

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

%

Date of decision: 9th September, 2013

**+ CS(OS) 1517/2010, IA No.18834/2011 (for condonation of delay),
IA No.6254/2012 (u/O 7 R-11), IA No.10409/2012 (for directions)
& IA No.12893/2012 (for directions).**

BHARAT KUMAR

..... Plaintiff

Through: Mr. Anil Sapra, Sr. Adv. with Mr.
Sunil Magon, Adv.

versus

ASHOK SAHDEV & ORS

..... Defendants

Through: Mr. Peeyoosh Kalra with Mr. Omar
Siddiqui & Mr. S. Tripathi, Advs.
Ms. Bandana Shukla, Adv. for Ms.
Ruchi Sindhwani, Adv. for GNCTD.

AND

**+ TEST.CAS. 61/2010, IAs No.7488/2012 (u/s 151 CPC) &
2539/2012 (u/O 18 R-3).**

BHARAT KUMAR & ORS

..... Petitioners

Through: Mr. Anil Sapra, Sr. Adv. with Mr.
Sunil Magon, Adv.

versus

STATE & OTHERS

..... Respondents

Through: Mr. Peeyoosh Kalra, Adv. with Mr.
Oman Siddiqui & Mr. Sudhindra
Tripathi, Advs.
Ms. Bandana Shukla, Adv. for Ms.
Ruchi Sindhwani, Adv. for GNCTD.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This judgment adjudicates the objections of the defendants in the suit and respondents in the testamentary case as to the very maintainability thereof.

2. The plaintiff Shri Bharat Kumar has instituted CS(OS) No.1517/2010, (a) for partition of property No.92, Golf Links, New Delhi; (b) for rendition of accounts with respect to the rental received by the defendants no.1&2 from the said house w.e.f. 17th January, 2008; (c) for perpetual injunction restraining the defendants no.1&2 from dealing with the property; and, (d) for a direction to the defendant no.5 McKinsey & Company to handover vacant peaceful physical possession of the said property upon termination of its lease, jointly to the plaintiff and the defendants no.1&2.

3. Summons of the suit were issued and vide *ex parte ad interim* order dated 28th July, 2010 the defendants were restrained from creating any third party interest in the property No.92, Golf Links, New Delhi. Separate written statements were filed by the defendants no.1&2 on the one hand and the defendants no.3&4 on the other hand. The counsel for the defendant no.5 McKinsey & Company on 19th November, 2010 informed that it was a tenant in the said property and had vacated the same and handed over possession to the defendants no.1&2 landlords; accordingly the name of McKinsey & Company as defendant no.5 was deleted; the defendants no.1 to 4, vide the same order, were permitted to negotiate with the prospective tenants in the property. Vide subsequent order dated 25th January, 2011 the defendants no.1&2 were permitted to let out the property to any tenant of

their choice subject to furnishing a Bank Guarantee of Rs.5 crores and further subject to deposit of 1/8th of the rent in the Court. The defendants no.1 to 4 preferred FAO (OS) No.115-116/2011 and vide order dated 16th March, 2011 wherein the property was permitted to be let out to the Norwegian Embassy with 1/4th of the rent being deposited in the Court. The plaintiff sought amendment of the plaint, to claim share of 1/4th instead of 1/8th as originally claimed in the property on account of the stand of the defendants no.3&4 in the written statement filed by them and which amendment was allowed vide order dated 21st February, 2012. The defendants have filed IA No.6254/2012 under Order 7 Rule 11 of the CPC challenging the very maintainability of the suit. The counsels have been heard.

4. The plaintiff claims rights in property No.92, Golf Links, pleading:-

- (a). that the plaintiff and the defendant no.1 are the sons and the defendant no.3 Ms. Prabha Manga and the defendant no.4 Ms. Shobha Manga are the daughters and only children of Shri Sahdev and Smt. Shakuntala Sahdev;
- (b). the defendant no.2 Smt. Sarita Sahdev is the wife of the defendant no.1;
- (c). that Shri Sahdev was carrying on business of paints and thinners in the name and style of India Trading House;
- (d). upon the plaintiff coming of age Shri Sahdev asked him to start business in Chlorinated Paraffin Wax in the name and style of M/s. Vinspar Industries, as sole proprietor thereof;

- (e). subsequently the defendant no.1 also joined as a partner in M/s.Vinspar Industries;
- (f). that upon the marriage of the plaintiff, his wife at the instance of Shri Sahdev started business in garments in the name and style of Shakun International, with the wife of the plaintiff having a 90% share therein and the defendant no.1 having a 10% share therein;
- (g). the defendant no.1 thereafter retired as partner of M/s. Vinspar Industries and Smt. Shakuntala Sahdev became a partner in the said business;
- (h). that the parties had a common kitchen till then;
- (i). that a Memorandum of Understanding (MoU) dated 24th October, 1980 was executed by Shri Sahdev as per which M/s. Vinspar Industries vested with the plaintiff and Sakun International with the defendant no.1; M/s. Vinspar Industries purchased plot No.119 in Badli Industrial Estate;
- (j). that Shri Sahdev was managing the business of India Trade House and the garments business with no assistance from defendant no.1 and the garment business was closed in the year 1984;
- (h). that the entire household was managed by Shri Sahdev and the plaintiff;

- (i). that as desired by Shri Sahdev the partnership of the plaintiff and Smt. Shakuntala Sahdev of M/s. Vinspar Industries was dissolved and thereafter the plaintiff continued the said business as a proprietor;
- (j). that though Shri Sahdev started chemical business in the name and style of Allied Chemicals for engaging the defendant no.1 but the defendant no.1 could not sustain the said business which suffered losses;
- (k). that Shri Sahdev as head of the joint family sold some property to invest the proceeds thereof in the business of Allied Chemicals and to secure loan for the said business Smt. Shakuntala Sahdev also deposited the Title Deed of her property at 24, Alipur Road with the bank;
- (l). that though Shri Sahdev attempted to set-up other business for the defendant no.1 but the defendant no.1 could not make any efforts resulting in the said business also coming to a halt;
- (m). Shri Sahdev acquired a plot of land at D-9, Manufacturers Co-op Industrial Estate, Udyog Nagar, Delhi but since the defendant no.1 could not sustain any business Shri Sahdev decided to sell the same to acquire a good property for the family; accordingly the plot at Udyog Nagar was disposed of and from the sale proceeds thereof property No.92, Golf Links was purchased; that since the property at Udyog Nagar was in the name of partnership in which Shri Sahdev had a 50% share

and the defendants no.1&2 had remaining 50% share, Shri Sahdev had a 50% share in the Golf Links property with the remaining 50% share being of the defendants no.1&2;

- (n). that however no formal conveyance of Golf Links property was executed though Shri Sahdev and the defendants no.1&2 were in possession thereof;
- (o). that the Golf Links property was being rented out and the rents were being utilized by Shri Sahdev for the family as he desired;
- (p). that Shri Sahdev executed a Will dated 27th March, 1998 bequeathing all his movable and immovable properties to his wife Smt. Shakuntala Sahdev;
- (q). that another set of mutual Wills were executed by Smt. Shakuntala Sahdev on 3rd April, 1998 and by Shri Sahdev on 9th April, 1998 and under which they became entitled to inherit each other's properties;
- (r). accordingly on the demise of Shri Sahdev on 9th January, 2000, by virtue of his Wills dated 27th March, 1998 and 9th April, 1998 Smt. Shakuntala Sahdev became entitled to 50% share in the Golf Links property and the other properties of Shri Sahdev;
- (s). thereafter the income of the Golf Links property was received by Shri Shakuntala Sahdev and the defendant no.1 and Smt. Shakuntala Sahdev utilized the money for her own purpose;

- (t). that Smt. Shakuntala Sahdev died on 17th January, 2008 and since she had not executed any Will with respect to the Golf Links property, her 50% share therein was inherited by her two sons i.e. the plaintiff and the defendant no.1 and her two daughters i.e. the defendants no.3&4;
- (u). that however since the defendants no.3&4 in the written statement to the plaint as originally filed had renounced their share in the suit property, their share also is to be equally distributed between the plaintiff and the defendant no.1 and the plaintiff is thus the owner of 1/4th share in the Golf Links property;
- (v). that the defendants no.1&2 however to appropriate the Golf Links property onto themselves only, got executed and registered an Agreement to Sell, a General Power of Attorney and a Special Power of Attorney with respect thereto from the persons in whose name the same stood, in their favour on 4th February, 2009; and,
- (w). that the documents with respect to the Golf Links property executed on 4th February, 2009 in favour of the defendants no.1&2 are fraudulent, being intended to defeat the share of the plaintiff therein.

5. The defendants no.1&2 have contested the suit by filing a written statement, pleading:-

- (i). that the Golf Links property is the self acquired property of the defendants no.1&2 and the plaintiff has no share therein;
- (ii). that the plaintiff along with the plaintiff has not filed a single document showing ownership of the said property;
- (iii). that the suit has been filed as a counterblast to the adverse orders suffered by the plaintiff in other litigations between the parties and to pressurize the defendants no.1&2 to settle the pending litigations with the plaintiff;
- (iv). that the Golf Links property was never the subject matter of any of the earlier litigations between the parties;
- (v). that one Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra were the owners of the Golf Links property and had vide Agreements to Sell dated 25th October, 1997 and 1st November, 1997 agreed to sell the different floors of the said property to the defendants no.1&2 for a total sale consideration of Rs.94 lacs paid by the defendants no.1&2 from their own account, sourced from self acquired funds and loans from various sources;
- (vi). that in fact the agreement for purchase of the Golf Links property was struck on 25th October, 1997 when advance consideration of Rs.10 lacs was paid;
- (vii). that the entire consideration of the Golf Links property stood paid on 1st November, 1997 i.e. prior to the sale on 5th December, 1997 of the Udyog Nagar property; the same

falsifies the contention of the plaintiff of the Golf Links property having been acquired from the sale proceeds of Udyog Nagar property;

- (viii). that since the land underneath the Golf Links property was leasehold, no Sale Deed with respect thereto could be executed and in accordance with the normal practice regarding selling of leasehold property, the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra on 15th April, 1998 executed and got registered Will, Special Power of Attorney, General Power of Attorney with respect to the said property in favour of the defendants no.1&2 and in favour of Shri R.N. Marwah being the father-in-law of the defendant no.1 and father of the defendant no.2;
- (ix). possession letters dated 1st January, 1998 were also executed by the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra confirming that possession of the property had been handed over to the defendants no.1&2 in pursuance to the Agreements to Sell;
- (x). the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra also executed receipts confirming receipt of sale consideration of Rs.93 lacs out of total sale consideration of Rs.94 lacs from the defendants no.1&2, with the balance of Rs.1 lac being payable upon conversion of leasehold rights into

freehold and execution of Sale Deed in favour of defendants no.1&2;

- (xi). that the said purchase of the Golf Links property was also reflected in the Income Tax Returns for the year 1998-99 of the defendants no.1&2;
- (xii). that the Income Tax Assessing Officer of the defendants no.1&2 ordered addition of certain exorbitant sums as unexplained investment on account of purchase of the said property and against which order appeals were preferred by the defendants no.1&2 which were allowed by the Commissioner of Income Tax (Appeals) vide order dated 20th June, 2001 which also records the purchase of the property by the defendants no.1&2 only;
- (xiii). that the defendants no.1&2 have peacefully owned and enjoyed the Golf Links property since purchase thereof as aforesaid and have been renting out the same and enjoying the rents thereof;
- (xiv). that however the Sale Deed of the aforesaid property could not be executed owing to the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra being unable to get the leasehold rights converted into freehold;
- (xv). that in the circumstances the defendants no.1&2 made payment of balance sale consideration of Rs.1 lac and got executed fresh registered Agreement to Sell, Will, Power of Attorney etc. on 4th February, 2009 from the vendors Shri Surinder Singh

Dhingra and Shri Ravinder Singh Dhingra in their own favour, also taking over the responsibility of getting the leasehold rights converted into freehold;

- (xvi). that the Golf Links property is thus the self acquired property of the defendants no.1&2 and Shri Sahdev was never the owner of the said property and thus the question of Smt. Shakuntala Sahdev, on the death of Shri Sahdev inheriting any share in the said property did not arise and it is for this reason only that the said property does not find mention in any of the Wills of Shri Sahdev and Smt. Shakuntala Sahdev propounded by the plaintiff;
- (xvii). that the plaintiff has never been in possession of the property and has filed the suit affixing nominal Court Fees when he is required to pay *ad valorem* Court Fees;
- (xviii). that the plaintiff had earlier instituted CS(OS) No.396/2008 in this Court on the basis of the Wills dated 3rd April, 1998 and 9th April, 1998 seeking the reliefs of declaration and injunction with respect to the another property being property No.24, Alipur Road, Delhi; no relief with respect to the Golf Links property was claimed in the said suit and the present suit with respect to the Golf Links property is barred under Order 2 Rule 2 of the CPC;
- (xix). that the suit is barred by the provisions of the Benami Transaction (Prohibition) Act, 1988; and

(xx). that the plaintiff is claiming the same property through Test. Case No.61/2010 also and is thus indulging in multiplicity of proceedings.

6. The defendants no.3&4 have also filed a written statement supporting the defendants no.1&2.

7. The plaintiff has filed replications to the written statement of the defendants no.1&2 and the written statement of the defendants no.3&4 denying the contents thereof and reiterating his case and further pleading:-

- (A). that the documents on the basis of which the defendants no.1&2 are claiming ownership of the Golf Links property are forged and fabricated;
- (B). it now transpires that the defendants no.1&2 had earlier hatched a conspiracy with the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra to deny Shri Sahdev's ownership rights in the Golf Links property and subsequently the defendants no.3&4 also joined the conspiracy in fabrication and registration of the documents of 4th February, 2009;
- (C). the defendants no.1&2 have concealed the original Agreement to Sell entered on 5th February, 1998 which contained the name of Shri Sahdev also as co-purchaser of the Golf Links property;
- (D). that the amount of sale consideration paid towards purchase of the Golf Links property was brought into the accounts of the defendants no.1&2 from the partnership account of India Trade House in which Shri Sahdev had a 50% share;

- (E). that the defendants no.1&2 have taken advantage of the trust reposed as well as the old age of Shri Sahdev and fraudulently got the Golf Links property assessed in their own name and have abused fiduciary relationship;
 - (F). that the registered Wills and the Power of Attorney of the year 1998 in the names of the defendants no.1&2 only with respect to the Golf Links property are a result of conspiracy to oust the co-owner Shri Sahdev who was then 86 years of age;
 - (G). that the Income Tax orders are self serving documents and the narration of events therein is contradictory to the documents of the year 1997-98;
 - (H). that the defendants no.1&2 had made cash withdrawals of Rs.19.5 lacs from their bank accounts on 2nd February, 2009 and 3rd February, 2009 to make payment thereof to the vendors as an incentive to execute the documents of 4th February, 2009;
 - (I). that the documents of 4th February, 2009 have no reference to the earlier documents claimed of 1997-98; and,
 - (J). that the Test. Case No.61/2010 is independent of the partition suit.
8. The defendants no.1&2 seek rejection of the plaint on the grounds of:-
- (I). the suit being barred by the Benami Act;
 - (II). the suit being barred under Order 2 Rule 2 of the CPC;

- (III). the plaintiff having not produced any documents in support of his claim;
 - (IV). the reliefs claimed being not maintainable without claiming the relief of declaration to the effect that Shri Sahdev was the co-owner of the property;
 - (V). the suit being in abuse of the process of the Court on account of multiplicity of proceedings owing to pendency of Test. Case No.61/2010;
 - (VI). the suit claim being barred by limitation as Shri Sahdev died nearly ten years prior to the institution of the suit;
 - (VII). the claim in suit being false for the reason of the Golf Links property not finding any mention in any of the Wills propounded by the plaintiff of Shri Sahdev or Smt. Shakuntala Sahdev;
 - (VIII). the suit being without cause of action; and,
 - (IX). the requisite Court Fees being not paid on the plaint.
9. The plaintiff has filed reply to the application *inter alia* pleading:-
- (a). that the defendants had earlier also filed an application under Order 7 Rule 11 of the CPC but the consent order dated 16th March, 2011 in FAO(OS) No.115-116/2011 supra arising from the suit recorded that all pending applications stood disposed of and the defendants being thus estopped from seeking rejection;

- (b). that the defendants no.3&4 had not renounced their rights in the property but have taken a stand that the defendants no.1&2 are the owners of the property; and,
- (c). that the suit property had neither been mutated in the names of either defendants no.1&2 or Shri Sahdev nor any formal Conveyance Deed with respect thereto been executed till the demise of Smt. Shakuntala Sahdev on 17th January, 2008.

10. The defendants no.1&2 have filed a rejoinder to the aforesaid reply but need is not felt to refer thereto.

11. The counsel for the defendants no.1&2, while challenging the maintainability of the suit has reiterated the grounds taken in the application under Order 7 Rule 11 of the CPC. He has further contended that the applicants/defendants are not estopped from applying under Order 7 Rule 11 of the CPC in as much as after the order dated 16th March, 2011 supra the plaintiff had amended the plaint and to which a written statement was filed by the defendants.

12. The senior counsel for the plaintiff has drawn attention to the order dated 16th March, 2011 supra to contend that the earlier application filed by the defendants no.1&2 for rejection of the plaint was on the same grounds and the parties had before the Division Bench agreed that all pending applications would stand disposed of; the defendants no.1&2 cannot again seek rejection of the plaint.

13. The senior counsel for the plaintiff however could not controvert that the Court remains empowered to reject the plaint and dismiss the suit on

finding the same to be not maintainable but contended that the consent arrived at before the Division Bench ought to be respected.

14. The senior counsel for the plaintiff has invited attention to the photocopy of the passbook of the account of the Ashok Sahdev (HUF) with the Bank of India, Shahdara, copy whereof is filed along with the replication to contend that the flow of funds as appears there from is clearly indicative of the purchase consideration of the Golf Links property having flown from the receipt of sale consideration of the Udyog Nagar property. The senior counsel for the plaintiff, to meet the plea of the suit claim being barred by the Benami Act, has drawn attention to *Marcel Martins Vs. M. Printer* (2012) 5 SCC 342 in para 31 whereof it has been held that though the expression “fiduciary capacity” has not been defined in the Benami Act or any other statute but is an expression of known legal significance, the import whereof was examined in the subsequent paras of the judgment. The senior counsel for the plaintiff has next invited attention to paras 38 & 44 of the said judgment to contend that the plea of *Benami* would not be available when it can be proved that the funds for purchase of the property had come from the common ancestor of the parties.

15. The senior counsel for the plaintiff has further argued that there is no Sale Deed with respect to the Golf Links property, not even in favour of the defendants no.1&2 till now and thus the need for challenging the title does not arise.

16. It is further argued that though the defendants no.1&2 have in their written statement referred to the Income Tax Returns but have not filed the same.

17. The counsel for the defendants no.1&2 has in his rejoinder arguments referred to ***Priyanka Vivek Batra Vs. Neeru Malik*** 154 (2008) DLT 354.

18. I may mention that the plaintiff amongst the documents filed along with the plaint has filed the photocopy of the registered General Power of Attorney dated 5th February, 1998 executed by the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra in favour of the father-in-law of the defendant no.1 and father of the defendant no.2 with respect to the said property; subsequently while filing the original document, a certified copy thereof has also been filed.

19. The plaintiff has also filed the documents of the 4th February, 2009 with respect to the Golf Links property.

20. Besides the aforesaid, the plaintiff has not filed any other documents with respect to the ownership or title of the Golf Links property.

21. The registered documents dated 4th February, 2009 in favour of the defendants no.1&2 with respect to the Golf Links property show the sale consideration of Rs.93 lacs with respect thereto having been paid between 1st November, 1997 and 23rd August, 1999 and the balance sale consideration of Rs.1 lac having been paid on 4th February, 2009 and record the possession of the property having been delivered to the defendants no.1&2 earlier.

22. The other documents filed by the plaintiff pertain to the various other businesses mentioned in the plaint and the Udyog Nagar property.

23. The defendants have produced before this Court the documents with respect to the property of the year 1997-98 as recorded above and the orders of CIT (Appeals). The said orders are in the context of purchase by the defendant no.2 Ms. Sarita Sahdev and by Shri Ashok Kumar Sahdev (HUF) of the Golf Links property vide Agreements dated 25th October, 1997/1st November, 1997.

24. Though the plaintiff in his replications supra has referred to an Agreement dated 5th February, 1998 of purchase of the Golf Links property showing Shri Sahdev as co-purchaser along with the defendants No.1&2 but no copy thereof has been filed by the plaintiff.

25. The defendants also have not filed any documents of letting of the property since the year 1997-98 exclusively by them as pleaded by them.

26. From the admitted registered documents on record, the execution of purchase documents of the Golf Links property in the name of defendants no.1&2 only is not in dispute. The documents of 4th February, 2009 are also in confirmation thereof. Though the documents of 4th February, 2009 can be said to have been got executed by the defendants no.1&2 in their favour in view of the disputes which had arisen between the plaintiff on the one hand and the defendants no.1&2 on the other hand but the said documents are not found to belie or contradict the transaction of the year 1997-98 showing execution of purchase documents in the name of defendants no.1&2 only and there being no document of purchase in the name of Shri Sahdev through whom the plaintiff claims a share in the property. The plaintiff also by pleading that the defendants no.1&2, at the time of purchase of property

in the year 1997, got the documents of purchase thereof executed in their own favour only and excluding the name of Sh. Sahdev, taking advantage of his old age and the faith reposed by him in defendants no.1&2, has admitted to the documents of purchase of the property being in the name of defendants no.1&2 only and not in the name of Sh. Sahdev. Though the plaintiff claims Sh. Sahdev being shown as co-purchaser with defendants no.1&2 in agreement dated 5th February, 1998 but has not filed the same. The claim of the plaintiff in the suit thus clearly is to the effect that though in the documents of purchase of the property only the defendants no.1&2 are shown as purchasers but they, to the extent of 50% share, are *Benami* for Sh. Sahdev who had contributed 50% of the purchase price and was thus the real/actual owner of 50% of the property. The plaintiff of course has in the plaint hedged the said plea but it is settled principle of law that clever drafting by Advocates should not stop the Courts from on a meaningful reading of pleadings decipher the real cause of action/case and if the same is found to be barred by any law, to nip the same in the bud.

27. The question which arises on the plea of the defendants no.1&2 of the said claim being barred by *Benami* is, whether the claim of the plaintiff of Shri Sahdev having a 50% share in the property owing to 50% of the purchase price of the property having been contributed by him is required to be put to trial. If it were to be held that the said claim if established would be an exception to Benami Act, the same is required to be put to trial. However if it were to be held that the said claim even if established, is in the teeth of the Benami Act, then no purpose would be served by putting the same to trial.

28. Section 2(a) of the Benami Act defines a *benami* transaction as a transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 4 (1) of the said Act prohibits any 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 by or on behalf of a person claiming to be the real owner of such property.

29. However Section 4(3) makes the provisions of Section 4 (1) & (2) inapplicable 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 and 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.

30. The claim of the plaintiff of Shri Sahdev being the owner of 50% share in the property notwithstanding the documents of purchase of the property being in the name of the defendants no.1&2 only, for the reason of Shri Sahdev having paid 50% of the consideration for the property is clearly a claim of *Benami* transaction which is prohibited by Section 4 (1) of the Benami Act.

31. The plaintiff has not pleaded any case of a Hindu Undivided Family and has not made out any case of the Benami Act being inapplicable for the said reason.

32. Though the plaintiff has not pleaded of the property being held by the defendants no.1&2 as a trustee for or of the defendants no.1&2 being in fiduciary capacity towards Shri Sahdev and the property being held by the defendants no.1&2 for the benefit of Shri Sahdev also but the senior counsel for the plaintiff has attempted to take benefit of the judgment of the Supreme Court in *Marcel Martins* supra pronounced subsequent to the institution of the suit.

33. However before I proceed to examine the said aspect it is deemed expedient to deal with the contention of the plaintiff of there being no Sale Deed with respect to the property, not even in the names of defendants no.1&2 and the impact thereof.

34. The Division Bench of this Court in *Asha M. Jain Vs. Canara Bank* 94 (2001) DLT 841 had held that judicial notice has to be taken of the practice prevalent in the city of Delhi of sale/purchase of leasehold properties through the medium of Agreement to Sell coupled with the delivery of possession in part performance thereof, powers of attorney, Wills etc. Though the said judgment of the Division Bench of this Court has been expressly overruled by the Supreme Court in *Suraj Lamp & Industries P. Ltd. v. State of Haryana* 2012 (1) SCC 656 but para 26 of the said judgment clearly makes the judgment of the Supreme Court prospective and the Supreme Court has clarified that judgment is not intended to unsettle transactions which had taken place in the past. The transaction in the present case is of much prior to the date of pronouncement of the judgment in *Suraj Lamp & Industries P. Ltd.* and of the time when the view as pronounced by the Division Bench of this Court in *Asha M. Jain* was prevalent. It has thus

to be held that the words “any transaction in which property is transferred” in Section 2(a) of the Benami Act would include transfer of a date prior to the pronouncement in *Suraj Lamp & Industries P. Ltd.* through the medium of Agreement to Sell coupled with delivery of possession in part performance, Will, Power of Attorney etc.

35. Such transfer of the Golf Links property as per the admitted documents is in favour of the defendants no.1&2 and not in favour of Shri Sahdev who is claimed by the plaintiff to have paid 50% of the purchase consideration of the property and through whom the plaintiff now claims a right in the property.

36. Though I am of the view that non-applicability of the prohibition contained in the Benami Act has to be expressly pleaded and in the absence of the plaintiff setting up a case of the defendants no.1&2 being the trustee of Shri Sahdev or standing in a fiduciary capacity towards Shri Sahdev, cannot be permitted to argue inapplicability of the prohibition contained in the Benami Act and further though I find from a reading of the judgment of the High Court in *Marcel Martins* reported in AIR 2002 Karnataka 191 that the plaintiffs therein had expressly pleaded the property being transferred to the defendant in trust for others and the defendant having expressly agreed to hold it in trust for the others but notwithstanding the same I proceed to examine whether the claim of the plaintiff can be said to be covered by the principle laid down by the Supreme Court in *Marcel Martins* supra.

37. In *Marcel Martins* the property of the Municipality was in the tenancy of the mother of the parties; the Municipality floated a scheme to sell its properties to the occupants; however before the sale could be effected the mother passed away leaving daughters, son and husband/father as her only legal heirs; that though all the said heirs were in occupation of the property but the Municipality insisted on sale/transfer in the name of one only and for which reason the father and the daughters consented to transfer in the name of the son/brother; the sale consideration was paid by the father; the father executed a Will bequeathing the property to the son as well as the daughters equally and thus claimed to be the exclusive owner thereof.

38. It was in the aforesaid facts that the High Court and the Supreme Court held the purchase of the property in the name of the son/brother to be in trust or confidence for his sisters and his father and the Benami Act to be inapplicable. Thus in *Marcel Martins* it was not merely the flow of the purchase consideration from the father but, (i) the factum the right to purchase being available to all the occupants of the property, (ii) the father as well as the daughters being in occupation also having a right to purchase and having desire to purchase in the joint name and the purchase having been effected in the name of the son/brother only for the reason of the Municipality/seller insisting on sale in the name of one only; and, (iii) the agreement between the parties of the son/brother holding the property in trust and for the benefit of the father and the sisters also, which prevailed to hold the case to be covered by the exception contained in Section 4(3)(b) of the Benami Act and all of which ingredients are absent in the present case.

39. In the present case neither can the rights in the property be traced to any common ancestor (as was the tenancy in the name of the mother in **Marcel Martins**) nor was there any reason (as the insistence of the Municipality/seller in **Marcel Martins** to transfer in one name only) for the purchase documents to be in the name of the defendants no.1&2 only and not in the name of Shri Sahdev through whom the plaintiff claims, nor any agreement between Shri Sahdev on the one hand and the defendants no.1&2 on the other hand of the defendants no.1&2 holding the property in trust and for the benefit of Shri Sahdev. Moreover the senior counsel for the plaintiff has been unable to show that a son and/or daughter-in-law in law are a trustee with respect to immovable property of their father/father-in-law or stand in a fiduciary capacity towards the father/father-in-law. In my view it is not so in law, unless a specific case of trust and fiduciary relationship is pleaded. No such case has been made out. Rather the only basis for claiming Shri Sahdev to be having a 50% right in the property is the contribution of 50% of the purchase consideration by Shri Sahdev and which is clearly in the teeth of the Benami Act. I have recently in judgment dated 4th July, 2013 in CS(OS) No.1026/2010 titled **Peeyush Aggarwal Vs. Sanjeev Bhavnani** discussed the said aspect in detail and thus do not feel the need to reiterate here.

40. The plaintiff in the replications have also, as aforesaid, admitted to the payment of purchase consideration to the vendors Shri Surinder Singh Dhingra and Shri Ravinder Singh Dhingra from the acts of defendants no.1&2 only but claim the monies in the said account to be from the sale proceeds of Udyog Nagar property in which Shri Sahdev had a 50% share. I

am unable to see as to how the case set up by the plaintiff is not of Sh. Sahdev being the actual owner and defendants no.1&2 being *benami* owners of 50% share in the property for the said reason.

41. As far as the plea of, the defendants no.1&2 having taken advantage of old age of Shri Sahdev and the faith reposed by Shri Sahdev, is concerned, the same is falsified from the own case of the plaintiff of Shri Sahdev having taken a decision to sell the Udyog Nagar property and acquire the Golf Links property in lieu thereof and the two transactions having taken place at the same time. If Shri Sahdev, according to the plaintiff, was capable of taking decision with respect to Udyog Nagar property, it is inconceivable that he was suffering any handicap while acquiring the Golf Links property. Moreover Sh. Sahdev was alive for about three years after the date of acquisition of property and there are no pleadings of Shri Sahdev, had he intended the purchase of Golf Links property to be in his name also, declaring himself as owner thereof at any place. No mention of the said property is made in any Wills pleaded by the plaintiff of Shri Sahdev and Smt. Shakuntala Sahdev and which would have been had the documents of purchase of Golf Links property intended to be in the name of Shri Sahdev also and the defendants no.1&2 had surreptitiously excluded his name from the documents.

42. I am therefore of the view that the suit claim is clearly barred by the Benami Act.

43. As far as the plea of the defendants of the plaintiff having not paid the requisite Court Fees on the plaint is concerned, though the Division Bench

of this Court recently in judgment dated 2nd February, 2012 in FAO(OS) No.183/2006 titled ***Sonu Jain Vs. Rohit Garg*** has held that it is the averments in the plaint alone which are to be seen for the said purpose and merely because the plaintiff has allowed other co-owners to manage the property is no ground to infer ouster of the plaintiff but I find the position in the present case to be clearly different. There are no averments in the plaint to show the plaintiff being in joint ownership, control or management of the property or having allowed the defendants no.1&2 as co-owners to control or manage the property. Rather a case of complete ouster of the plaintiff from the property is writ large in the pleadings and the plaintiff for claiming the relief of partition was required to pay *ad valorem* Court Fees and which has not been done.

44. Though before rejecting a plaint on this ground an opportunity is required to be given but the suit claim as aforesaid having been found to be otherwise barred by the Benami Act, no need therefor is felt.

45. I do not find any merit in the plea of the defendants of the suit claim being barred by Order 2 Rule 2 of the CPC. The suit on the basis whereof the said plea is taken is not stated to have been disposed of and in any case is with respect to another property. Moreover the said suit is not for partition of the other property but with respect to the user of the other property. Merely because a suit was filed regarding user of another property is no bar to a subsequent suit for partition of a joint property.

46. I am also unable to find any merit in the contention of the senior counsel for the plaintiff of this Court being not entitled to consider the aspect

of maintainability of the suit in the light of the order dated 16th March, 2011 in appeal arising from the suit. Even if the counsels' consent to disposal of applications challenging the maintainability of the suit, the Court is not precluded from, if finds the suit to be not maintainable, dismissing the same. The Courts which are already overburdened are not to be guided by such concessions and go ahead with the trial of a suit which is ultimately bound to doom.

47. I therefore hold CS(OS) No.1517/2010 to be barred by the Benami Act and dismiss the same.

48. As far as Test. Case No.61/2010 is concerned, the petitioners therein (i.e. the plaintiff in CS(OS) No.1517/2010 and his two sons and daughter) seek grant of Letters of Administration of the Will dated 9th April, 1998 of Shri Sahdev. The petitioners have as an Annexure 'C' to the said petition filed a Schedule of Property left behind by Shri Sahdev and which is as under:-

Sr. No.	Asset	Value
1.	Half Ownership of No.92 Golf Linkss, New Delhi	Rs.15.00 crores approximately
2.	Cash deposits in State Bank of India, Rajpur Road, Delhi	
3.	Investments in Unit Trust of India	
4.	Jewellery and household goods	
5.	Investment in India Trading House	
6.	Household goods like furniture, fixture, carpets, decorative articles, Godrej Almirah	
7.	50% share in the firm India Trading House	

8.	Akai TV, Onida TV and VCR	
----	---------------------------	--

49. The respondents no.2 to 9 (being the defendants no.1,3&4 in CS(OS) No. 1517/2010 and their children) have in their reply/objections pleaded the said testamentary case to be not maintainable on the grounds of:-

- (i). that the petitioners having pleaded Shri Sahdev to have under his Will bequeathed his entire estate to his wife Smt. Shakuntala Sahdev, Letters of Administration with respect to whose Will dated 3rd April, 1998 had already been applied for in Test. Case No.82/2008, are not entitled to also seek Letters of Administration with respect to the Will of Shri Sahdev;
- (ii) that the petitioners are abusing the process of the Court; they had in RFA No.206/1989 relied upon the Will dated 27th March, 1998 of Shri Sahdev and not referred to the subsequent Will dated 9th April, 1998 and which also established that the Will dated 9th April, 1998 with respect to which Letters of Administration have been claimed has been subsequently forged and fabricated;
- (iii). that there is no mention of the property No.92, Golf Links neither in the Will dated 9th April, 1998 of Shri Sahdev nor in the Will dated 3rd April, 1998 of Smt. Shakuntala Sahdev, though there is reference to other properties; and,

(iv). that the petition filed in 2010 seeking the Letters of Administration with respect to the estate of Shri Sahdev who died on 9th January, 2000 is barred by time.

50. Though in my view none of the aforesaid constitutes ground for summary rejection of the testamentary case and further though the counsel for the respondents also has not addressed any arguments in this respect but what is apparent from the schedule aforesaid to the petition is that the petition is concerned only with the Golf Links property and with respect to which it has already been held hereinabove that the claim of the plaintiff of Shri Sahdev being the 50% owner is barred by the Benami Act. Once it has been so held, the question of the plaintiff or the other petitioners inheriting any share in the Golf Links property under the Will or as heirs of Shri Sahdev does not arise.

51. Though the schedule of properties annexed to the petition also refers to certain other items but the petitioners have not even chosen to give any value or particulars thereof. The same are thus found to be inconsequential.

52. It is thus felt that no purpose will be served in keeping the said petition alive qua the other items of the properties, the averments with respect thereto are vague and not in accordance with law.

53. The Test. Case No.61/2010 is also thus dismissed summarily with liberty however to the petitioners therein to, if at any time feel the need for Letters of Administration with respect to any asset/property of Shri Sahdev including assets/properties mentioned at serial No.2 to 8 of the schedule of property aforesaid, may after giving complete particulars thereof, re-apply.

54. However in the circumstances no costs in either of the proceedings.

55. Resultantly both proceedings are dismissed.

Decree sheet be drawn up in the suit.

The amounts deposited in this Court pursuant to interim orders in the suit be released in favour of the defendants no.1&2.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 09, 2013

pp