

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

Judgment Reserved on : January 07, 2016

% *Judgment Delivered on : February 02, 2016*

+ **LPA 528/2012**

DELHI DEVELOPMENT AUTHORITY Appellant

Represented by: Mr.Sanjay Poddar, Sr.Advocate
instructed by Ms.Shobhana Takiar,
Mr.Govind Kumar and Ms.Pavi
Poddar, Advocates

versus

HUMAN CARE MEDICAL CHARITABLE TRUSTRespondent

Represented by: Mr.Rajiv Nayar, Sr.Advocate
instructed by Mr.Rajesh Yadav and
Mr.Neeraj Yadav, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. The brief factual matrix required to be noted for adjudication of present appeal is that Human Care Medical Charitable Trust (hereinafter referred to as the 'Society') is a Society registered under the Societies Registration Act, 1860.

2. On June 11, 1996, a perpetual lease-deed was executed by the DDA in favour of society. By and under the said perpetual lease-deed, a plot of land ad-measuring 0.955 Hectares at Sector-6, Dwarka was demised in favour of the society with effect from April 23, 1996. Terms of the lease-deed required the society to construct a hospital on the land after obtaining

sanction from the municipal authorities within a period of two years from April 23, 1996.

3. Being relevant, it would be apposite to note following clauses in the lease-deed dated June 11, 1996:-

“II. The Lessee for himself, successor and assignees covenants with the Lessor in the manner following that is to say;

(4) The Lessee, shall within a period of two years from 23rd day of April one thousand nine hundred and Ninety Six (and the time so specified shall be of essence of the contract) after obtaining sanction to the building plan, with necessary designs, plans and specifica-land and complete in a substantial and workmanlike manner a building for Hospital with the requisite and proper walls, sewers and drain and other conveniences in accordance with the sanctioned building plan and to the satisfaction of such municipal or other authorities.

(5) (a) The Lessee shall not sell, transfer, assign or otherwise part with possession of the whole or any part of the said land or any building thereon except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

PROVIDED that such consent shall not be given for a period of ten years from the commencement of this Lease unless, in the opinion of the Lessor, exceptional circumstances exist for grant of such consent.

PROVIDED FURTHER that, in the event of the consent being given the Lessor may impose such terms and conditions as he thinks fit and the Lessor shall be entitled to claim and recover the whole or a portion (as the Lessor may in his absolute discretion determine) of the unearned increase in the value (i.e. difference between the premium

paid and market value) of the said land at the time of sale, transfer, assignment or parting with the possession and the decision of the Lessor in respect of the market value, shall be final and binding.

PROVIDED FURTHER that the Lessor shall have the pre-emptive right to purchase the property after deducting such percentage as decided by the Lessor of unearned increase as afore-said.

(13) The Lessee shall not without the written consent of the Lessor carry on, or permit to be carried on, on the said land or in any building thereon any trade or business or whatsoever or use the same or permit the same to be used for any purpose other than that of Hospital or do or suffer to be done therein any act, or thing whatsoever which in the opinion of the Lessor may be nuisance, annoyance or disturbance to the .Lessor and persons living in neighbourhood.

PROVIDED that if the Lessee is desirous of using the said land or the building thereon for a purpose other than that of Hospital the Lessor may allow change of user on such terms and conditions including payment of additional premium and additional yearly rent as the Lessor may in his absolute discretion determine.”

4. Significantly, the Governing Body of the Society, comprised of undernoted persons/members at the time when the lease-deed dated June 11, 1996 was executed:-

(i)	Mr.Naresh Chandra	....	President
(ii)	Dr.Ravi Shankar Garg	....	Vice-President
(iii)	Ms.Shashi Singhal	....	Treasurer
(iv)	Mr.Manoj Aggarwal	....	General Secretary
(v)	Mr.Tarun Jain	....	Secretary
(vi)	Mr.Rajeshwar Dayal	....	Member

(vii) Ms.Pushpa Gautam Member

5. The society could not construct the hospital within the stipulated period i.e. within two years from April 23, 1996. From time to time DDA kept on granting extension(s) to the society to construct the hospital. (We need not bother ourselves with this aspect of the matter inasmuch as construction of hospital on the land in question is not an issue in the present appeal).

6. On April 09, 2009, DDA issued a notice to the society to show cause as to why the lease-deed dated June 11, 1996 be not cancelled alleging breach of a condition of the lease, in that, (office-bearers) of society having sold the demise land to a third party in a clandestine manner in order to earn profit out of a concessional allotment obtained in the name of the society. (We may note here that DDA also sought to determine the lease on the ground of non-construction of hospital by the society within the prescribed period. However we may not burden ourselves with this aspect of matter inasmuch as the appellant DDA has not challenged the findings returned by the learned Single Judge on the aspect of non-construction of the hospital in the instant appeal).

7. Being relevant, we note the following portion of the show cause notice dated April 09, 2009 issued by DDA:-

“AND WHEREAS as per clause 5 (a) of lease deed the Lessee shall not sell, transfer, assign or otherwise part with the possession of the whole or any part of the said land or any building thereon except with the previous consent in writing of the lessor which he shall be entitled to refuse in his absolute discretion.

AND WHEREAS a complaint has been received regarding

sale of the allotted land. After examine the documents submitted by the complainant and yourself, it has been established that it is a clear case of sale of DDA's property in a clandestine manner to earn profit out of concessional allotment obtained in name of trust and is being circulated in the market as saleable property.

*Now you are hereby asked to Show Cause as to why the allotment/lease deed of allotted plot be not cancelled for sale of DDA's Property without the prior permission of the Lessor. **Please note that if a satisfactory reply is not received within 15 days from the date of issue of this Show Cause Notice, it will be presumed that the Society has nothing to say in the matter and action as deemed fit, including cancellation will be initiated.***

8. In its reply the society stated as follows:-

- a) In the year 2001 Mr.Naresh Chandra, the then President of society, met one Sh.Sanjay Khurana who was a Non-Resident Indian (NRI) and some others NRIs and requested them to invest money in the society to enable it to construct a hospital because the society was facing a financial crunch.
- b) Mr.Sanjay Khurana and other Non-Resident Indians agreed to lend money to the society and gradually the said persons became members of the society and thereafter lent money to the society to enable it to construct the hospital.
- c) In the year 2004 the said persons (NRIs) returned from the United States of America and learnt that Mr.Naresh Chandra and his associates had misused the funds of the society meant for constructing a hospital and therefore Mr.Sanjay Khurana made a complaint to the police resulting in registration of FIR No.367/2005 for offences punishable under Sections

341/420/409/506 IPC at PS Dwarka against Naresh Chandra and his associates.

d) In the year 2002 most of the members holding various posts in the Governing Body of society at the time of execution of the lease-deed dated June 11, 1996 resigned from the posts held by them and new members were elected/appointed on said posts in their place. As on February 10, 2005 Governing Body of the society consisted of following persons/members:-

i)	Dr.Nirmal Kumar	....	President
ii)	Ms.Archana Khurana	....	Vice-President
iii)	Mr.Rakesh Passi	....	General Secretary
iv)	Dr.Ish Kumar	....	Treasurer
v)	Mr.Naresh Chandra	....	Member
vi)	Ms.Shashi Singhal	....	Member
vii)	Mr.Sanjay Khurana	....	Member

e) Investigations conducted into the affairs of the society revealed that Mr.Naresh Chandra was misusing the funds of the society by transferring the same i.e. funds in the bank accounts of his family members. Investigations further revealed that in the year 2003-2004 Mr.Naresh Chandra was entrusted with a loan of a sum of ₹10.3 crores for construction of hospital but he i.e. Naresh Chandra misappropriated said loan by various means.

f) In the year 2007 a settlement was arrived between Mr.Naresh Chandra and his associates on one hand and (new) members of Governing Body of society whereby Naresh Chandra and his associates agreed to have no connection with society or its properties as also to return all documents relating to society lying in their possession. On the basis of aforesaid settlement, FIR registered against Naresh Chandra and his associates was

quashed by a learned Single Judge of this Court vide order dated April 20, 2007 passed in Crl.M.C.No.1192/2007. Thereafter Mr.Naresh Chandra and Ms.Shashi Singhal also ceased to be the members of the society.

g) The aforesaid circumstances, particularly the fraud played by Mr.Naresh Chandra, necessitated the change in membership of Governing Body of society, which changes were made in accordance with law and have been duly reflected in the records maintained by society. No sale of land in question has been made by society and/or any of its office-bearers.

9. The reply furnished by society did not cut ice with DDA and vide order dated June 02, 2009, DDA cancelled the allotment of land in favour of the society, the relevant portion whereof reads as under:-

“WHEREAS by virtue of allotment letter dated 15.5.96 and lease deed executed on 11.6.96 you were the lessee of the plot allotted at Sector-6, Dwarka of land measuring 9950 Sq. M and were required to use the plot and building constructed thereon exclusively for Hospital.

AND WHEREAS as per clause 5(a) of the lease deed the lessee shall not sell, transfer, assign or otherwise part with possession of the whole or any part of the said land or any building thereon except with the previous consent in writing of the Lessor which he shall be entitled to refuse in his absolute discretion.

AND WHEREAS it has been seen from the documents submitted by you and Sh. Sanjay Khurana it is clear case of sale of the Institutional Property allotted on concessional rates in the utter violation of the terms of allotment. The sale of DDA property in a clandestine manner is to earn profit. It has also been seen that all the original members have been replaced by new set of members, which is clear case of change of hands.

AND WHEREAS the reply submitted by you from time to time were not found satisfactory.

Now, therefore, in view of the gross violation of terms and conditions of allotment and lease deed, the Competent Authority has cancelled the allotment on account of sale of the Institutional Property allotted on concessional rate in the utter violation of the terms of allotment.”

10. In these circumstances, the society filed a writ petition under Article 226 of Constitution of India in this Court assailing the legality of the order dated June 02, 2009 passed by DDA cancelling the allotment of the land in favour of society, inter-alia, reiterating the averments/submissions made by the society in its reply to the show cause notice, contents whereof we have summarized in the preceding paragraph.

11. In the counter affidavit filed, DDA firstly highlighted the facts stated by the society in its reply to the show cause notice, particularly the facts relating to the change in the constitution of the Governing Body of the society. In addition thereto, DDA highlighted that Naresh Chandra, the erstwhile President of the society, had stated in a letter dated December 23, 2008 written by him to DDA that Mr.Sanjay Khurana had issued a cheque in sum of ₹2,34,67,290/- in favour of the society towards construction of the hospital on the land and an agreement was executed between the society and M/s.Nidhi Builders for construction of the hospital soon after receipt of money by the society from Mr.Sanjay Khurana.

12. After highlighting aforesaid facts, DDA justified its action of cancelling allotment of land in favour of society in its counter affidavit in the following manner:-

“11. That the above referred factual submission clearly

indicated the transactions made by the trust members regarding the land in question allotted at concessional rates for the construction of hospital to Human Care Medical Charitable Trust with Sh. Naresh Chandra as its President. It is also revealed that NRIs were allowed to enter into the affairs of the Trust by accepting a huge sum of ₹2,34,67,290/-, which is not a mean amount by any stretch of imagination. Sh. Naresh Chandra has himself accepted having received this amount. This clearly indicates that the property had changed hands in a clandestine and surreptitious manner, in total breach of contract, violation of allotment terms and conditions laid down in the lease deed. It is also noted that under the garb of philanthropy, a business deals appears to have been struck.

12. That in the light of versions of founder president of the Hospital and present President, the respondent DDA came to the conclusion that it was a case of change of hands of monetary considerations, in a collusive manner to get over the proper permission of the DDA. The version of founder president clearly shows acceptance of money by cheques for a sum of above two crores, though the same has been explained as philanthropic donation for help. The version of present president speaks of misappropriation of loan or funds by M/s Nidhi Builders in the capacity of construction contractor, after their resignation as members. The capacity of contractor/builder is subsequent to monetary considerations passed in 2002, though construction agreement came in 2003.

13. That in the facts and circumstances of this case, no other view is possible, it being a clear case of sale of DDA property in clandestine manner to earn profits out of concessional allotment obtained in the name of trust by private family members. After over a decade, the Hospital is nowhere, and is being circulated in the market as a

saleable property.

14. That in view of the above facts after detailed deliberations and after examining the case in detail the respondent DDA cancelled the allotment and determined the lease deed on 21.5.2009 under the orders of Hon'ble Lt. Governor. The cancellation was conveyed to the founder President Sh. Naresh Chandra on 02.6.09."
(Emphasis Supplied)

13. In the rejoinder filed, the society reiterated the averments/submissions made by it in the reply to the show cause notice as also in the writ petition filed by it. In addition thereto, following averments were made by the society in its rejoinder:-

- a) On February 15, 1995 the society deposited a sum of ₹1,23,63,875/- with DDA after taking loan from Nidhi Builders. Thereafter the society further paid sums of ₹8,18,121/- and ₹15,900/- to DDA again after taking loan from Nidhi Builders. Additionally, the society had taken loans from Nidhi Builders, HUDCO and others from time to time to make payments to DDA as also to meet other expenses of the society including cost of construction of the hospital. The balance sheet of the society reflects that amount(s) of ₹1,85,33,576/-, ₹26,00,000/- and ₹11,78,093/- were outstanding as loans to Nidhi Builders, HUDCO and others respectively.
- c) On March 11, 2002 the society entered into a loan agreement with Dr.Ish Kumar, Sanjay Khurana and Dr.Rakesh Passi whereby Dr.Ish Kumar, Sanjay Khurana and Dr.Rakesh Passi lent a sum of ₹2,34,67,290/- (US \$ 5,00,000) to the society for a period of nine years with interest @ 6% per annum.
- d) After receiving aforesaid loan from Dr.Ish Kumar, Sanjay Khurana

and Dr.Rakesh Passi, the society cleared the outstanding dues of Nidhi Builders, HUDCO and others in the year 2002 itself.

14. Vide impugned judgment dated January 04, 2012, the learned Single Judge allowed the writ petition filed by the society and has quashed the order dated June 02, 2009 passed by DDA cancelling the allotment of the land in favour of the society.

15. In so concluding, the learned Single Judge has held as under:-

a) The case projected by DDA to justify its action of cancelling the allotment of land in favour of society that sale of land was effected by the society by changing membership of society has no legs to stand in view of the fact that the lease-deed dated June 11, 1996 executed by DDA in favour of the society does not prohibit the society from inducting new members or filling up membership upon resignation of existing members. Change of membership would not amount to a sale of land.

b) A conjoint reading of Sections 4, 5 and 16 of the Societies Registration Act, 1860 brings out that though a society may own a property but the same is held for the purposes of management thereof in the Governing Body. But, the person in whom the property is vested for management cannot become the owner thereof.

c) The lease-deed dated June 11, 1996 executed by DDA is in favour of the society and not in favour of the then Governing Body or the members of society. Further, the particulars of the Governing Body or members of society have also not been stated in the lease-deed dated June 11, 1996. Thus, the only conclusion which emerges is that DDA has created rights by way of a perpetual lease in the land in question in favour of the society, irrespective of who is in the management of the society and who are the

members of the society.

d) In view of the settled legal position that the society is a quasi-corporation and is deemed to be a separate legal entity distinct from its members and entitled to hold property, any change in the membership of the society or its Governing Body cannot fall within the meaning of the expression '*otherwise part with possession of the property*' occurring in the lease-deed dated June 11, 1996, particularly when the perpetual lease-deed dated June 11, 1996 has been executed by the DDA in favour of the society and it is the society which is prohibited from selling, transferring, assigning the land/building constructed thereon. The privity of DDA under the perpetual lease-deed dated June 11, 1996 is with the society and not with the members of the society.

e) The expression '*otherwise part with possession*' occurring in clause II(5)(a) of the lease-deed dated June 11, 1996 have to be read in *ejusdem generis* to sale, transfer, assignment by society to another entity and cannot be read as prohibiting a change in membership.

f) Notwithstanding the change in membership of the society, the society continues and will continue to hold the land as the lessee and thus no case of violation of any terms of the lease-deed dated June 11, 1996 can be made out. (We again repeat that we are not noting the findings returned by the Ld. Single Judge on the aspect of non-construction of hospital by society in the prescribed period for appellant DDA has not challenged the findings returned by the Ld. Single Judge on the aspect of non-construction of hospital in the present appeal).

16. Aggrieved by the aforesaid, appellant DDA has filed the present Letters Patent Appeal.

17. In support of the appeal, learned senior counsel for the appellant argued that the learned Single Judge has taken a hyper-technical view in reaching the conclusion that the society had not effected sale of the land in question in favour of Mr.Sanjay Khurana and other persons (NRIs) who were inducted in the society around the year 2002 as members thereof and some to them in its managing committee. Counsel argued that a careful analysis of the balance sheets of the society and other documents filed by the society in the writ petition goes to show that huge sum(s) were paid by Mr.Sanjay Khurana and other newly inducted members of the society, which sum(s) were nothing but a consideration paid by said persons to Mr.Naresh Chandra, the President of the society at the time when the lease-deed dated June 11, 1996 was executed. To put it pithily, learned counsel argued that a minute analysis of the documents filed by the society, particularly its balance sheets, shows that consideration (money) for sale of land in question had flown into the coffers of Mr.Naresh Chandra, the President of society at the time of execution of the lease-deed dated June 11, 1996.

18. To support the above submission, learned senior counsel highlighted that an analysis of the balance sheets of the society for the years ending March 31, 2002 till March 31, 2005 brings out that contribution(s) made by newly inducted members of the society and amount spent by the society towards construction of the hospital in a given year, are as follows:-

S. No.	Year ending	Contribution made by new member	Amount spent by society on construction of hospital
1.	March 31, 2002	₹11,52,966/-	₹14,21,954.81
2.	March 31, 2003	₹64,59,989.97	₹9,00,000/-
3.	March 31, 2004	₹6,00,51,300.46	₹5,07,64,526.50
4.	March 31, 2005	₹2,24,03,547/-	₹2,46,87,818/-

	Total	₹9,00,67,803.43	₹7,77,74,299.31
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19. Counsel highlighted that aforesaid chart/table, when analyzed in conjunction with the recording contained in FIR No.367/2005 registered against Mr.Naresh Chandra at the behest of Mr.Sanjay Khurana that *'We the NRI's have contributed about 14 crores of rupees out of which Mr. Naresh Chandra and his wife have taken 4.75 crores for the land and 8 crores for the construction of the hospital'* as also the recording contained in compromise deed dated April, 2007 entered into between society and Mr.Naresh Chandra that *'Trust (society) has advanced from time to time a sum of over ₹8,18,53,802/- given to the Company (Nidhi Builders, a company whose Managing Director was Mr.Naresh Chandra) towards the construction agreement including mobilization advance, which was given to the Company by the Trust (society)'* leaves no manner of doubt that the newly inducted members of the society (members inducted around the year 2002 such as Mr.Sanjay Khurana and other NRIs) had paid consideration to Mr.Naresh Chandra, the President of society at time of the execution of the lease-deed dated June 11, 1996 towards acquisition of the land from DDA by the society.

20. Per contra, learned senior counsel for the respondent society supported the impugned judgment dated January 04, 2012 passed by the learned Single Judge arguing that on the admitted facts the conclusion arrived at was correct and the legal principles culled out were correct.

21. It is evident that learned senior counsel for appellant DDA wants us to apply the principle of *'tracing'* to conclude that the consideration (money) for sale of land in question had flown into the coffers of Mr.Naresh Chandra,

the President of society at the time of execution of the lease-deed dated June 11, 1996.

22. The principle of tracing was extensively dealt by the House of Lords in the decision reported as (1992) 4 All. ER 512 Lipkin Gorman vs. Karpnale. The dictum of law laid down by the House of Lords in Lipkin's case (supra) can be summarized as under:-

I Law of restitution is not based upon implied or quasi contract theories but based upon the principle that unjust enrichment must be restituted.

II An action for money had and received is maintainable whenever the money of one man has, without consideration, got into the pocket of another.

III Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him bona fide for valuable consideration, and without notice, then it may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not.

IV Where money or notes are paid bona fide, and upon a valuable consideration, they shall never be brought back by the true owner; but where they come mala fide into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover.

V It is well established that a legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property. 'Tracing' or 'following' property into its product involves a decision by the owner of the original property to assert his title to the

product in place of his original property.

VI Change of position is a valid defence to avoid restitution but the change of position must be in good faith. The defence of change of position should be applied on case to case basis as the law of restitution is based on unjust enrichment of the defendant.

VII Where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position.

VIII Benefits acquired by fraud, breach of confidence, breach of fiduciary relationships or by other wrong doings do not get benefit under the defence of change of position. Change of position as a defence has to be casually linked to the receipt that makes it inequitable for the recipient to make restitution. Mere fact that the recipient has spend the money whole or in part, does not make it inequitable because expenditure might have been incurred by him in any event in ordinary course of things. But a bona fide recipient is entitled to establish the defence that he had increased his outgoings as a result of the receipt.

23. The argument advanced by learned senior counsel for the appellant have to be understood in the light of principle of tracing enunciated above.

24. In essence, learned senior counsel for appellant had argued that on applying principle of tracing, the position which would emerge is that when so-called loan advanced by the newly inducted members of the society is

traced, the trail would end in the coffers of Mr.Naresh Chandra and his family members, which in turn would show the so-called loan was merely a camouflage but in reality consideration paid by newly inducted members to Mr.Naresh Chandra towards sale of land in question.

25. Is it so? Has DDA been able to establish that trail of loan advanced by newly inducted members of the society ends in hands of Mr.Naresh Chandra and his family members?

26. In our opinion, the answer is NO.

27. No material whatsoever has been placed on record by DDA to show that the loan advanced by the newly inducted members of the society ended in the hands of Mr.Naresh Chandra and his family members. Particular emphasis was placed upon balance sheets of the society by learned senior counsel for DDA to show the end of the trail of money (loan) in the hands of Mr.Naresh Chandra and his family members. However, the balance sheets of society do not help the cause of DDA, for the balance sheets merely show various sum(s) were advanced by newly inducted members of the society viz. Mr.Sanjay Khurana and other NRIs to the society from time to time. But the trail of money gets cold here. There is no material to show that said sum(s) advanced by newly inducted members of society to the society reached the hands of Mr.Naresh Chandra and/or his family members.

28. Such being the factual position, the irresistible conclusion which emerges is that appellant DDA failed to justify its action of cancelling the allotment of land in question in favour of the society. The legal principles which we have succinctly culled out from the impugned judgment are correct. A society is distinct from its members. If a person gives money to a society by way of a donation or even a loan and is inducted as a member of

the society does not mean that the members of the society who were managing the society when the society acquired an asset have sold that asset to the person who after giving donation is inducted as a member in the society. It happens most often that a person who gives a substantial money to a society, desiring to ensure that the funds are better utilized is inducted as a member in a society. It may also happen that existing members may resign. An allegation that this is a camouflage for sale of the asset of the society would require proof of money reaching the coffers of the members who walk out.

29. As a necessary corollary thereof, the present appeal fails and is hereby dismissed.

30. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 02, 2016
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