the behest of the respondent no.25 and ultimately moulding the relief to return the plaint to be presented before the appropriate forum.

56. In such view of the matter, the appeal succeeds.

57. Accordingly, F.M.A.T. No.543 of 2023 is allowed on contest, thereby setting aside the impugned Order dated December 22, 2021 passed in Title Suit No. 88 of 2006 by the Learned Civil Judge (Senior Division), Fourth Court at Alipore, District: South 24 Parganas.

58. CAN 1 of 2022 and CAN 2 of 2024 also stand disposed of accordingly.

59. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)