

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

+ **RFA No. 957/2017**

% **14th November, 2017**

JHARMAL SINGH & ANR. Appellants
Through: Mr. Kuldeep Mansukhani,
Advocate.

versus

RAVINDER SINGH MAJITHIA (SINCE DECEASED THROUGH
LR's) & ANR. Respondents
Through: Ms. Sonali Malhotra and Mr.
Amit Sanduja, Advocates.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

CAVEAT No. 973/2017

1. Since counsel for the caveators has entered appearance,
the caveat stands discharged.

C.M. Appl. No. 41120/2017 (for exemption)

2. Exemption allowed, subject to all just exceptions.

The application stands disposed of.

RFA NO. 957/2017 and C.M. Appl. Nos. 41119/2017 (for stay)

3. This Regular First Appeal is filed under Section 96 of the
Code of Civil Procedure, 1908 (CPC) by the defendants in the suit

impugning the judgment of the trial court dated 16.8.2017 by which the trial court has decreed the suit for possession and *mesne* profits filed by the respondents/plaintiffs. Suit property comprises of one room on the ground floor and one room, kitchen and bathroom on the first floor of the suit property bearing no. A-2/12, Rajouri Garden, New Delhi. There were two plaintiffs in the suit being the two brothers Sh. Ravinder Singh Majithia and Sh. Rajinder Singh Majithia. Both the plaintiffs were sons of late Sh. Prahlad Singh, the original owner of the suit property. The appellant no. 1, and who was the defendant no. 1 in the suit is the brother of late Sh. Prahlad Singh, and appellant no. 2/defendant no. 2 is the son of appellant no. 1/defendant no.1. Respondent no.1/plaintiff no. 1/Sh. Ravinder Singh Majithia expired during the pendency of the suit and he was substituted by his legal heirs. Reference to the respondents/plaintiffs would therefore wherever the context so requires be deemed to include the legal heirs of late Sh. Ravinder Singh Majithia.

4. The facts of the case are that the property being A-2/12, Rajouri Garden, New Delhi was purchased under a registered sale deed dated 9.8.1965 by Sh. Prahlad Singh. A portion of the property,

being the suit property, was given by Sh. Prahlad Singh to his brother/appellant no.1/defendant no. 1 for residence as a licensee. Sh. Prahlad Singh expired on 17.4.2001. Sh. Prahlad Singh before his death had executed a registered Will dated 3.3.2001 in favour of the respondents/plaintiffs and this Will was got probated by filing of a Probate Petition in terms of the judgment dated 8.1.2008. Respondents/plaintiffs therefore claim to be the owners of the suit property and since the appellants/defendants failed to vacate the suit property inspite of serving the legal notice dated 10.1.2012, the subject suit for possession and *mesne* profits hence came to be filed.

5. Appellants/defendants contested the suit and pleaded that though the property was purchased in the name of late Sh. Prahlad Singh, however, the appellant no. 1/defendant no. 1 was giving his entire income in the family pool and that moneys of appellant no.1/defendant no. 1 was used for purchase of the property. It was pleaded by appellant no. 1/defendant no. 1 that he was a Government employee and therefore all the properties were in the name of late Sh. Prahlad Singh who was therefore the trustee of the property of the family. Appellant no. 1/defendant no. 1 claimed to be living in the

suit property as of rights since 1967. It was pleaded that the suit be dismissed because Sh. Prahlad Singh always permitted the appellants/defendants to stay in the suit property.

6. After pleadings were complete the trial court framed the following issues:-

- “1. Whether the suit property was purchased out of the joint income of defendant no. 1 and the deceased brother Mr. Prahlad Singh? If so, to what effect? OPD
2. Whether the suit does not disclose any cause of action? OPD
3. Whether the plaintiff is entitled to decree of possession and permanent injunction with respect to the suit property i.e. one room on the ground floor and one room, kitchen and bathroom on the first floor portion of property bearing No. A-2/12, Rajouri Garden, New Delhi as shown in “Red” in the site plan along with the plaint? OPP
4. Whether the plaintiff is entitled to the damages @ Rs.12,000/- per month w.e.f. 1st February, 2012? OPP
5. Whether the plaintiff is entitled to future damages, if so at what rate and for which period? OPP
6. Relief.

7. Parties thereafter led evidence and this aspect is noted in paras 12 and 13 of the impugned judgment, and these paras read as under:-

“12. Plaintiffs in order to prove their case have examined plaintiff no. 1 as PW-1 and have relied upon the following documents as under:-

S. No	Particulars of documents	Exhibition of documents
1.	Certified copy of registered Sale Deed dated 09.08.1965.	Ex.PW1/1
2.	Site Plan	Ex.PW1/2
3.	Certified copy of Will dated 03.03.2001 executed by late Sh. Prahlad Singh.	Ex.PW1/3

4.	Certified copy of judgment dated 08.01.2008 passed in Probate Case bearing PC No. 113/2007.	Ex.PW1/4
5.	Legal Notice dated 10.01.2012	Ex.PW1/5 (also Ex. D-1)
6.	Postal Receipts and Courier Receipts	Ex.PW1/6 & Ex.PW1/7
7.	Certified copy of Rent Agreement dated 09.05.2012.	Ex.PW1/9

13. The Defendants in their defence have examined the defendant no. 2. Charanjeet Singh Majithia as DW-1; Sh. Kewal Singh as DW-2; Sh. Niranjana Singh as DW-3; defendant no. 1, Sh. Jharmal Singh as DW-4."

8. The trial court has held issue no. 1 in favour of the respondents/plaintiffs, and rightly so as per the reasoning given hereinafter. It has been held by the trial court that the appellant no. 1/defendant no. 1 has miserably failed to prove that he ever gave any moneys for purchase of the suit property or for construction upon the same because on behalf of the appellants/defendants only oral evidence was led of payment of moneys but obviously such oral statements could not be discharge of onus of proof as held by the trial court. Trial court held that the oral depositions of the appellant no. 1/defendant no. 1 as also his witnesses DW-2 and DW-3 could not be believed for holding that appellant no. 1/defendant no. 1 had given moneys to Sh. Prahlad Singh for purchase of the property or for construction of the same. Trial court has further held that the case of the appellant no.1/defendant no.1 was only that he was a Government

servant and that he claimed that he was doing the work in the shop with Sh. Prahlad Singh in Motia Khan by performing supervision in the shop while also doing Government service, and also that allegedly the appellant no.1/defendant no.1 used to get commissions from auctions in which *kabadi*/waste/scrap/second-hand items were used to be sold and which aspects were also only oral testimonies without any documentary proof. Some of the relevant paras of the trial court in this regard are paras 15, 17, 21, 23, 24, 25 and 26 and these paras read as under:-

“15. The onus to prove the aforesaid issues was on the defendants. Ld. Counsel for the defendants submitted that the defendant no. 1 and the father of the plaintiffs being real brothers had stayed together throughout their life and shared common kitchen. He further submitted that on coming to India after partition, the defendant no. 1 was working in All India Radio and used to contribute in common family kitty. He further submitted that the defendant no. 1 had hesitation in purchasing the property in his personal name and thus, he gave no objection permitting the purchase of the family assets in the name of his elder brother, who was in charge of the entire household. He further submitted that the suit property was purchased out of the joint income of the defendant no.1 and father of the plaintiffs. He further contended that the ground floor was constructed initially due to paucity of funds but later on, construction was made in respect of the upper floors i.e. first floor and the second floor. He further submitted that the defendant no. 1 incurred expenditure on construction of the upper floors and some of the bills of the construction were filed by the defendant no. 1 but the same were not taken on record by the Local Commissioner as the application for seeking permission to file those documents was dismissed on 04.07.2014 by the Ld. Joint Registrar. He further submitted that the defendant no. 1 and late Sh. Prahlad Singh had also made some joint investments in the Unit Trust of India in the year, 1999 onwards and both the brothers lived cordially and all the assets were treated as joint assets for the welfare of all the family members. He further submitted that late Sh. Prahlad Singh wanted the defendant no. 1 to have

the possession of the second floor after the same was vacated but the defendant no. 1 decided to allow his nephews i.e. plaintiffs to earn rental income of the same. He thus argued that the suit property was purchased out of joint income of the defendant no. 1 and the deceased brother, Sh. Prahlad Singh and the suit does not disclose any cause of action.

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17. Per contra, Id. Counsel for the plaintiffs submitted that late Sh. Prahlad Singh was the owner of the suit property by virtue of registered Sale Deed dated 9.08.1965, Ex.PW1/1 and he had executed the registered Will dated 03.03.2001, Ex PW1/3 during his lifetime which was probated by the Court of Ld. ADJ vide judgment dated 08.01.2008, Ex.PW1/4 and the plaintiffs are now owner of the suit property. She further submitted that the defendants were allowed to stay in the demised premises by deceased father of the plaintiffs as licensees and on the termination of license vide legal notice dated 10.01.2012, Ex.PW1/5, the defendants have no right to stay therein. She further submitted that the defendant no. 1 has failed to prove that he had ever given any money or made any contribution for purchase and construction of the suit property.

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21. Defendant no. 1, who appeared as DW4 deposed during his crossexamination on 14.09.2015 that he joined service in 1953 in All India Radio and remained in service upto February, 1987. He further deposed that he had workshop with late Sh. Prahlad Singh in Motia Khan prior to joining service and was doing the work of supervision in the workshop while in service. He also deposed that he used to get commission from auctions in which kabadi's used to participate. He deposed that he is still doing the work of Kabadi Union and also getting pension. **He admitted that the government official is not allowed to do any other service but he deposed that he was doing work of supervision as it was his own work. He further deposed that he was not getting any money for supervision in the work shop.** He further deposed that he did not pay any income tax as his salary was not taxable. He further deposed that he had paid 50% of Rs. 35,000/being sale consideration of the suit property. He deposed that he had not withdrawn any amount from his bank account and had paid 50% sale consideration in cash. He also deposed that he did not get his name included in the sale deed being government servant as he would have had to declare the property to his employer. He denied the suggestion that the entire payment was made by late Sh. Prahlad Singh, who was the excusive owner of the suit property. He deposed that he never asked late Sh. Prahlad Singh to write any family settlement to show his share in the suit property. He deposed that the property is assessed to house tax in the name of late Sh. Prahlad Singh.

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23. The deposition of the defendant no. 1 that he did not declare to the government about purchase of the suit property is not legally sustainable. His further deposition that he was earning commission from Kabadi union and also getting salary as a government employee, albeit, he was not paying income tax till he retired as his salary was not taxable shows that he was not having alleged other source of income besides salary. Moreover, the defendant no. 1 has not mentioned his income in the pleadings nor filed any documentary evidence of his income during or around the year, 1967 when the suit property was purchased and during the period of 1982-1984 when the suit property was allegedly constructed. The contention of the defendant no.1 that he had not withdrawn any amount from his bank account and had paid 50% sale consideration in cash appears to be not plausible. Moreover, the defendants have made contrary averments as on one hand, the defendants pleaded that the defendant no. 1 was putting his entire income into the family pool, whereas, on the other side, he deposed that he had paid amount at the time of purchase and construction of the suit property. Had he put money into the joint family pool, there was no question of separate contribution at the time of purchase and construction of suit property.

24. No doubt, it emerges from the above said deposition of DW3 that brothers and their families were having good terms and living together, nevertheless, the same does not lead to the inference that the defendant no. 1 was putting his entire income in the family pool. There is no cogent evidence to arrive at the conclusion that the defendant no.1 had put his income into the joint family pool and suit property had been purchased out of joint family funds.

25. The defendants have also examined Sh. Kewal Singh, Building Contractor as DW2 to show that defendant no.1 had contributed money in construction of the suit property. DW2 during his crossexamination dated 14.09.2015 denied knowledge about money spent on construction of the suit property on the plea he had only provided labour. He also could not depose as to how much money was paid to him for construction of the house. He volunteered that payment was made to him sometime by the defendant no. 1 and sometime by late Sh. Prahlad Singh. He could not produce any copy of rate contract and deposed that he had not entered into any agreement with the parties for construction of the house. He also could not recall as to how many houses have been constructed by him.

26. The aforesaid deposition of DW2 is of no help to the defendants for the simple reason that DW2 could not produce the copy of rate contract and state as to how much amount was spent on the construction. Nothing has been said regarding purchase of material and about other works such as finishing work etc. Moreover, defendant no. 1 as DW4 could not say during crossexamination as to how much amount was paid by him for construction. Hence, there is no plausible evidence to infer that the

defendant no. 1 had contributed any money in construction of the suit property.” (emphasis added)

9. I completely agree with the discussion and reasoning of the trial court contained in the aforesaid paras because oral statements are not discharge of onus of proof, more so when endeavor by means of the oral statements is to take away valuable rights in an immovable property. Also, it was not believable that the appellant no. 1/defendant no. 1 while working in Government service besides doing Government service would/could also have participated in the business of shop at Motia Khan. In my opinion, therefore there is no warrant for interference with the aforesaid observations and conclusions of the trial court whereby it has been held that the appellant no. 1/defendant no. 1 did not pay or make any contribution for purchase or construction of the suit property.

10. Another reason given by the trial court for disbelieving the plea of the appellant no.1/defendant no. 1 was that this plea of appellant no. 1/defendant no. 1 of being owner on account of paying moneys is to be held to be barred by Section 4 of the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as 'the

Benami Act') as the plea of appellant no.1/defendant no. 1 was that he was a joint owner i.e a benamidar of the subject property although the sale deed of the suit property dated 9.8.1965, Ex.PW1/1, was in the sole name of late Sh. Prahlad Singh. Trial court for holding the defence of appellant no.1/defendant no. 1 of being owner allegedly by having paid moneys and thus being barred by the Benami Act has referred to two judgments passed by this Court in the cases of *J.M. Kohli Vs. Madan Mohan Sahni and Anr.*, in RFA No. 207/2012 decided on 7.5.2012 and CS(OS) No. 478/2004 titled as *Sh. Amar N. Gugnani Vs. Naresh Kumar Gugnani (through legal heirs)* decided on 30.7.2015. These judgments hold that since by passing of the Benami Act the relevant provisions of the Indian Trusts Act calling the benamidar as a trustee have been repealed, hence the relationship of benami transaction though is in the nature of a trust/trustee the same cannot be included in the exception contained in Section 4(3)(b) of the Benami Act because otherwise effectively the repealed provisions of the Indian Trusts Act will again be brought into force. The object of excluding fiduciary relationships from benami transactions is to give exception to a very limited classes of fiduciary relationships provided

that they are really not in the nature of benami transactions. The relevant paras of the judgment of the trial court in this regard are paras 28 to 32 and these paras read as under:-

"28. Even otherwise, plea of the defendants that the suit property was purchased out of the joint income of defendant No. 1 and the deceased brother, Mr. Prahlad Singh and thus the defendants are residing therein in their own right is also not sustainable after the enactment of the Benami Transactions (Prohibition) Act, 1988. In this regard, it is relevant to peruse section 4 of the Benami Transactions (Prohibition) Act, 1988 which reads as under:

“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.”

29. It is evincible from bare perusal of subsection (1) of section 4 of the Benami Transactions (Prohibition) Act, 1988 that the suit shall not be filed by or on behalf of a person claiming to be the real owner of the suit property against the person in whose name, the benami property is held. Further, as per subsection (2) of section 4 of the said Act, no defence based on any right in respect of any property held benami shall be raised against a person in any suit filed by him claiming to be real owner of such property. However, sub section (3) of section 4 of the said Act provides for exceptions with respect to the property held by coparcener in a Hindu Undivided Family for the benefit of coparceners in the HUF. Similar is the case with respect to trustee and persons standing in fiduciary capacity and the property is held for the benefit of another person for whom he is trustee or towards him, he stands in a fiduciary capacity.

30. The defendant no.1 has pleaded that the suit property was purchased in the name of his brother from the joint contribution; the question is, whether such plea, if taken is permissible. As per the ratio laid down in judgment titled as J M Kohli Vs. Madan Mohan Sahni & Anr in RFA No.207/2012 decided on 07.05.2012 by Hon'ble High Court of Delhi, said plea even if taken, in any case is not sufficient to come within the purview of exception laid down in sub section (3)(b) of section 4 of the Benami Act, 1988. Their lordship observed as:-

“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/dejure 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.”

31. In CS(OS) No. 478/2004 titled as Sh. Amar N. gugnani Vs. Naresh kumar Gugnani (through Legal heirs) decided on 30.07.15 by Hon'ble High Court of Delhi, their lordship observed that 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. It was held that the suit is barred by the provision of Section 4(1) of the Benami Transactions (Prohibition) Act, 1988.

32. Having regard to mandate of section 4 (2) of the Benami Transactions (Prohibition) Act, 1988 and the ratio of the aforesaid judgment passed by Hon'ble High Court of Delhi, it is amply clear that Section 4(2) nullifies the defence available to the real owner in recovering the benami property from the benamidar. Once section 4(2) applies, no defence will be permitted or allowed in any such suit by or on behalf of person claiming to be the real owner of such property held benami. Section 4(1) of the Act places a bar on the plaintiff "pleading benami" while Section 4(2) places a bar on the defendant pleading benami after coming into force of the Act. It may also be noted that section 7 of the benami Act has repealed Section 81, 82 and 94 of the Indian Trust Act 1882."

(underlining added)

11. I completely agree with the aforesaid findings and conclusions of the trial court that the defence of the appellants/defendants was barred by the Benami Act inasmuch as if a defence as is pleaded by the appellants/defendants is permitted to be raised that the suit property should be taken as joint property of late Sh. Prahlad Singh and appellant no. 1/defendant no. 1, effectively a benami relationship would be furthered and which is prohibited in view of Section 4 of the Benami Act. Also, in my opinion, the Benami Act was passed for facts of the case such as the present where a Government servant who did not have a property in his name used to claim ownership of the same on the ground of the property being in the name of a family member. The facts/defence of the appellants/defendants therefore clearly falls against the intendment of

the Legislature in bringing in the Benami Act, and therefore the defence was rightly held by the trial court to be barred by the Benami Act.

12.(i) Learned counsel for the appellants/defendants then argued that the trial court has wrongly held that the appellants/defendants should pay *mesne* profits at the rate of Rs.10,000/- per month with effect from 1.2.2012 till August, 2017 and thereafter increase by 10% after eleven months because it is argued that the respondents/plaintiffs have failed to lead any evidence to show the rate of rent in the area.

(ii) I cannot agree with this argument urged by the appellants/defendants because the respondents/plaintiffs have filed on record and proved a rent agreement dated 9.5.2012, Ex.PW1/9, and which is with respect to a second floor in the same Rajouri Garden area. This lease deed of the second floor was from 1.6.2012 to 31.3.2014 at Rs.50,000/- per month and therefore considering that the suit premises are a total of two rooms with kitchen and a bathroom on two floors of the subject property, hence trial court reduced the figure of rent of Rs.50,000/- per month in terms of the lease deed Ex.PW1/9

to a figure of Rs.10,000/- per month. Surely some amount of honest guess work is always inbuilt whenever a Court arrives at the figure of *mesne* profits since there cannot be identical evidence with respect to an identical property, and thus there is adjustment of the rate of rent to determine *mesne* profits after evidence is led with respect to what is the rate of rent in the area. In my opinion, therefore the trial court has committed no error in awarding a sum of Rs.10,000/- per month as *mesne* profits from 1.2.2012 till August, 2017.

13. In my opinion, trial court has also committed no error in increasing the *mesne* profits by 10% as courts do take judicial notice of increase of rent and one such judgment is a judgment passed by this Court in the case of *M/s. M.C. Agrawal HUF Vs. M/s. Sahara India and Ors., (2011) 183 DLT 105* wherein this Court has held that it is not illegal to grant 10% increase every year after fixing a base rent, unless there is overwhelming evidence to the contrary. In this case, there is no evidence on the contrary and though the trial court has specifically not referred to the judgment in the case of *M.C. Agrawal HUF (supra)*, the principle which is applied by the trial court is

completely in accordance with the ratio in the case of *M.C. Agrawal HUF (supra)*.

14. In view of the aforesaid discussion this appeal is without merit and the same is therefore dismissed with costs. Let the counsels for the respondents/plaintiffs file their certificate of costs, and such costs as stated in the certificate of the counsels for the respondents/plaintiffs shall be the costs as against the appellants/defendants in favour of the respondents/plaintiffs with respect to this appeal. Necessary certificate be filed by the counsels for the respondents/plaintiffs within a period of two weeks from today and costs be paid within six weeks thereafter.

NOVEMBER 14, 2017
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VALMIKI J. MEHTA, J