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

Judgment Reserved on: February 09, 2017
%   *Judgment Delivered on: February 22, 2017*

+   **RSA 399/2015**

KASHI NATH SAH & ANR   ..... Appellants
Through: Mr.Mahmood Hasan, Advocate

versus

SHRI NATH   ..... Respondent
Through: Mr.A.K.Sharma & Mr.C.M.Sharma, Advocates.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT

RSA 399/2015

1. This RSA under Section 100 CPC, has been filed by the appellants/defendants impugning the judgment of the First Appellate Court dated 12th October, 2015 by which the judgment of the Trial Court has been reversed.

2. The learned Trial Court vide judgment dated 3rd July, 2015 has dismissed the suit for possession of the premises under the occupation and possession of the appellants/defendants in respect property bearing No. D-3/213, Morya Gali, Gali No.20, D-Block, IIIrd Pusta, Sonia Vihar, Delhi-110094, measuring 25 sq. yds.

3. As a result of the impugned judgment of the learned First Appellate Court, the suit of the respondent/plaintiff has been decreed.

4. The parties to this litigation are real brothers who came to Delhi from Bihar for earning their livelihood. They were engaged in petty jobs and started living in a rented accommodation. On the advice of their father they started searching for a small plot which could be acquired at a low price and that too payable in installments. Their search ended on locating a plot 25 sq. yds. bearing No. D-3/213, Morya Gali, Gali No.20, D-Block, IIIrd Pusta, Sonia Vihar, Delhi-110094, owned by M/s Saraswati Land and Housing Scheme for ₹55,000. After paying the earnest money of ₹5,000, the balance amount was paid in flexible installments spread over a period of ten months. The first floor consists of sheds and in possession of the appellant/defendant. Admittedly ten receipts issued by M/s Saraswati Land and Housing Scheme towards payment of plot, are in the name of Sh.Thakur Sah, father of the parties. On 28th April, 2003, the General Power was executed and registered in favour of the respondent/plaintiff. Other documents i.e. Agreement to Sell and Will are un-registered.

5. The question involved is whether mere execution of G.P.A. in favour of one brother i.e. of the respondent/plaintiff reduce the status of other brothers who, as evident from the record, had made substantial contribution in acquiring and constructing this small piece of plot, to be that of a licensee thereby entitling the younger brother who is holder of G.P.A. to seek possession by terming their possession to be that of a licensee or the respondent/plaintiff would be holding property in trust on behalf of his father and brothers when the G.P.A. and other documents (G.P.A. is registered and other documents are un-registered) were executed in his favour.

6. Civil Suit No.339/2010 was filed by Shri Nath against his elder brothers Kashi Nath Sah and Shiv Nath Sah impleading them as defendants No.1 & 2 and pleading as under:

(i) The plaintiff is lawful owner of built-up property consisting of ground floor & first floor bearing No.D-3/213, Morya Gali, Gali No.20, D-Block, III Pusta, Sonia Vihar, Delhi-110094, measuring 25 sq. yds.

(ii) He **purchased the suit property on 28th April, 2003** for a valuable consideration i.e. ₹55,000/- by virtue of a G.P.A., Agreement to Sell, Deed of WILL, Receipt.

(iii) On 1st May, 2003 he allowed the defendants who were his real brothers to live jointly on the first floor for a period of three years.

(iv) Since the defendants failed to vacate after three years**, he served them with a legal notice dated 15th April, 2008. Again on 4th September, 2010 another notice was sent by her.**

(v) Since both of them failed to vacate despite notice, he filed the civil suit seeking possession of the suit property as shown red in the site plan annexed with the plaint.

7. The suit was contested by both the defendants pleading as under:-

(i) After migrating from Bihar to earn their livelihood, all the brothers started living in a rented premises at 122/A, Ghondli Village, Krishna Nagar, Delhi-110051, under the tenancy of Sh.Brij Mohan.

(ii) As all the brothers started earning, their father suggested them to search for a plot which could be purchased on installment basis by them.

(iii) After some efforts they could manage to locate the suit property belonging to Sh.Ranbir Singh, Proprietor of M/s Saraswati Land and Housing Scheme, 2-1/2 Pusta, Sonia Vihar, Delhi and **a plot measuring 25 sq. yds. was agreed to be purchased for sum of ₹55,000/-**.

(iv) On 9th December, 2002, earnest money of ₹5,000/- was paid to Sh.Ranbir Singh who issued a receipt in the name of Sh.Thakur Sah, father of the parties. One of their brother namely Raj Kishore Sah who was residing in Mumbai as well their father and both the plaintiff and the defendants collectively started making payments to Sh.Ranbir Singh in installments.

(v) The payment was made by all the brothers and their father, however, the receipts were issued only in the name of the father with the understanding that everybody will have 1/5 share.

(vi) The total amount was paid in 10 installments against receipt issued in the name of Sh.Thakur Sah, father of the parties.

(vii) When the documents were to be executed in respect of the said plot, the appellant/defendant and their father had to go to Bihar in connection with a criminal Case No.125/1999 under Section 323/344 IPC for getting the compromise recorded.

(viii) Since only Shri Nath, the plaintiff was having the ID proof, it was decided that initially let the documents be got executed in favour of Shri Nath and thereafter he will execute the documents in favour of Sh.Thakur Sah, father of the parties.

(ix) The cost of construction on the plot was also borne by the appellants/defendants for which they were having *kachha* bills.

(x) The parties were living in the said property in their independent capacity as joint owner and the appellants/defendants were not having the status of licensee.

(xi) In the year 2007 Shri Nath executed the documents in favour of the father which were duly notarized, however, the same were stolen which was also mentioned in the police complaint.

(xii) The respondent/plaintiff could not seek possession of the suit property as all the brothers have contributed in acquiring the plot measuring 25 sq.yds. and also raising construction thereon.

8. On the pleadings of the parties, following issues were framed:

(i) Whether the suit of the plaintiff is bad for non-joinder of the necessary party? OPD

(ii) Whether the plaintiff has concealed the material facts from this Court as stated by the defendants in the preliminary objection in their WS? OPD

(iii) Whether the plaintiff is entitled for the relief of possession as prayed for by the plaintiff in the plaint? OPP

9. Learned Trial Court dismissed the suit noting that all the receipts towards payment of the plot were in the name of Sh.Thakur Sah, father of the parties and the respondent/plaintiff did not deny that his brothers were making the payment, stating that the payment was made by him through medium of his brothers. Learned Trial Court also referred to the line of cross-examination adopted by the plaintiff during cross examination of defence witnesses to hold that there was no material to prove that the payments to Sh.Ranbir Singh, the seller were on behalf of plaintiff Shri Nath. Learned Trial Court also noted that the plaintiff did not dispute the execution of the documents in the year 2007 but claimed that it was for the purpose of obtaining ration card. This fact was not disclosed in the plaint. On the basis of oral and documentary evidence, learned Trial Court held that the payment towards acquisition of the suit property and raising construction thereon had been jointly made by the brothers and their father. The suit seeking possession claiming the other two brothers to be licensee was dismissed. The order of learned Trial Court was impugned by the plaintiff by filing RCA No.25.2015.

10. In RCA No.25/2015 the First Appellate Court set aside the judgment of learned Trial Court mainly on the following grounds:-

(i) It is admitted fact that the title documents of the suit property i.e. GPA, agreement to sell, Will dated 28th April, 2003 exhibit PW-1/B (Colly) are in the exclusive name of the respondent/plaintiff.

(ii) Though it is claimed by the appellants/defendants that the property was subsequently transferred by the respondent/plaintiff in the name of his father DW-3, Sh.Thakur Sah in the year 2007 but no such document was proved. Even no evidence was led that any such document was executed and stolen.

(iii) There is no evidence to prove that on the date of execution of document in favour of Sh.Thakur Sah (DW-3) and Sh.Kashi Nath Sah (DW-1) i.e. father and brother were required to appear before the Court in Bihar in connection with settlement in the criminal case as certified copy of the proceedings of that date was not filed, mere filing of copy of criminal complaint of the case pending in Bihar was not accepted to be a reason for execution of the sale document in favour of plaintiff.

(iv) If the defendants have contributed towards construction or have raised construction exclusively from their funds, that is not sufficient to hold them joint owner of the property as status of a person is ascertained from the title documents and not from the receipt of payment of installment to the seller.

(v) Defendants have not filed any suit for declaring them to be owner of the property. There is nothing on record to suggest that transaction entered into by the plaintiff was not genuine.

(vi) The property was purchased in the year 2003 i.e. much prior to the judgment of the Supreme Court in *Suraj Lamp and Industries Private Limited Vs. State of Haryana and Anr.* (2012) 1 SCC 656.

11. For the above reasons the First Appellate Court set aside the judgment of the learned Trial Court and decreed the suit of the plaintiff which is impugned in this RSA No.399/2015.

12. At the time of admission of appeal the following substantial question of law was formulated:-

> *'Whether the findings of the First Appellate Court in RCA No.25/2015 is contrary to the evidence led by the parties and suffer from perversity?'*

13. In my opinion the aforesaid substantial question of law has to be answered in favour of the appellants/defendants and against the respondent/plaintiff. This Court is entitled to give additional reasoning for discussing the suit in view of Order XLI Rule 24 CPC and the ratio of a recent judgment of the Supreme Court in the case of *Lisamma Antony and Another Vs. Karthiyayani and Another* (2015) 11 SCC 782. The reasons given are hereunder:-

(i) PW-1, the plaintiff in his cross-examination has stated the following facts:-

(a) In the year 2003 he used to do the work of stitching the clothes and **earning d ₹6,000/- to ₹7,000/- per month**.

(b) Payment of the plot was made in installments through his brothers.

(c) **The plaintiff himself has made the payment of plot only ₹5,000/-** at two occasions and rest of the payment was made through the medium of his brothers. The amount was not paid in equal installments.

(d) The earnest money to the tune of ₹2,000/- was given initially and after 2-3 days ₹3,000/- was given thus total ₹5,000/- was given as earnest money. The cost of the plot was ₹ 55,000/-.

(e) At the time of purchasing the plot in question **there was some kacha construction in the form of shed on the ground floor and the construction was completed prior to 28th April, 2003 i.e. the date of execution of General Power of Attorney and Agreement to Sell etc. He spent ₹1,30,000/- towards constructions.**

(f) The possession of the suit property was handed over by the seller in December, 2012.

(g) He had allowed the defendants to reside in the suit property from 1st May, 2003 after execution of the documents.

(ii) Prior to living in the suit property he as well the defendants used to reside in rented accommodation belonging to Sh.Brij Mohan. In the rented accommodation he was residing on the ground floor and defendants were residing on the third floor in the same premises. He admitted that in the year 2007 he signed certain papers but claimed that it was in connection with the preparation of ration card and not for transferring the property in the name of father.

14. Though the plaintiff claims that much before the execution of the documents in his favour on 28th April, 2003, he has taken the possession and spent ₹1,30,000/- on constructions, not even a single document has been placed on record to prove the above facts. Admittedly at that time his earning was ₹5000 – ₹6000/- per month as tailor and even if his entire earning is taken to have been spent on acquisition of plot and raising construction thereon i.e. ₹55000/- plus ₹1,30,000/-, he could not have earned that much amount within a short period of about five months from 9th December, 2002 to 28th April, 2003 when G.P.A. was executed in his favour.

15. As per the status of PW1(Plaintiff/respondent) the total amount spent on the entire construction of the suit property was ₹1,30,000/- that too before 28th April, 2003. DW-1, Kashi Nath Sah, brother of the plaintiff was cross-examined by the plaintiff wherein suggestion has been given to DW-1, Kashi Nath Sah i.e. the receipts exhibit DW-1/1 to 1/7 were got deliberately issued in the name of Sh.Thakur Sah instead of plaintiff. The *kachha* bills exhibit DW-1/9 to DW-1/12 have been produced by DW-1 to prove that not only they have contributed towards the sale consideration for acquiring a plot measuring 25 sq.yds. but also the construction material was purchased by them vide bills Ex.DW-1/9 to 1/12. His statement in this regard has remained unrebutted.

16. DW-2, Shiv Nath Sah also deposed about his contribution towards acquisition of the plot and its construction. He has stated that all the three brothers including plaintiff and defendants started residing there w.e.f. November, 2003.

17. DW-3, Sh.Thakur Sah, father of the parties, is the most crucial witness as all the receipts of payment made in installment for acquisition of the plot measuring 25 sq. yds. were issued in his name. He deposed that for acquiring 25 sq.yds. plot he and his sons, Kashi Nath Sah, Shiv Nath Sah and Raj Kishore Sah as well plaintiff Shri Nath made contribution. The family was joint. Since the plaintiff Shri Nath was having the residential proof and ID proof required for the purpose of execution/registration of General Power of Attorney, in good faith the property was purchased in his name. During that time, he alongwith his other sons had to go to Bihar to settle a criminal case. It was mutually agreed that Shri Nath after getting the documents executed in his name, will transfer the said property in the name of their father. In February, 2007 Shri Nath executed the documents in their father's (DW-3)

favour, which were duly notarized and kept with Kashi Nath Sah. But the same were stolen and it was so mentioned in the complaint exhibit DW-3/1 lodged with the police on 7th September, 2007. He further stated that his sons came from Bihar to Delhi for earning their livelihood. Earlier they used to live together in a tenanted premises owned by one Brij Mohan. He asked his sons to search for a small plot which could be purchased by making the payment in installment. The suit property which was owned by Sh.Ranbir Singh, Proprietor of M/s Saraswati Land and Housing Scheme, 2-1/2 Pusta, Sonia Vihar, Delhi was a plot measuring 25 sq. yds. which was agreed to be purchased for a sum of ₹55,000/-. The earnest money of ₹5,000/- was paid to Kashi nath for which cash receipts dated 9th December, 2002 exhibited as Ex.DW1/1 was issued by Ranbir Singh and receipts were issued in his name. Father, DW-3 has also stated that for raising construction on the suit property not only the defendants but his son Raj Kishore Sah who lived in Mumbai also made contribution and all i.e. father and four sons had equal share i.e. 1/5th share each in the suit property. But the plaintiff is trying to dispossess his brothers forcibly and despite his efforts to make the plaintiff understand having no effect, he had to serve a notice dated 10th July, 2007 to the plaintiff. Despite extensive cross-examination of DW-3 i.e. his father, the plaintiff could not extract any support to his claim of being sole owner of the plot measuring 25 sq. yds. There was ample evidence to prove that the plot was purchased and the construction was raised with the joint contribution of his father and other brothers and all of them having 1/5th share in the suit property. Though all of them were making the payment, the receipts were in the name of father (DW-3) so that all can have 1/5 share in the plot to be purchased in the name of father.

18. Learned First Appellate Court while setting aside the judgment of the learned Trial Court failed to examine the issue that the plaintiff was holding the property in trust on behalf of his father and brothers. The respondent/plaintiff is claiming his title in respect of the plot measuring 25 sq. yds. out of Khasra No.140, situated in village Sadatpur Gujran, in the abadi of D-Block, IIIrd Pushta, Sonia Vihar, Delhi-94. The title document proved by him is the General Power of Attorney which was registered on 28th April, 2003. As per this general power of attorney, the executants Ranbir authorized the Shri Nath, the respondent/plaintiff to do certain acts specified therein on his behalf in respect of 25 sq. yds. plot.

19. The respondent/plaintiff is claiming his ownership on the basis of General Power of Attorney, Agreement to Sell, Will and Receipt Ex.PW1/B (Colly.). A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property.

20. The agreement to sell is also dated 28th April, 2003 and clause I of the agreement reads as under:-

> *"That the first party has delivered the vacant possession of the said property to the second party on the spot."*

21. The agreement to sell has been witnessed by Sh.Brij Mohan, son of Sh.Yash Pal, resident of 122-A, Ghondli Village, Delhi, who is none else but landlord of the parties till they shifted to the property purchased in the name of the plaintiff. This agreement to sell is prepared on a stamp paper of ₹10 and is neither sufficiently stamped nor registered. Hence, it does not confer any title on the plaintiff Shri Nath. Here it is not out of place to mention that the title deed forming basis of title of Sh.Ranbir is neither mentioned in the General Power of Attorney nor in the agreement to sell. Unless the respondent/plaintiff could prove some title vested in Ranbir Singh which he

was capable to transfer to the respondent/plaintiff, the respondent/plaintiff himself cannot claim to be owner of this 25 sq. yds. of plot.

22. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future “any right, title or interest” whether vested or contingent of the value of ₹100 and upwards to or in immovable property requires compulsory registration.

23. Section 49 of the Registration Act provides that no document required by Section 17 to be registered shall, affect any immovable property comprised therein or received as evidence of any transaction affected such property, unless it has been registered. Registration of a document gives notice to the world that such a document has been executed.

24. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of section 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53A of TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance.)

25. I may note that the agreement to sell dated 28th April, 2003 in the present case is in the nature of part performance and is executed after the amendment of Section 53A of the Transfer of Property Act which was amended by Act 48 of 2001 with effect from 24th September, 2001. After the amendment an agreement to sell can be relied upon for purpose of protection under Section 53A of the Transfer of Property Act as per doctrine of part performance only if that agreement to sell is registered. No interest in immovable property can be created by an unregistered document.

26. It is said that so long as the testator is alive, a will is not be worth the paper on which it is written, as the testator can at any time revoke it.

27. Till Ranbir Singh is alive the Will dated 28th April, 2003 cannot become operative hence on the strength of the Will respondent/plaintiff cannot claim any title.

28. The last document on record to claim ownership is the receipt for a sum of ₹50,000/- which reads as under:-

> *"Received a sum of ₹50,000/- (₹Fifty Thousand Only), in cash in advance from Sh.Shree Nath Sah S/o Sh.Thakur Singh R/o D-Block, IIIrd Pushta, Sonia Vihar, Delhi-94 against a plot of land meas. 25. Sq. yeds. Out of Kh.No.140, situated in village Sadatpur Gujran, in the abadi of D-Block, IIIrd Pushta, Sonia Vihar, Delhi-94, in full and final settlement.*
>
> *Hence this receipt is made at Delhi on 28/4/2003, in the presence of the following witnesses.*
>
> *Witnesses:-*
>
> *1. Brij Mohan S/o Yash Pal, R/o 122-A, Ghondi Village, Delhi-51*
>
> *Executant*
> *sd/-*
> *(Ranvir Singh)*
> *S/o Sh.Desh Raj*
> *R/o Village Sadatpur,*
> *Delhi-94"*

29. It is not the case of the respondent/plaintiff that apart from the receipts exhibit DW-1/1 to DW-1/9 which are for a sum of ₹55,000/-, he also paid ₹50,000/- on 28th April, 2003. The contents of the receipt dated 28th April, 2003 do not suggest it to be an acknowledgement for payments made in the past in the name of Sh.Thakur Sah, father of the plaintiff. There is plea in the plaint about payment of ₹50,000/- on 28th April, 2003. If the substantive cost of the plot was paid prior to 28th April, 2003 in the name of Thakur Sah, there was no occasion for Sh.Ranbir Singh – the vendor to execute a fresh receipt on 28th April, 2003 in favour of Shri Nath. At the most there could

have been a combined receipt acknowledging the payment received in the past in installments and mentioning the balance, if any, due thereafter.

30. The receipts exhibit DW-1/1 to DW-1/9 of the payment made for purchasing the plot are of different dates. The table showing details of payment for purchase of plot are as under:-

S.No.	Receipt No.	Date	Amount	Paid by
1	073	9/12/2002	5,000/-	Kashi Nath Sah
2	077	16/12/2002	10,000/-	Kashi Nath Sah
3	081	Undated	5,000/-	Kashi Nath Sah
4	090	15/01/2003	13,000/-	Kashi Nath Sah
5	301	Undated	5,000/-	Shri Nath Sah
6	308	10/03/2003	8,000/-	Kashi Nath Sah
7	328	14/04/2003	1500/-	Shri Nath Sah
8	331	28/04/2003	1500/-	*Name not mentioned*
9	**340**	**19/05/2003**	**2000/-**	**Shri Nath Sah**
10	**350**	**16/06/2003**	**4,000/-**	**Kashi Nath Sah**
	Total		**55,000/-**	

The payments shown at Serial No.9 and 10 in the above table was made after the execution of the sale documents.

31. It is respondent/plaintiff's own case that he was working as a tailor and earning ₹6,000/- to ₹7,000/- per month. In that case even if his entire earning is calculated for the period of 5-6 months, he could not have paid ₹55,000/- towards purchase of the plot and also spent ₹1,30,000/- towards costs of construction and that too before any execution of the documents on 28th April, 2003 as claimed by him. Otherwise also without receiving the

substantial payment, no vendor would part with the possession and also allow vendee to raise construction thereon. Thus, the entire statement of the respondent/plaintiff on the mode of acquisition of 25 sq.yds. plot and the construction thereon is found to be false on the basis of his own documents and testimony.

32. It is also noteworthy that if the property was exclusively purchased by him for his own benefit and his brothers were residing as tenant under Sh.Brij Mohan on third floor separately, there was no reason for him to let his brothers enter the small unit of 25 sq.yds. acquired by him and permit them to live there from 1st May, 2003 till two notices were served in the year 2008 and 2010 claiming himself to be owner and terming them to be licensee. It is not his case that at any point of time any license fee was paid by his brother to him.

33. The First Appellate Court committed clear cut illegality in considering the case of the respondent/plaintiff; to be covered by the protection granted in Suraj Lamp's case (supra). At the most on the basis of General Power of Attorney which is a registered document the status of the respondent/plaintiff in the suit property could only be that of an agent of Ranbir Singh and nothing beyond that. Even Ranvir Singh's title is not proved. Learned First Appellate Court has failed to consider that all the receipts pertaining to payment in installment for acquiring this small plot of 25 sq. yds. were issued in the name of Sh.Thakur Sah. If for the payment received, receipts were issued in the name of Sh.Thakur Sah, in ordinary course the sale documents were also required to be executed by Sh.Ranbir Singh in the name of Sh.Thakur Sah only and not in the name of Sh.Sri Nath who is stranger to the transaction. The fact that the General Power of Attorney and notarized agreement to sell is in the name of Shri Nath (the plaintiff) lends

credence to the testimony of Sh.Thakur Sah that the documents were executed in the name of Shri Nath as only he was having the ID proof required to be submitted for registration of General Power of Attorney. This was with the understanding amongst them that Shri Nath would transfer the plot in suit property in favour of his father and thereafter all of them will have 1/5th share each in the suit property.

34. Taking into consideration the financial status of the parties that they are migrant labours who were trying to build a shelter for them in Delhi, not only plot was purchased in easy/flexible installments, the construction continued from 2003 to 2005 and the first floor is stated to be tin shed only, speaks about the nature of the construction and the amount which might have been spent jointly for raising it over a period of two years.

35. In my opinion the various bills pertaining to construction raised on this plot by the appellants/defendants in the presence of the respondent/plaintiff attracts the principal of estoppels under Section 115 of the Indian Evidence Act. So on this score also the respondent/plaintiff is not entitled to seek possession from the appellants/defendants who raised the construction under the belief that they are having 1/5th share in the suit property and that the property is in fact owned by the father and all the brothers are having share in the same and making contribution as per their earnings.

36. Surprisingly Shri Nath has not produced even a single bill to prove that before the execution of the document on 28th April, 2003 in his favour, he has completed the construction between December, 2002 and April, 2003. His claim is mainly based on deriving title on the strength of exhibit PW-1/B (Colly.) i.e. General Power of Attorney against Will etc.

37. In the facts of the present case it is clearly discernible that there was a relationship of trust amongst the father and brothers when the document exhibit PW-1/B (colly.) were got executed in the name of the respondent/plaintiff Shri Nath despite the fact that all the receipts of paying the installments towards the sale consideration for 25 sq. yds. plot were in the name of Sh.Thakur Sah, father of the parties.

38. In view of the decision reported as *Sri Marcel Martins Vs. M.Printer and Ors.*, AIR 2012 SC 1987, it can be said that the respondent/plaintiff was in fiduciary capacity vis-à-vis his brothers and father. Therefore the transaction was saved from the mischief of Section 4 of Benami Transactions (Prohibitions) Act, 1988 by reason of same falling under Sub-Section 3(b) of Section 4 of Benami Transactions (Prohibitions) Act, 1988.

39. In the case *P.V. Sankara Kurup V. Leelavathy Nambiar*, 1994(6) SCC 68 the Supreme Court had 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.

40. The respondent/plaintiff was holding the suit property in trust on behalf of his father and brothers. Thus, he could not have succeeded in seeking possession of the first floor consisting of tin shed in possession of appellants/defendants by terming them to be licensee. The decision of the First Appellate Court suffers from perversity and hereby set aside. The decision of the learned Trial Court dismissing the suit, is restored.

41. The substantial question of law is answered in favour of the appellants and against the respondent.

42. The appeal stands disposed of.

43. No costs.

44. LCR be sent back alongwith copy of this order.

<u>CM No.27522/2015 (stay)</u>

The application is dismissed as infructuous.

PRATIBHA RANI
(JUDGE)

FEBRUARY 22, 2017
'hkaur/pg/st'