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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CS(OS) No. 478/2004

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30th July, 2015

SH. AMAR N. GUGNANI

..... Plaintiff

Through

Mr. Raman Kapur, Sr. Advocate
along with Mr. Manish Kumar,
Mr. Amit Kumar, Mr. Piyush Kaushik
and Mr. Mohit Arora, Advocates

versus

NARESH KUMAR GUGNANI (THROUGH LEGAL HEIRS)

..... Defendant

Through

Mr. Pravir K. Jain, Adv. for D-1
with Mrs. Sunita Gugnani

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

Yes

VALMIKI J. MEHTA, J (ORAL)

1(i) The present suit is a suit for declaration, eviction, recovery of damages, rendition of accounts and permanent and mandatory injunctions. Plaintiff is Sh. Amar N. Gugnani and who was the son of late Sh. Jai Gopal Gugnani. Defendant is the brother of the plaintiff and the other son of late Sh. Jai Gopal Gugnani. Defendant has now expired and is now being represented by his legal heirs.

(ii) Disputes in the present suit concerns the property no.33, Uday Park, New Delhi (suit premises). Plaintiff claims that he is the sole and exclusive owner of the suit premises, although, the suit premises as per the title document was in the name of the father, late Sh. Jai Gopal Gugnani.

2. In this suit on 11.08.2008 issues were framed and issue no.1 reads as under:-

“Whether the claim in the suit is barred by the provisions of Benami Transactions Prohibition Act, 1988? OPD”

3. Issues, if they are legal issues, and result in bar of any law to the filing of the suit, then such issues under Order XIV Rule 2 of the Code of Civil Procedure, 1908 (CPC) can be treated as preliminary issues. Also, under Order VII Rule 11 CPC if the plaint is shown to have been barred by any such law, the suit plaint can be rejected at any stage. Order XII Rule 6 CPC also entitles a court to decree the suit finally at any stage.

4. In the present case evidence of the plaintiff commenced way back i.e around six years back on 22.09.2009, when the plaintiff filed his evidence by way of affidavit, thereafter now even after around six years and around 25 dates of hearings, plaintiff/PW1 has not completed his evidence, and not only that the evidence of the plaintiff has not been completed,

plaintiff as PW1 has stepped into the witness box for his cross-examination for three times and his cross-examination is still not complete. The cross-examination of the plaintiff could not be completed as repeated orders passed by this Court and the Joint Registrars of this Court show that for around 20 dates the plaintiff has claimed his illness and illness of his wife for not appearing in the witness box. This ground of illness is such which existed from the year 2009 itself onwards. Plaintiff is residing in the USA.

5. This matter came up before this Court on 20.07.2015 as the plaintiff had filed OAs challenging the Orders passed by the Joint Registrar on 29.05.2015 by which two applications filed by the plaintiff were dismissed. First application being for adding a witness to the list of witnesses. The second application was for filing of additional documents. These applications were filed after at least 20 dates when the plaintiff failed to appear in the witness box for his cross-examination on the ground of illness as stated above. On 20.07.2015, when the matter came up before this Court, noticing that issue no.1 is a strictly legal issue, and hence the plaintiff was put to notice with respect to arguments on this issue. This Order dated 20.07.2015 reads as under:-

“O.A. Nos.265/2015 & 266/2015

List on 30th July, 2015. Counsel for the plaintiff is put to notice that the issue no.1 which is framed in this case is a completely legal issue and once the issue is a legal issue with respect to bar to the suit, then, either under Order 7 Rule 11 of Code of Civil Procedure, 1908 (CPC) or Order 12 Rule 6 CPC the suit may no longer to be continued. Plaintiff, of course, with respect to arguments of maintainability of the suit will be heard on the next date of hearing and when these OAs be also listed for hearing.”

6. Before I turn to the arguments urged on behalf of the learned senior counsel for the plaintiff, why the issue is only a legal issue requires to be stated because only a legal issue can be decided as a preliminary issue and not a factual issue on which evidence is required to be led. The issue is legal because this Court is only looking at the plaint filed by the plaintiff and on the basis of admissions and statements made by the plaintiff in the plaint, it is seen that actually issue no.1 can be decided against the plaintiff by holding that the suit is barred by the Benami Transactions (Prohibition) Act, 1988 (in short ‘the Benami Act’). Let us therefore turn firstly to the relevant averments in the plaint which have been made by the plaintiff and which show that the suit is barred by the Benami Act. The relevant paras of the plaint read as under:-

“1. The plaintiff and Defendant are brothers. The plaintiff is presently residing in USA at the address given above. The Defendant who is the Plaintiff’s younger brother is presently residing in the ground floor of the Plaintiff’s house at 33, Uday Park, New Delhi as a

licencee of the Plaintiff alongwith the Plaintiff's mother. Prior to 1962, the Plaintiff was living with his father Shri Jai Gopal Gujnani, mother Smt. Raj Kumari and younger brother Amar Nath as well as sisters in a rented house at 7/23 Darya Ganj, Old Delhi.

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3. That in February/March 1969, the Plaintiff visited India and gave substantial funds to his father Shri Jai Gopal Gugnani to keep it by way of deposit in India for the benefit of the Plaintiff. Again in the year September 1970, the Plaintiff came to India for marriage of his sister brought funds from abroad and extended financial help in solemnization of her marriage. Once again, the Plaintiff handed over substantial funds to his father to keep in deposit in trust for and on behalf of the Plaintiff and for his benefit.

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5. That after marriage of the Plaintiff with Usha, the Plaintiff's father suggested that as the Plaintiff's substantial funds are in deposit with him and he is doing well for himself in USA, he should purchase a plot of land to build a house thereon in New Delhi. He offered to do the needful, if the Plaintiff makes additional funds available. The idea was fascinating and consequently acting upon the said idea of his father, the Plaintiff decided to purchase a plot for construction of a residential house for himself. Plaintiff's father agreed to help the Plaintiff in selecting and acquiring a plot and constructing a house from the funds and money of the Plaintiff.

6. That the Plaintiff and his wife, Smt. Usha made special efforts and purchased Plot No.33 located at Masjid Moth Extension now known as Uday Park, New Delhi having an area of 425.25 sq. meters for a consideration of Rs.1,07,000/- by the money made available by the Plaintiff to his father, Shri Jai Gopal Gugnani with an understanding and assurance that the plaintiff's father who stood in **fiduciary relationship** would hold the property in his name **trust** for the Plaintiff and the Plaintiff shall be real owner always.

7. That on 4th May, 1973 the Plaintiff came to India and handed over further funds to his father for acquiring the plot that had already been identified on perpetual lease. The said deposit was made so that including the funds deposited from time to time, the Plaintiff's father

had sufficient funds for the acquisition, registration of lease deed and incidental expenses.

8. That in view of the said, understanding the Plaintiff's father in his **capacity as trustee** obtained perpetual lease of the aforesaid plot **benami** in his name to endure to the exclusive benefits of the Plaintiff. All the funds in purchase of the plot were availed by the Plaintiff's father from the money deposited with father and given to him from time to time. The possession of the plot was obtained by the Plaintiff's father for and on behalf of Plaintiff in his capacity as a trustee on 9th May, 1973, a perpetual lease deed was executed by the Delhi Development Authority, which was registered on 5th July, 1974 at No.4300 in Additional Book No.1, Volume 3391, pages 24-29 on 21st August, 1974. The Plaintiff has been throughout and still continues to be exclusive real owner in possession of the plot and the **name of his father** Late Shri Jai Gopal Gugnani **was benami.**

9. That the Plaintiff entrusted the title deed of the land in question to his father for safe custody in his capacity, **as a benami** and the real ownership always vested in the Plaintiff.” (emphasis added)

7. There are other similar averments made by the plaintiff in the plaint but the aforesaid paras are representative of the essence of the plaint.

8. It is on the basis of these averments that the reliefs are claimed in the suit by pleading essentially that the plaintiff is the exclusive owner of the suit premises no.33, Uday Park, New Delhi and his father in whose name the title deeds are is only a benamidar trustee. A reading of the aforesaid paras of the plaint which have been reproduced above shows that no doubt the plaintiff has used the expression of the property being purchased in the name of the father of the parties because of a fiduciary relationship and that

the father was a trustee, however, simultaneously a reading of the last lines of paras 8 and 9 of the suit plaint shows that the plaintiff has admitted that the ownership in the name of the father, late Sh. Jai Gopal Gugnani was benami and since the father was only a benami owner, real ownership fell with the plaintiff.

9. On behalf of the plaintiff, the learned senior counsel, Mr. Raman Kapur has argued that the suit is not barred by the Benami Act, inasmuch as, the suit falls within the exception contained in Section 4(3)(b) of the Benami Act because this provision allows exception to the benami transactions once there is a fiduciary relationship or a relationship of a trust/trustee. It is argued that the plaintiff's father was a trustee for purchase of the property for and on behalf of the plaintiff, and hence a fiduciary relationship was created, and resultantly the subject suit therefore is saved by the provision of Section 4(3)(b) of the Benami Act. Strong reliance is placed by the learned senior counsel for the plaintiff upon the judgment of the Supreme Court in the case of *Marcel Martins Vs. M. Printer and Others (2012) 5 SCC 342*.

10. Section 4 of the Benami Act reads as under:-

“4. Prohibition of the right to recover property held benami— (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,—

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

11. Before I turn to the arguments urged on behalf of the plaintiff and the judgment of the Supreme Court in the case of *Marcel Martins (supra)*, I would at this stage refer to a judgment delivered by this Court in the case of *J M Kohli Vs. Madan Mohan Sahni & Anr* in *RFA No.207/2012* decided on 07.05.2012. In this judgment this Court has had an occasion to consider the intendment of the passing of the Benami Act as reflected from Section 7 of the Benami Act. Section 7 of the Benami Act

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repealed the provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 (in short ‘the Trusts Act’) and which provisions of the Trusts Act gave statutory recognition and protection to the benami transactions by calling such transactions protected by a relationship of a trust. It bears note that benami transactions were very much legal within this country before the passing of the Benami Act and the relationship of a benamidar to the owner was in the nature of a trust/fiduciary relationship because it was the Trusts Act which contained the provisions of Sections 81, 82 and 94 giving statutory recognition to the benami ownership of the properties being in the nature of trust. In ***J M Kohli’s*** case (*supra*), this Court has held that the expression “fiduciary relationship” and a relationship of a trustee cannot be so interpreted so as to in fact negate the Benami Act itself because all benami transactions actually are in the nature of trust and create a fiduciary relationship and if the expression “trustee” or “fiduciary relationship” is interpreted liberally to even include within its fold a typical benami transaction, then it would amount to holding that there is no Benami Act at all. Putting in other words, since Section 7 of the Benami Act repealed certain provisions, hence, the relationship of trust comprised in such provisions necessarily would be excluded from the sweep of the expression trust/fiduciary relationship found in Section 4(3)(b) of the Benami Act

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because what is excluded by Section 7 of the Benami Act cannot be got included in Section 4(3)(b) of the Benami Act. Let me at this stage refer to the relevant paras in the judgment in the case of **J M Kohli (supra)** and these paras read as under:-

“6. The consequences of the Benami Transactions (Prohibition) Act, 1988 were harsh as they brought to an end the ownership rights of an actual owner against the benami owner. Before passing of the Benami Act, a *de jure* owner could also file a suit against *de facto* owner and thereby claim ownership of the property on the ground that ostensible owner was only a benamidar. The legal provisions which helped the plaintiff in such a suit prior to passing of the Benami Act were inter-alia the provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 and as per which provisions a benami owner was actually a trustee for the real owner. Section 7 of the Benami Act specifically repeals the aforesaid sections of the Indian Trusts Act, 1882 and also Section 66 of the CPC which had similar substance.

7. Section 4(3)(b) of the Benami Act, however, protected rights of a real owner where the person in whose name the property is held is a trustee or other person standing in the fiduciary capacity and the property is held for the benefit of other person, for whom the person in whose name the property is held is a trustee. Section 4(3)(b) of the Benami Act reads as under:-

“4. Prohibition of the right to recover property held benami.-

(3) Nothing in this section shall apply –

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity.”

8. In a way, therefore, there may be some ostensible conflict between the provision of Section 4(3)(b) of the Benami Act and

Section 7 of the same Act which repeals the provisions of the Indian Trusts Act, 1882, however, one has to read and interpret Section 4(3)(b) in a manner which is in accord with the legislative intention to bar claims against properties held as benami. The concept of trust was always inbuilt once a transaction was a benami transaction as the benamidar was the trustee for the real owner. But in spite of the concept of trust being inbuilt in benami transactions, the Benami Act provided that no rights could be asserted in a benami property by the actual/*de jure* owner.

Putting it differently, once Sections 81, 82 and 94 of the India Trusts Act, 1882 have been repealed, they cannot be brought in from the back door, so to say, by giving the same content contained in the repealed provisions of Sections 81, 82 and 94 of the Indian Trusts Act, 1882 to Section 4(3)(b) of the Benami Act. If we give such an interpretation, the entire Benami Act will fall and it will be as if the same has not been enacted. Therefore, Section 4(3)(b) which provides that the property which is held as a trustee or in a fiduciary capacity must be interpreted in the sense that the trustee or a person who is holding the property in a fiduciary capacity has either committed a fraud and got the property title in his name or is in furtherance of law holding property in his name however in the capacity of a trustee or in fiduciary capacity, although the real owner is somebody else. Repealed Sections 81, 82 and 94 of the Indian Trusts Act, 1882 read as under:-

“81. Where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that the intend to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative.

82. Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this session shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36.

94. In any case not coming within the scope of any of the proceeding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.”

9. Two of the examples where the Supreme Court has held the property to be held as a trustee in terms of Section 4(3)(b) of the Benami Act are the judgments in the cases of *C. Gangacharan V. C. Narayanan, 2000 (1) SCC 459* and *P.V. Sankara Kurup V. Leelavathy Nambiar, 1994(6) SCC 68*.

In the case of *C. Gangacharan* (supra), the Supreme Court has held that the property was held as a trustee as per Section 4(3)(b) of the Benami Act, and the person in whose name the property stood cannot take up a plea of the bar of Benami Act, inasmuch as, actually the owner had given moneys for the property to be purchased under his name, however, the moneys were in fraud utilized to get the property purchased in the name of defendants in that suit. In the case of *P.V. Sankara Kurup* (supra) also the obvious fraud which was perpetrated was that the property was to be purchased in the name of the plaintiff by his attorney holder and which the defendants did not do and instead got the property purchased directly in their name. In the case of *P.V. Sankara Kurup* (supra), the Supreme Court was dealing with Section 66 of CPC as it existed before its repeal by Section 7 of the Benami Act and in the facts of the case as stated above it was held that the purchaser had acted in fiduciary capacity as an agent and consequently the bar of the Benami Act would not apply. In the said judgment, the Supreme Court held that when the agent was employed to purchase the property on behalf of his principal, however does so in his own name, i.e. the agent's name then upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal.

10. Therefore, in certain cases where there is obvious breach of trust in purchasing the property in the name of a person, whereas it ought to have been purchased in the name of the principal or the real owner, Supreme Court has, to that limited extent, held that such actions are covered under Section 4(3)(b) of the Benami Act and such transactions are not hit by the Benami Act.”

12. It need not be again said, but at the cost of repetition it bears note that the expression “trustee” or “fiduciary relationship” cannot be interpreted in such a manner that the definition of “benami transaction” provided under Section 2(a) of the Benami Act and prohibited by Sections 4(1) & 4(2) of the Benami Act is totally washed away, inasmuch as, it is the benami transactions which are sought to be completely barred by the provisions of the Benami Act.

13. In the judgment in *J M Kohli*’s case (*supra*) certain cases where there is a relationship of trust and fiduciary relationship, and which cases are exempted from operation of the Benami Act and they fall under the exception of Section 4(3)(b) of the Benami Act are given in para 9 by reference to the judgments of the Supreme Court in the cases of *C.Gangacharan Vs. C. Narayanan 2000 (1) SCC 459* and *P.V. Sankara Kurup Vs. Leelavathy Nambiar 1994 (6) SCC 68*. These Supreme Court judgments held as to when a relationship of trustee would be covered under

Section 4(3)(b) of the Benami Act for the same not to be a benami
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transaction which is barred as per Section 2(a) read with Sections 4(1) and 4(2) of the Benami Act. Para 9 of the judgment in ***J M Kohli's*** case (*supra*) gives the facts of these two Supreme Court judgments and hence the factual reasons why those cases fell in the exception of Section 4(3)(b) of the Benami Act.

14. Let me at this stage refer to the judgment of the Supreme Court in the case of ***Marcel Martins*** (*supra*) and which judgment has been very strenuously relied upon by the learned senior counsel for the plaintiff to argue that the judgment passed by this Court in ***J M Kohli's*** case (*supra*) will not hold the field but it is the ratio in the case of ***Marcel Martins*** (*supra*) which will hold the field. Let us therefore examine the facts in the case of ***Marcel Martins*** (*supra*), again keeping in mind, that it depends upon the facts of each case as to whether the relationship is in the nature of a fiduciary relationship which is exempted by Section 4(3)(b) of the Benami Act and only which is in the nature of exception to the Benami Act. Surely Section 4(3)(b) of the Benami Act, and which is an exception, cannot have an effect of in fact repealing the entire Benami Act.

15. The facts in the judgment in the case of ***Marcel Martins*** (*supra*) are that the suit property was in the tenancy of one Smt. Stella

Martins. The landlord of the property was the Corporation and the Corporation took a decision to sell the tenanted properties to the occupants of the same. Smt. Stella Martins therefore was to be given the ownership rights in the property subject to her paying a certain amount/consideration to the Corporation. Before the property could be transferred to Smt. Stella Martins, Smt. Stella Martins died and therefore the right to own the property by payment of consideration devolved upon all the legal heirs of Smt. Stella Martins i.e her husband Sh C.F. Martins and the other children. In the facts of the case, when all the legal heirs of Smt. Stella Martins went to the Corporation for getting the property transferred in their joint names, Corporation as per its policy desired that property will not be transferred in the name of all the legal heirs of Smt. Stella Martins but will only be transferred in the name of one person. Consequently though the amount of sale consideration of the property was paid to the Corporation essentially by the husband of Smt. Stella Martins and the father of all the other parties, namely, Sh. C.F. Martins, but the title documents of the property by the Corporation were executed in the name of only one child of Smt. Stella Martins, namely Sh. Marcel Martins. Sh. Marcel Martins therefore claimed that he was the sole owner of the property and the other legal heirs who filed the suit as plaintiffs were barred from claiming the rights in the suit property

as the transaction in question as per Sh. Marcel Martins, the plaintiff, was a benami transaction, and hence rights in the property claimed by other legal heirs were barred by the Benami Act. In such facts, the Supreme Court by referring to the meaning of “fiduciary relationship” as per various dictionaries held that the transactions were not barred by the Benami Act viz the transaction was not a benami transaction but was a breach of trust which was a transaction of fiduciary relationship of the trust therefore covered under the exception under Section 4(3)(b) of the Benami Act. The Supreme Court therefore essentially held that unlike a benami transaction falling under Section 2(a) and Sections 4(1) and 4(2) of the Benami Act, which is a voluntary transaction deliberately entered into as a benami transaction, in the facts of the case before it the transaction became ‘benami’ involuntarily because of the requirement of the policy of a statutory body viz the Corporation. But for the requirement of the Corporation to transfer the property only in one name, the title deed would have been in the names of all the legal heirs and in such circumstances Sh. Marcel Martins was a trustee having fiduciary capacity falling in the exception of Section 4(3)(b) of the Benami Act. The relevant paragraphs of the judgment of the Supreme Court in the case of *Marcel Martins (supra)* are paras 27 to 46 and which paras read as under:-

“27. It is common ground that although the sale deed by which the property was transferred in the name of the appellant had been executed before the enactment of above legislation yet the suit out of which this appeal arises had been filed after the year 1988. The prohibition contained in Section 4 would, therefore, apply to such a suit, subject to the satisfaction of other conditions stipulated therein. In other words unless the conditions contained in Section 4(1) and (2) are held to be inapplicable by reason of anything contained in Sub-section (3) thereof the suit filed by plaintiffs-respondents herein would fall within the mischief of Section 4.

28. The critical question then is whether sub-section (3) of Section 4 saves a transaction like the one with which we are concerned.

29. Sub-section (3) to Section 4 extracted above is in two distinct parts. The first part comprises clause (a) to Section 4(3) which deals with acquisitions by and in the name of a coparcener in a Hindu Undivided Family for the benefit of such coparceners in the family. There is no dispute that the said provision has no application in the instant case nor was any reliance placed upon the same by learned counsel for the respondent-plaintiffs.

30. What was invoked by Mr. Naveen R. Nath, learned counsel appearing for the respondents was Section 4(3)(b) of the Act which too is in two parts viz. one that deals with trustees and the beneficiaries thereof and the other that deals with persons standing in a fiduciary capacity and those towards whom he stands in such capacity. It was argued by Mr. Nath that the circumstances in which the purchase in question was made in the name of the appellant assumes great importance while determining whether the appellant in whose name the property was acquired stood in a fiduciary capacity towards the respondent-plaintiffs.

31. The expression "fiduciary capacity" has not been defined in the 1988 Act or any other statute for that matter. and yet there is no gainsaying that the same is an expression of known legal significance, the import whereof may be briefly examined at this stage.

32. The term "fiduciary" has been explained by *Corpus Juris Secundum* as under:

“A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil, or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee with respect to the trust and confidence involved in it and the scrupulous good faith and condor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate.”

33. *Words and Phrases*, Permanent Edn. (Vol. 16-A, p. 41) defines "fiducial relation" as under:

“There is a technical distinction between a 'fiducial relation' which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and 'confidential relation' which includes the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.

Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards

another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations.”

34. *Black's Law Dictionary* (7th Edn. p. 640) defines "fiduciary relationship" thus:

“Fiduciary relationship—A relationship in which one person is under a duty to act for the benefit of the other on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client - require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.”

35. *Stroud's Judicial Dictionary* explains the expression "fiduciary capacity" as under:

“Fiduciary Capacity - An administrator who had received money under letters of administration and who is ordered to pay it over in a suit for the recall of the grant, holds it "in a fiduciary capacity" within Debtors Act, 1869 so, of the debt due from an executor who is indebted to his testator's estate which he is able to pay but will not, so of moneys in the hands of a receiver, or agent, or Manager, or moneys due to an account from the London agent of a country solicitor, or proceeds of sale in the hands of an auctioneer, or moneys which in the compromise of an action have been ordered to be held on certain trusts or partnership moneys received by a partner.”

36. *Bouvier's Law Dictionary* defines "fiduciary capacity" as under:

“What constitutes a fiduciary relationship is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society. Medical or religious adviser, husband and wife, an agent who appropriates money put into his hands for a specific purpose of investment, collector of city taxes who retains money officially collected, one who receives a note or other security for collection. In the following cases debt has been held not a fiduciary one; a factor who retains the money of his principal, an agent under an agreement to account and pay over monthly, one with whom a general deposit of money is made.”

37. We may at this stage refer to a recent decision of this Court in *CBSE v. Adiya Bandopadhyay*:² (2011) 8 SCC 497 wherein Ravindeeran, J. speaking for the Court in that case explained the term 'fiduciary' and 'fiduciary relationship' in the following words: (SCC pp.524-25, para 39)

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

It is manifest 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 that are founded on confidence and trust on the one part and good faith on the other.

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

39. The first and foremost of the circumstance relevant to the question at hand is the fact that the property in question was tenanted by Smt Stella Martins, the mother of the parties before us.

40. It is common ground that at the time of her demise she had not left behind any will nor is there any other material to suggest that she intended that the tenancy right held by her in the suit property should be transferred to the Appellant to the exclusion of her husband, C.F Martins or her daughters, respondents in this appeal, or both.

41. In the ordinary course, upon the demise of the tenant, the tenancy rights should have as a matter of course devolved upon her legal heirs that would include the husband of the deceased and her children (parties to this appeal). Even so, the reason why the property was transferred in the name of the appellant was the fact that the Corporation desired such transfer to be made in the name of one individual rather than several individuals who may have succeeded to the tenancy rights. A specific averment to that effect was made by plaintiffs-respondents in para 7 of the plaint which was not disputed by the appellant in the written statement filed by him. It

is, therefore, reasonable to assume that transfer of rights in favour of the appellant was not because the others had abandoned their rights but because the Corporation required the transfer to be in favour of individual presumably to avoid procedural complications in enforcing rights and duties qua in property at a later stage.

42. It is on that touchstone equally reasonable to assume that the other legal representatives of the deceased-tenant neither gave up their tenancy rights in the property nor did they give up the benefits that would flow to them as legal heirs of the deceased tenant consequent upon the decision of the Corporation to sell the property to the occupants. That conclusion gets strengthened by the fact that the parties had made contributions towards the sale consideration paid for the acquisition of the suit property which they would not have done if the intention was to concede the property in favour of the appellant.

43. Superadded to the above is the fact that the parties were closely related to each other which too lends considerable support to the case of the plaintiffs that the defendant-appellant held the tenancy rights and the ostensible title to the suit property in a fiduciary capacity vis-à-vis his siblings who had by reason of their contribution and the contribution made by their father continued to evince interest in the property and its ownership. Reposing confidence and faith in the appellant was in the facts and circumstances of the case not unusual or unnatural especially when possession over the suit property continued to be enjoyed by the plaintiffs who would in law and on a parity of reasoning be deemed to be holding the same for the benefit of the appellant as much as the appellant was holding the title to the property for the benefit of the plaintiffs.

44. The cumulative effect of the above circumstances when seen in the light of the substantial amount paid by late Shri C.F Martins, the father of the parties, thus puts the Appellant in a fiduciary capacity vis-à-vis the said four persons. Such being the case the transaction is completely saved from the mischief of Section 4 of the Act by reason of the same falling under sub-section 3(b) of Section 4. The suit filed by the respondents was not, therefore, barred by the Act as

contended by the learned counsel for the appellant. The view taken by the High Court to that effect is affirmed though for slightly different reasons.

45. We may while parting say that we have not been impressed by the contentions urged on behalf of the Appellant that the plea of a fiduciary relationship existing between the parties and saving the suit from the mischief of Section 4 of the Act, was not available to the respondents, as the same had not been raised before the Courts below. The question whether the suit was hit by Section 4 of the Act was argued before the High Court and found against the appellant. The plea was not, therefore, new nor did it spring a surprise upon the appellant, especially when it was the appellant who was relying upon Section 4 of the Act and the Respondents were simply defending the maintainability of their suit. That apart no question of fact beyond what has been found by the High Court was or is essential for answering the plea raised by the appellant nor is there any failure of justice to call for our interference at this stage.

46. In the result, this appeal fails and is hereby dismissed but in the circumstances without any orders as to costs.”

16. With all humility I may note that in the judgment in the case of *Marcel Martins (supra)*, none of the parties drew attention of the Supreme Court to the extremely important provision of Section 7 of the Benami Act that the fiduciary relationships which were protected earlier by virtue of Sections 81, 82 and 94 of the Trusts Act, such fiduciary transactions by virtue of repeal of these provisions would stand excluded from Section 4(3)(b) of the Benami Act i.e those transactions which were transactions of trust and fiduciary in nature, once they were in the nature falling under Sections 81, 82 and 94 of the Trusts Act, then on these Sections being

repealed, hence trust/fiduciary relationships covered under such Sections were those transactions which were benami transactions which stood prohibited by the promulgation of the Benami Act. As held in ***J M Kohli***'s case (*supra*), surely intendment of Section 4(3)(b) of the Benami Act is not to bring through the back door, relationships of trust/fiduciary character falling in the provisions of Sections 81, 82 and 94 of the Trusts Act which were specifically repealed by Section 7 of the Benami Act. Putting it in other words, once transactions were in the nature of trust, and such transactions in the nature of trust were encompassed within the meaning of trust as comprised in Sections 81, 82 and 94 of the Trusts Act, though such transactions were transactions in trust and fiduciary in nature, such transactions were held to be illegal after passing of the Benami Act by repeal of these provisions of the Trusts Act. Obviously, it cannot be otherwise held that the transactions which fall within the meaning of Sections 81, 82 and 94 of the Trusts Act, though these Sections stand repealed, yet the transactions falling in these Sections will have protection of Section 4(3)(b) of the Benami Act. A reading of the judgment in the case of ***Marcel Martins*** (*supra*) shows that on the facts of the said case it was held that there was a fiduciary relationship and a relationship in the nature of trust, inasmuch as, actually all the parties were to be the owners but for the fact that the

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Corporation had desired, and which is in fact in the nature of compulsion by the Corporation and as per its policy, the property by the Corporation was not transferred in the name of all the legal heirs of Smt. Stella Martins but only in the name of one legal heir. Such transactions compassed in the case of *Marcel Martins (supra)*, and which were brought about on the direction of a third party, is different from a voluntary transaction where a person voluntarily gives money for property to be purchased in the name of another person and in which case such a transaction where A pays money for the property to be purchased in the name of B, this by itself will necessarily be a benami transaction under Section 2(a) of the Benami Act which states that any transaction in which property is transferred to one person for a consideration paid or provided by another person, such a transaction is a benami transaction, and such benami transactions are subject matter of prohibition of Sections 4(1) and 4(2) of the Benami Act.

17. In my humble opinion therefore the judgment in the case of *Marcel Martins (supra)* is distinguishable in view of the existence of the provision of Section 7 of the Benami Act repealing Sections 81, 82 and 94 of the Trusts Act.

18. In view of the above, since the plaintiff in the plaint himself states that the property was purchased as a benami property in the name of the father, late Sh. Jai Gopal Gugnani, merely and although the plaintiff has used the expressions fiduciary relationship and trustee, yet these expressions of fiduciary relationship and trustee are not those expressions which will cause the transaction to fall under the exception of Section 4(3)(b) of the Benami Act, but these expressions are those expressions which fall under Sections 81, 82, and 94 of the Trusts Act and which have been repealed by Section 7 of the Benami Act.

19. In view of the above, I hold that the suit is barred by the provision of Section 4(1) of the Benami Transactions (Prohibition) Act, 1988.

20. The suit is accordingly dismissed. Parties are left to bear their own costs. All pending applications will stand disposed of accordingly. Next date of 24.8.2015 stands cancelled.

JULY 30, 2015
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VALMIKI J. MEHTA, J