

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

Judgment Reserved on : August 13, 2015

% *Judgment Delivered on : August 24, 2015*

+ **RFA(OS) 28/2015**

**JHANG BIRADARI HOUSING
RESIDENTS SOCIETY**

..... Appellant

Represented by: Mr.Ravi Gupta, Sr.Advocate
instructed by Mr.P.Choudhary,
Mr.Ajay Gulati and Mr.Sachin Jain,
Advocates

versus

BHARAT BHUSHAN SACHDEVA & ORS. Respondents

Represented by: Mr.B.K.Sood, Sr.Advocate instructed
by Mr.Shivam Rawat, Advocate
Mr.Bharat Bhushan Sachdeva, R-1 in
person

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The appellant instituted a suit praying for a declaration to be granted that it is the owner of property measuring 31 bigha comprised in Khasra No.206/2, 208/2, 209, 210/2 and 211/2 Basai Darapur, Rohtak Road, New Delhi.

2. It was pleaded in the plaint that the appellant is a society registered under the Societies Registration Act and was initially formed by the name Jhang Biradari Association, with the object of re-settling people who had migrated to India from Jhang in Pakistan after partition. That Late

Sh.Amir Chand and Brij Lal were the pioneers to form the Jhang Biradari Association. As per policy of the Ministry of Rehabilitation, Government of India, evacuee properties were auctioned and one such evacuee property auctioned was 61 bigha and 6 biswa land comprised in Khasra No.206, 207, 208, 209, 210 and 211 in the revenue estate of Basai Darapur Delhi. That the Jhang Biradari Association took a decision to bid for the said evacuee property put up for auction but was handicapped on account of it being then not registered as a society under the Societies Registration Act and additionally because as an association it could not participate in the bidding process, thus it was resolved that Late Sh.Amir Chand and Brij Lal shall make a bid for the land, which would actually be on behalf of the society. Accordingly the said two persons made a bid in sum of ₹3,00,050/- which was accepted and as a result the said sum of ₹3,00,050/- had to be either paid to the account of the Central Government or could be adjusted by making adjustments of persons whose entitlement for being allotted evacuee property, with amount i.e. money quantified was accepted by the Government. It was pleaded that by adjusting claims of associates for evacuee property left by them in Pakistan the bid amount was satisfied and the sale certificate was issued in the names of Amir Chand and Brij Lal. Pleading that 30 bigha 6 biswa land was acquired and only 31 bigha remained, it was pleaded that Late Sh.Matwal Chand was appointed as the Secretary of the Society. Sh.Amir Chand and Brij Lal executed a general power of attorney on April 16, 1960 in favour of Matwal Chand and the reason was that as the Secretary of the Society, Matwal Chand could deal with the property by corresponding with various authorities so that a permission could be obtained to put the land to group housing use for the

members of the society. It is pleaded that on May 16, 1962 Amir Chand and Brij Lal executed a sale-deed in favour of Matwal Chand selling to him 31 bigha land which remained post acquisition. It was pleaded that Matwal Chand corresponded in his name with various statutory authorities to grant permission to put the land to a group housing use, and though he wrote in his name the various letters to the statutory authorities, he was actually acting on behalf of the society as the Secretary thereof. Pleading that Matwal Chand expired on October 21, 2006 and his two sons and a daughter, impleaded as defendants No.1 to 3 in the suit applied for the land to be mutated in their names, the suit was filed, praying as aforenoted.

3. Relevant for the purposes of decision in the appeal would be to note averments made in paragraph 21 of the plaint. They reads as under:-

“21. That cause of action accrued in favour of the plaintiff and against the defendants on different dates when it was known that the defendants/their father Matwal Chand started dealing with the property as their own exclusive property. The cause of action accrued when the property in question was conveyed from the name of Amir Chand Brij Lal to the name of Sh.Matwal Chand. It also accrued when General Power of Attorney was executed for performing the functions of Society and dealing with obligations of Society vis-a-vis the property in question. The cause of action also accrued on different dates when the plaintiff Society corresponded and exchanged various letters with different civic authorities for changing land use and sanctioning of plans for raising construction for its members. The cause of action also accrued when MCD, DDA, SDM (South-West), Delhi Jal Board, Senior Town Planner of MCD sent various letters for the said purpose. The cause of action also accrued when land measuring 31 bighas was notified for acquisition under Section 4 & 6 of Land Acquisition Act. It further accrued on 15.4.2004 when Award dt.7.1.81 was set aside by Hon’ble High Court of Delhi vide

W.P.(C) No.697/1983. The cause of action also accrued on 21st October, 2006 when Sh.Matwal Chand expired. It further accrued when mutation of the property in question was got fraudulently effected in the name of the legal heirs of Sh.Matwal Chand in February, 2009. It also accrued recently when plaintiff came to know that defendants were contemplating to sell a portion of the property in question representing themselves to be the sole and absolute owner of the said property. The cause of action is still continuing as the defendants are actively instrumental in achieving their illegal designs of selling, transferring and disposing off the suit property/part thereof by illegally representing them to be the sole owners. The cause of action is still continuing.”

4. Along with the plaint the appellant filed 56 documents, most of which emanate from government authorities and succinctly put would show that on February 15, 1958 when the bid made by Amir Chand and Brij Lal was accepted the Regional Settlement Commissioner informed them that they can associate other claimants to satisfy the bid amount and that on March 18, 1959 the Government conveyed to Amir Chand and Brij Lal that the bid amount in sum of ₹3,00,050/- has been satisfied by adjusting Amir Chand's claim in sum of ₹7,280/- and Brij Lal's claim in sum of ₹2,786/-. ₹19,939/- being received in cash and associate claims of Sain Ditta in sum of ₹7,433/-, Avnashi Lal in sum of ₹11,300/-, Mukan Lal Kapur in sum of ₹6,972/-, Rattan Chand in sum of ₹7,016/-, Kedar Nath in sum of ₹12,090/-, Lachman Dass in sum of ₹9,671/-, Keshar Chand in sum of ₹8,788/-, Mukand Lal in sum of ₹7,620/-, Siv Dass Kapur in sum of ₹8,042/-, Sohan Lal in sum of ₹8,760/-, Ganga Ram in sum of ₹10,960/-, Amar Nath in sum of ₹6,018/-, Budh Singh in sum of ₹7,434/-, Smt.Gian Devi in sum of ₹12,702/-, Shri Nand Lal in sum of ₹6,498/-,

Prem Chand in sum of ₹8,210/-, Manohar Lal in sum of ₹3,330/-, Bishan Sarup in sum of ₹9,143/-, Harnam Singh in sum of ₹14,680/-, Smt.Mansa Devi in sum of ₹5,849/-, Shiv Dass in sum of ₹7,320/-, Kedar Nath in sum of ₹4,828/-, Ram Dass in sum of ₹5,994/-, Manohar Ahuja in sum of ₹3,600/-, Janki Nath in sum of ₹6,884/-, Kanshi Ram in sum of ₹7,192/-, Gurbachan Sngh in sum of ₹9,747.69, Khem Singh in sum of ₹8,373.50, Jiwan Lal Puri in sum of ₹4,666/-, Hardit Singh in sum of ₹9,599/-, Rup Lal in sum of ₹4,853/-, Chandra Gupta in sum of ₹8,921/-, Gurdial Singh in sum of ₹6,090/-, Shri Maya Dass in sum of ₹4,139/- and Shri Ram Lal in sum of ₹2,305.43. Communication sent by Matwal Chand to various statutory authorities, as per the documents filed, show that he was acting on behalf of the society and seeking permission for change of land use to group housing.

5. In the written statement filed, the defendants pleaded that Amir Chand and Brij Lal were the owners of the suit land and vide sale-deed dated May 16, 1962 the land was sold to Matwal Chand. It was denied that the land was ever intended to be acquired for the society. Maintainability of the suit was questioned by raising the plea that suit for mere declaration would not lie and that cancellation of the sale-deed dated May 16, 1962 being not sought for was the reason why the suit for mere declaration would not lie. It was pleaded that the suit was barred by limitation and for which pleadings in paragraph 21 of the plaint were highlighted. Relevant would it be to highlight that the maintainability of the suit which sought only a decree for declaration was challenged on the plea that cancellation of the sale-deed dated May 16, 1962 executed by Amir Chand and Brij Lal in favour of Matwal Chand was not sought. It

was not the case pleaded that because the plaintiff was not in possession of the suit land the suit for declaration simplicitor would not lie.

6. The respondents filed an application under Order VII Rule 11 of the Code of Civil Procedure praying for rejection of the plaint with respect to the two legal objections raised in the written statement. The respondents also filed IA No.13043/2011 praying for rejection of the plaint on said two legal preliminary objections raised in the written statement. Under the belief that the maintainability of the suit which sought a decree for mere declaration was being questioned on account of possession of the suit land not being claimed, IA No.16791/2011 was filed by the appellant seeking to amend the plaint by pleading that the society was in legal possession and occupation of the suit land since 1958. This was by way of inserting para 2A after existing paragraph 2 in the plaint. Certain clarificatory amendments were proposed by the insertion of paragraphs 9A and 9B after existing paragraph 9 in the plaint, paragraphs 10A to 10C after existing paragraph 10 in the plaint, an addition of a sentence at the end of existing paragraph 12, insertions of paragraphs 13A and 13B after existing paragraph 13 of the plaint and insertion of paragraph 18A after existing paragraph 18 of the plaint.

7. Vide impugned decision dated February 04, 2015, putting the cart before the horse, the learned Single Judge has first decided IA No.13043/2011 rejecting the plaint and thereafter has proceeded to decide IA No.16791/2011 filed by the appellant to amend the suit.

8. Whereas IA No.13043/2011 has been allowed and the plaint has been rejected IA No.16791/2011 has been dismissed.

9. We propose to deal with the reasoning of the learned Single Judge first qua IA No.16791/2011 and thereafter with the reasoning qua IA No.13043/2011.

10. Dismissing IA No.16791/2011, the learned Single Judge has noted various judgments dealing with the power of the Court to grant amendment of a pleading. Without analyzing the proposed amendments and simply highlighting the proposed amendment as per para 2A sought to be inserted the learned Single Judge has held that there was an admission in the existing pleadings that the plaintiff was not in possession of the suit land and held that said admission could not be withdrawn. So holding the learned Single Judge has dismissed the application seeking amendment. The learned Single Judge has highlighted that in IA No.9562/2011 filed by the appellant under Order 39 Rule 1 and 2 of the Code of Civil Procedure, by pleading that the defendants were threatening to dispose of the property in favour of third parties and praying that the defendants be restrained from parting with possession of the suit property, there would be an admission that the defendants were in possession and therefore the proposed insertion of paragraph 2A to plead that the plaintiff was in possession of the suit land since inception would be taking away the admission.

11. The view taken by the learned Single Judge is incorrect for the reason it is settled law that even an admission in a pleading can be withdrawn provided a reason which is legally sound is pleaded in the application seeking amendment, as was held by the Supreme Court in the decision reported as AIR 1983 SC 462 Panchdeo Narain Srivastava Vs. Kumari Jyoti Sahay & Anr.

12. A perusal of the original plaint would evince that there is no admission made by the appellant that it is not in possession of the suit land. The plaint has been very inartistically drafted and unfortunately the lawyer has not even used the word that originally Amir Chand and Brij Lal and thereafter Matwal Chand held the properties on behalf of the plaintiff as trustees, pending formal constitution of the plaintiff as a body incorporate. The entire pleadings in the plaint, meaningfully read, pleads so. But yet the counsel did not formally incorporate said aspect in the pleadings. It is trite that it is the substance of the pleadings which matters and not the form. Meaningfully read, the suit is based upon the plea that the suit property was purchased by Amir Chand and Brij Lal for the benefit of the members of Jhang Biradari Association and the beneficiaries would be such persons who become members of the plaintiff and were migrants to India from Jhang upon partition. In other words case pleaded in the plaint would be that the individual persons referred to in the plaints held the properties as trustees and thus the legal possession would always be with that of the plaintiff. There is no positive pleading that the defendants are in possession of the suit land. No such pleading is to be found in the plaint or in IA No.9562/2011. The pleading in the application is that the defendants are threatening to sell, transfer, convey and dispose of the suit property in favour of third parties. Unfortunately the lawyer of the appellants, while making the prayer has prayed that the defendants be restrained from selling, transferring, alienating, parting with possession and/or creating any third party rights in the property in question. It is apparent that while giving ink to the thought of the author i.e. drafting the prayer in the application seeking interim relief, giving reflection to the

thought of the plaintiff, the counsel has in a mechanical way prayed that the defendants be restrained from parting with possession of the suit land.

13. The reasons given by the learned Single Judge to reject the application seeking amendment of the plaint are ex-facie unsound. There was no need for the plaintiff to plead that it was in possession of the suit land, and it was enough to plead that the suit property was purchased at the initial auction, when as an evacuee property it was sold, and the purchasers were Amir Chand and Brij Lal and that the two made the bid on behalf of such persons who would be the members of the plaintiff and in respect of which pleading material particulars were stated by pleading that the bid amount was satisfied by adjusting claims of other persons who had migrated to India and had left behind properties in Pakistan and whose claims were accepted by the Government of India, requiring satisfaction of the claim by either allotting evacuee property to them or permitting them to have their claims satisfied by adjustment with others. As we would be dealing with the reasoning of the learned Single Judge concerning the plaint being rejected on account of it being held to be barred by limitation and on account of no challenge being laid to the sale-deed dated May 16, 1962 and therefore a suit for declaration simplicitor not being maintainable, we would highlight the legal position regarding a trust property.

14. Though the learned Single Judge has not considered amendments proposed as per paragraph 9A, 9B, 10A, 10B, 10C, one line to be added to the existing paragraph 12, paras 13A, 13B and 18A, on a perusal thereof it becomes apparent that the amendments are clarificatory by expanding upon the existing pleadings and since issues have yet to be settled on the

pleadings of the parties and trial has yet to begin, it is a fit case where the proposed amendments ought to have been allowed.

15. Concerning the reasoning of the learned Single Judge that the suit was barred by limitation and that without seeking cancellation of the sale-deed dated May 16, 1962 a suit for declaration simplicitor would not lie, we need to note that the learned Single Judge has heavily relied upon pleadings in paragraph 21 of the plaint wherein it has been pleaded that the cause of action accrued when Amir Chand and Brij Lal sold the suit property to Matwal Chand. It also accrued when general power of attorney was executed authorizing Matwal Chand to perform functions for the society. It accrued on different dates when Matwal Chand corresponded with various authorities.

16. For the second time in our judgment we must express our regret at the drafting skills of the counsel who forgot the difference between pleadings constituting the cause of action and pleadings constituting the accrual of a cause of action. The two are totally different. In a plaint the complete cause of action has to be pleaded and limitation has no concern with said pleadings. Thereafter, a distinct pleading has to be made as to when did the cause of action to sue accrue, for the reason limitation commences when the cause of action to sue accrues. A cause of action accrues when the defendant does an act which causes or is likely to cause injury to the plaintiff. The lawyer while drafting the plaint and in particular paragraph 21 has just mumbled jumbled everything. This has misled the learned Single Judge to reason that the cause of action accruing has been pleaded to be as of May 16, 1962 when Amir Chand and Brij Lal sold the suit land to Matwal Chand. The suit filed in the year 2011 has

been held to be barred by limitation. The learned Single Judge has overlooked that in the plaint it was pleaded that Matwal Chand got the property transferred in his name because he was the Secretary of the plaintiff and the need for the sale-deed was that by then the plaintiff had not been incorporated as a juristic entity. The pleadings in the plaint are that though Matwal Chand wrote in his name when he sent letters to statutory authorities seeking to use the land for group housing, but he did so as the Secretary of the plaintiff and for the benefit of the associate members of the plaintiff.

17. A right to sue accruing has not to be confused with the cause of action. The wrong alleged, when committed, infringing upon a right would give rise to a right to sue. Simultaneously would accrue the cause of action to sue. The facts pleaded for purposes of cause of action have a nexus to the prayer and the pleadings to bring out the cause of action would not be the pleadings to determine when did the cause of action accrue or when did the right to sue commence. Limitation would commence from the date when the right to sue accrued.

18. It is settled law that a cue can be had from the Indian Trust Act, 1882 for understanding the various terms as well as the salient features attached to a Trust.

19. We may commence by making a reference to the judgement of the Supreme Court reported as (1974) 1 SCC 446 State of Uttar Pradesh Vs. Bansi Dhar & Ors. The undernoted extracts would bring out that its provisions guide all kinds of trusts, be it private or be it a public trust:-

“18.

While in India we shall not be hidebound by English decisions on this point, luckily both sides agree here - and that accords with the sense of the law - that a hospital for women is a charitable object, being for medical relief. Moreover, the beneficiaries are a section of the public, women - that still silent, suffering half of Indian humanity. Therefore, this element connotes a public trust. The next question is whether the Indian Trust Act, 1882, applies to the present case. The Courts below have argued themselves into an application of Section 83 of the Trust Act. Sri Dixit rightly objects to this course because that Act relates only to private trusts, public charitable trusts having been expressly excluded from its ambit. But while these provisions proprio vigore do not apply, certainly there is a common area of legal principles which covers all trusts, private and public and merely because they find a place in the Trusts Act, they cannot become 'untouchable' where public trusts are involved. Care must certainly be exercised not to import by analogy what is not germane to the general law of trusts, but we need have no inhibitions in administering the law by invoking the universal rules of equity and good conscience upheld by the English judges, though also sanctified by the statute relating to private trusts. The court below have drawn inspiration from Section 83 of the Trusts Act and we are not inclined to find fault with them on that score because the provision merely reflects a rule of good conscience and of general application.

20. Section 3 of the Indian Trust Act, 1882 reads:-

“Interpretation Clause – ‘Trust’ -A ‘trust’ is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.

‘Author of the trust’; ‘trustee’; ‘beneficiary’; ‘trust property’; ‘beneficial interest’; ‘instrument of trust’. -

The person who reposes or declares the confidence is called the ‘author of the trust’; The person who accepts the confidence is

called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust property' or 'trust money' the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust';

'Breach of trust' - A breach of any duty imposed on a trustee, as such, by any law for the time being in force, is called a 'breach of trust';

'registered', expressions defined in Act 9 of 1872 –

And in this Act, unless there be something repugnant in the subject of context, 'registered' means registered under the law for the registration of documents for the time being in force; a person is said to have 'notice' of a fact either when he actually knows that fact or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by his agent, under the circumstances mentioned in the Indian Contract Act, 1872, Section 229; and all expressions used herein and defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively attributed to them by that Act."

21. A plain perusal of it would clearly indicate and exemplify that a Trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner.
22. Once a Trust always a Trust, is the trite proposition of law, like one another proposition, 'once a mortgage always a mortgage'. The Trust property cannot be allowed to be dissipated in any manner.
23. It is a common principle that whenever a Trustee dies his legal representatives, not necessarily only the legal heirs of the deceased trustee,

could rightly manage the property till a proper trustee is appointed. Even a trustee de son tort could safeguard the trust property. Sections 73 and 75 of the Indian Trusts Act, 1882 could fruitfully be referred to. They read as under:-

“Section 73: *Appointment of new trustees on death, etc. - Whenever any person appointed a trustee disclaims, or any trustee, either original or substituted, dies, or is for a continuous period of six months, absent from India or leaves India for the purpose of residing abroad, or is declared an insolvent, or desires to be discharged from the trust, or refuses or becomes, in the opinion of a Principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust, or accepts an inconsistent trust, a new trustee may be appointed in his place by-*

a) the person nominated for that purpose by the instrument of trust if any, or

b) if there be no such person, or no such person able and willing to act, the author of the trust if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee, the number of trustees may be increased.

The Official Trustee may, with his consent and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

.....

Section 75. *Vesting of trust property in new trustees - Whenever any new trustee is appointed under Section 73 or Section 74, all the trust property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any trustee, shall become vested in such new trustee, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require.*

Powers of new trustee - Every new trustee so appointed, and every trustee appointed by a court either before or after the passing of this Act shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust."

(emphasis supplied)

24. Palpably and pellucidly, it is clear that even a legal representative of a deceased trustee for the purpose of protecting the Trust property could act as a trustee.

25. The biological children of a trustee can never inherit the property over which their father was the trustee. Furthermore, if the biological children of a trustee enter into possession of the Trust property under their father or on their fathers' death, once again they being the legal representative of the trustee, as per law are enjoined to protect the trust property and such persons cannot also plead adverse possession since Section 10 of the Limitation Act, 1963 stipulates:-

“10. Suits against trustees and their representatives - Notwithstanding anything contained in the foregoing provisions of this Act, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration) for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

Explanation - for the purposes of this section any property comprised in a Hindu, Muslim or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of the property shall be deemed to be the trustee thereof.”

(emphasis supplied)

26. A mere reading of the Section 10 of the Limitation Act, 1963 would unambiguously and unequivocally convey and portray the fact that no trustee or his legal representatives can plead prescription.

27. To the risk of repetition we point out once again that a Trust is always a Trust. Under Section 10 of the Limitation Act, 1963, the terminology 'legal representative' also is contemplated specifically. Exception is only in favour of bona fide assignees and not for legal representatives. At any rate, a legal representative of a Trustee cannot plead that Section 10 of the Limitation Act, 1963 would not be operative as against him, because the law enjoins a legal representative of a Trustee to protect the trust property till a proper trustee is appointed.

28. Thus, the question of the instant suit being barred by limitation does not arise. We have already held hereinabove that meaningfully read the claim in the suit is that Matwal Chand held title to the property as a trustee.

29. Though the suit has not been held to be not maintainable on the ground that the plaintiff has not sued for possession, but with respect to possession it would be useful to extract hereunder the concepts 'corpus possessionis' and 'animus possidendi', as found in the famous treatise Salmond's Jurisprudence 12th Edition page Nos.272 and 273.

“Salmond considered that possession consisted of a corpus possessionis and an animus possidendi. The former, he thought, comprised both the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed. It is certainly true that in assessing whether possession has been acquired, lost or abandoned intention may be highly relevant.....”

The test then for determining whether a man is in possession of anything is whether he is in general control of it. Unless he is actually holding or using it - in which event he clearly has possession - we have to ask whether the facts are such that we can expect him to be able to enjoy the use of it without interference on the part of others.”

(emphasis supplied)

It is quite apparent that the aforesaid concepts 'animus possidendi' and 'corpus possessionis', as extracted supra, would adequately explain the position.

30. There are two elements involved in the concept possession, namely, 'corpus possessionis' and 'animus possidendi'. The owner need not

necessarily be in physical possession at all times. Besides, in the case of a Trust the physical possession by the trustee would actually be a case of custody of the property being with the trustee and legal possession being with the trust.

31. There was no need to seek any cancellation of the sale-deed dated May 16, 1962 because in the plaint the said sale-deed has not been challenged. Meaningfully read, the pleading is that Amir Chand and Brij Lal executed the sale-deed in question in favour of Matwal Chand because Matwal Chand was the Secretary of the Association and he held the property as a trustee. There are pleadings that when Matwal Chand corresponded with various statutory authorities for change of land used to permit a group housing thereon he acted on behalf of the plaintiff as the Secretary of the plaintiff. The reasoning of the learned Single Judge that the suit for mere declaration without seeking cancellation of the sale-deed in question would not be maintainable is thus clearly wrong.

32. The appeal is allowed. Impugned order dated February 04, 2015 is set aside. IA No.16791/2011 filed by the appellant to amend the plaint is allowed. The amended plaint is taken on record. IA No.13043/2011 filed by the respondents is dismissed. The suit is restored for adjudication on merits. The Registry shall list the suit for directions before the Roster Judge on September 14, 2015. The respondents shall file the written statement to the amended plaint within 6 weeks from today. Replication if any intended to be filed by the appellant to the written statement filed to the amended plaint shall be filed within 4 weeks of receipt of the written statement to the amended plaint.

33. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

AUGUST 24, 2015
mamta