

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

% **Date of decision: 1<sup>st</sup> October, 2018.**

+ **RSA 292/2016**

**MAHESH KARWAL** ..... **Appellant**

Through: Mr. Kamal Kapoor, Adv.

Versus

**SATYA DEVI** ..... **Respondent**

Through: Mr. Rajesh Karwal, son of the  
respondent.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 impugns the judgment and decree [dated 29<sup>th</sup> April, 2016 in RCA No.13/2014 (Unique Case ID No.0121002014) of the Court of Additional Senior Civil Judge] allowing the First Appeal under Section 96 of the CPC filed by the respondent / plaintiff against the judgment and decree [dated 11<sup>th</sup> February, 2014 in Suit No.1/2013 (Unique ID No.02401C0002142013) of the Court of Civil Judge-01 (West)] of dismissal of the suit filed by the respondent / plaintiff for mandatory injunction directing the appellant / defendant to vacate the room, attached latrine in property bearing No.5/100, Top Floor (Third Floor), near Kawatra Tent House, Subhash Nagar, Delhi, and, for permanent injunction restraining the appellant / defendant from interfering with peaceful possession of the respondent / plaintiff of the remaining property and / or from in any manner dealing with the property. Resultantly, the First Appellate Court passed the

decree in favour of the respondent / plaintiff and against the appellant / defendant as sought.

2. This appeal came up first before this Court on 28<sup>th</sup> September, 2016 when, on the contention of the counsel for the appellant / defendant that the defence of the appellant / defendant was of the appellant / defendant having bought the property from his own monies and in the name of the respondent / plaintiff on account of the respondent / plaintiff being the mother of the appellant / defendant and that the case was covered by Section 4(3)(b) of the Benami Transactions (Prohibition) Act, 1988, notice of the appeal was ordered to be issued, execution of the judgment and decree stayed and the trial court record requisitioned. The appeal was thereafter adjourned from time to time, mostly on the request of the counsel for the appellant / defendant. The appeal was listed last before this Court on 27<sup>th</sup> September, 2018 when the advocate for the appellant / defendant again did not appear and sent a request for passover. Observing, that the appellant / defendant, after taking *ex parte* stay of judgment and decree impugned and without even any substantial question of law, which the *sine qua non* for entertaining a Second Appeal, having been framed, could not so perpetuate the interim order and further observing that seeing the cause list of this Court, the advocate for the appellant / defendant would have known that the matter if passed over would not reach again, while adjourning the appeal to 17<sup>th</sup> January, 2019, the interim order was vacated, preserving the rights of the appellant / defendant of restitution in the event of appeal succeeding. The counsel for the appellant / defendant appeared subsequently and on his request the matter was posted for today.

3. The counsel for the appellant / defendant has been heard and the trial court record perused to gauge whether the appeal raises any substantial question of law.

4. The argument of the counsel for the appellant / defendant, raised on the date when notice was issued as well as today is (i) that the appellant / defendant, with his own monies purchased the property aforesaid in the name of his mother i.e. the respondent / plaintiff; (ii) that the respondent / plaintiff is thus the benami owner of the property and the appellant / defendant is the real owner of the property; (iii) that the Suit Court appreciated the said defence of the appellant / defendant and upholding the same, dismissed the suit; (iv) however, the First Appellate Court, wrongly appreciating the judgment dated 7<sup>th</sup> May, 2012 in RFA No.207/2012 titled ***J.M. Kohli Vs. Madan Mohan Sahni***, has allowed the First Appeal of the respondent / plaintiff and consequently allowed the suit of the respondent / plaintiff.

5. Though The Benami Transactions (Prohibition) Act, 1988 stands amended vide The Benami Transactions (Prohibition) Amendment Act, 2016 and is now christened as the Prohibition of Benami Property Transactions Act, 1988 but the counsel for the appellant / defendant has urged his arguments in relation to the provisions as contained in The Benami Transactions (Prohibition) Act, 1988 and has referred to Section 4(3)(b) thereof. On enquiry, it is informed that the alleged benami purchase is dated 30<sup>th</sup> October, 2006.

6. It is deemed appropriate to set out herein below Section 4 of The Benami Transactions (Prohibition) Act, 1988 in entirety. The same is as under:

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

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

(3) Nothing in this section shall apply,--

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

7. The counsel for the appellant / defendant contends that the present case falls under Section 4(3)(b) of the Act because the respondent / plaintiff, in whose name the property is held, is a “trustee or other person standing in a fiduciary capacity” vis-à-vis the appellant / defendant and “the property is held” by the respondent / plaintiff “for the benefit of another person for whom she is a trustee or towards whom she stands in such fiduciary capacity” i.e. the appellant / defendant.

8. I have enquired from the counsel for the appellant / defendant, whether the appellant / defendant on 30<sup>th</sup> October, 2006 was a minor.

9. The answer is in the negative. Rather, it is contended that the appellant / defendant was earning on 30<sup>th</sup> October, 2006 and the respondent / plaintiff had no source of income. On enquiry, it is stated that the appellant / defendant, on 30<sup>th</sup> October, 2006, was 30 years of age.

10. I have enquired from the counsel for the appellant / defendant, on what basis is he saying that a mother is a 'trustee' of a 30 years old son and stands in a fiduciary capacity vis-à-vis her 30 years old son.

11. The counsel for the appellant / defendant draws attention to sub-paras 'm' and 'n' of Para No.3 memorandum of this appeal at page 16 of the paper book, which are as under:

"m. Because the Ld. Appellate Court failed to appreciate the definition of "fiduciary relationship" which accordingly states "where one person places complete confidence in another in regard to a particular transaction or one's general affairs or business. The relationship is not necessarily formally or legally established as in a declaration of trust, but can be one of moral or personal responsibility, due to superior knowledge and training of fiduciary as compared to one whose affairs the fiduciary is handling".

n. Because the Ld. Appellate Court failed to appreciate that the fiduciary relationships are juxtapose trust and dependence on one side with dominance and influence on the other. The problem is one of equity, and the circumstances giving rise to the confidential relationship are not subject to hard and fast lines. A confidential relationship exists where a special confidence is reposed in another who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence."

12. The counsel for the appellant / defendant however is neither carrying the dictionary from which the definition is stated to have been so quoted nor is aware from which dictionary it is so quoted. He now states that it is quoted from “Black’s dictionary”.

13. The counsel for the appellant/defendant, on enquiry states that he has not studied any precedents in this regard and is unable to cite any.

14. I am unable to agree. A mother is not a ‘trustee’ of her major son and does not stand in a fiduciary capacity to her major son. Such notions, held by the appellant / defendant or his counsel, are not supported by any law. Merely because a major son chooses to purchase the property in the name of his mother would not allow him to seek exemption from the societal malice which was sought to be curbed by enactment of the Benami Law and Section 4 whereof was intended to curb such litigation which consumes a lot of time of the Courts. An inkling in this regard can be had from Section 3(2)(a) and 3(2)(b) of the Act as enacted in 1988 as under:

**“3. Prohibition of *benami* transactions. –**

(2) Nothing in sub-section (1) shall apply to –

- (a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;
- (b) the securities held by a –
  - (i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996.
  - (ii) participant as an agent of a depository.

Explanation. – The expression “depository” and “Participants shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of Section 2 of the Depositories Act, 1996.”

Wherever the legislature wanted to make the presumption a rebuttal one, it made a provision therefor and no such provision has been made qua the purchase of a property by a major son in the name of his mother.

15. Section 4(3)(b) of the Benami Act provides that nothing contained in Sections 4(1) and 4(2) shall apply where the person, in whose name the property is held, is a trustee or other person standing in a fiduciary capacity. The question, whether mother is a trustee of her major son or stands in a fiduciary capacity to her son, is no longer *res integra*. It has been held in **Anil Bhasin Vs. Vijay Kumar Bhasin** (2003) 102 DLT 932 that property purchased by a parent in the name of a son does not fall under the category of a fiduciary relationship and is clearly hit by the prohibition contained in the Benami Act. Similarly, a property, even if purchased by a son in the name of mother, as is claimed here, would not fall in the category of “fiduciary relationship” and is clearly hit by the prohibition contained in the Benami Law. I have also, in **Peeyush Aggarwal Vs. Sanjeev Bhavnani** 2013 SCC OnLine Del 2397 held, that merely because the word ‘trust’ is used in pleadings, does not allow a transaction to be taken out of the Benami Act. It was also noticed therein that the bar/prohibition of the Benami Law was being avoided in all cases where the claim or the defence is clearly hit by the said legislation, merely by paying lip service and pleading the opposite party to be the trustee or standing in a fiduciary capacity and that putting a claim or defences with such a plea to trial tantamounts to permitting the so called ‘Benami owner’ to be harassed by litigation at the instance of the person claiming to be the ‘real owner’. It was yet further held that litigation cannot be permitted to be used as a tool of oppression, often forcing the ‘Benami owner’ to settle with the ‘real owner’, though having a valid defence of the

Benami Law, for the reason of the property coming under cloud owing to the mere pendency of litigation and thereby depriving beneficial use thereof. Reliance was placed on *Anil Bhasin* supra *inter alia* holding that it is only the purchase of property in the name of wife or unmarried daughter which is exempted from the prohibition and even purchase in the name of son or married daughter has not been given that status and that once the legislature has expressly conferred exemption in the name of the wife or unmarried daughter, it is to be deemed that such restricted exclusion cannot be extended or made applicable to others. Reliance was also placed on *Pushpa Kanwar Vs. Urmil Wadhawan* 2009 SCC OnLine Del 3761 and on *D.N. Kalia Vs. R.N. Kalia* (2011) 178 DLT 294 wherein the plea, of the plaintiff therein being only the Benami owner and holding the property in trust for the defendant and other family members, was held to be not tenable.

16. The matter is placed beyond any pale of doubt by *Aarti Sabharwal Vs. Jitender Singh Chopra* (2009) 162 DLT 38 holding that prohibition of the Benami Law will apply, if the property is purchased in the name of the mother and by *Ram Prakash Kathuria Vs. Ved Prakash Kathuria* (2007) 5 AD (Del) 694 where the plea of the son, that property was purchased by him out of his own funds, though in the name of the mother, was held to be hit by prohibition contained in the Benami Law.

17. As far as *J.M. Kohli* supra is concerned, the counsel for the appellant / defendant draws attention to the following paragraph thereof:

“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.”

and contends that the First Appellate Court has misconstrued the aforesaid paragraph to be meaning that a fraud has to be necessarily pleaded. It is contended that the said judgment nowhere lays down the same.

18. Even if the interpretation of the counsel for the appellant / defendant of the aforesaid paragraph of **J.M. Kohli** supra were to be accepted, the appellant / defendant is required to first prove that the property is held in the name of the respondent / plaintiff in furtherance of law or in the capacity of a trustee or in a fiduciary capacity and which the counsel for the appellant / defendant is not addressing. In fact, when I asked the counsel for the appellant / defendant whether the advocate is in a fiduciary capacity vis-à-vis his client, the counsel for the appellant / defendant answers in the negative. If such notions as are being applied were to be applied, a client reposes trust and faith in the advocate by entrusting his/her life or property to the advocate and if the notions of trusteeship as are urged vis-à-vis the mother were to be applied, the answer qua the advocate also should have been in the affirmative.

19. The position of law in this context does not admit of any ambiguity and is clear.

20. The appeal thus does not raise any substantial question of law.

21. Dismissed. Needless to state, the interim order is vacated.

22. To balance the equities arising from the interim order granted in this Second Appeal, I have enquired from the counsel for the appellant / defendant the rate of *mesne profits*. The counsel for the appellant / defendant states that the appellant / defendant has already vacated the said room and the same is no longer in his possession and not even in his lock and key. Mr. Rajesh Marwal, son of the respondent / plaintiff present in the Court, upon being asked in vernacular, confirms and states that the room earlier in possession of the appellant / defendant is now in possession of the respondent / plaintiff.

23. In view of the above, there is no requirement to balance the equities also.

**OCTOBER 01, 2018**

‘gsr/bs’

**RAJIV SAHAI ENDLAW, J.**