

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

+ **RFA(OS) 73/2019 and CM APPL. 35637-35638/2019**

Date of decision: 01.05.2020

IN THE MATTER OF:

NEERU DHIR AND ORS

..... Appellants

Through: Mr. Prag Chawla and Mr. Rajiv Singh
Pilania, Advocates

versus

KAMAL KISHORE DHIR AND ORS

..... Respondents

Through: Mr. Nilava Bandyopadhyay and
Ms. Swati Sinha, Advocates

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

HIMA KOHLI, J.

1. The appellants/plaintiffs have questioned the judgment dated 23.05.2019, passed by the learned Single Judge dismissing a suit for partition and permanent injunction instituted by them against the respondents/defendants claiming that they are collectively entitled to 1/10th undivided share in the residential premises bearing No.C-324, Vivek Vihar, Delhi.

2. The three appellants/plaintiffs are the successors-in-interest (widow and children) of late Shri Anil Kumar Dhir, brother of the respondents No.1 to 7 and the deceased respondents No.8 and 9. The factual averments made in the plaint have been neatly summarised in para 1 of the impugned judgment. For the sake of convenience, the said para is extracted below:-

“1. The three plaintiffs, namely (a) Neeru Dhir; (b) Nipun Dhir; and, (c) Vatsala Dhir, being the widow, son and daughter of late Anil Kumar Dhir, have instituted this suit for partition of Property No.C324, Vivek Vihar, Delhi – 110 095 and for permanent injunction restraining the defendants from alienating, encumbering or parting with possession of the said property, against the four brothers, three sisters and heirs of another two sisters, of Anil Kumar Dhir pleading that (i) R.P. Dhir father of Anil Kumar Dhir and defendants no.1 to 7 was a government servant and his family was a Hindu Undivided Family (HUF); (ii) during his service period the said R.P. Dhir was living in government accommodation along with his wife and children; (iii) R.P. Dhir, in the year 1966, from his own resources and earnings, “for the welfare and benefit of the family” purchased the land underneath the suit property from Delhi Development Authority (DDA) and in the year 1977 built a single storeyed house thereon; (iv) however at the time of allotment and execution of documents, R.P. Dhir and the defendants decided that “for the convenience sake the title documents/allotment etc. be got executed in the name of the eldest son namely K.K. Dhir i.e. defendant no.1”; (v) thus the suit property was got allotted in the name of defendant no.1; (vi) the defendant no.1 from time to time, in various letters has admitted the said fact; (vii) R.P. Dhir died intestate on 20th December, 1993, leaving five sons and five daughters; (viii) however Anil Kumar Dhir predecessor of the plaintiffs and two of the daughters of R.P. Dhir have also since expired; (ix) the defendants no.1 to 3 have been residing abroad and the defendant no.4 has been residing in government accommodation and the defendants no.5 to 9A have been residing in their matrimonial homes; (x) the three plaintiffs alone are residing in the property and paying charges for electricity, water and telephone therein; (xi) the defendant no.1 had written letters to the DDA as well as Delhi Municipal Corporation that the land underneath the property was purchased by R.P. Dhir in the name of defendant no.1 and construction thereon had also been made by R.P. Dhir from his own funds and that after the demise of R.P. Dhir all his

sons were co-owners of the property; (xii) upon the defendant no.1 applying to DDA for converting the leasehold rights in the land underneath the property into freehold in his own name, the plaintiffs objected; and, (xiii) the plaintiffs together have 1/10th share in the property.”

3. Written statements were separately filed by the respondent No.1, respondents No.2 and 3 and respondents No.4 to 9A. Pleadings were completed in the suit. In the meantime, respondent No.1, respondents No.2 and 3 and the respondents No.4 to 9A filed separate applications under Order VII Rule 11 CPC praying *inter alia* for rejection of the plaint on several grounds, including the ground that the predecessor of the parties i.e., Shri R.P. Dhir did not own any property; that there was no Hindu Undivided Family; that the suit instituted by the appellants is barred by limitation and that the same is also barred by the Benami Transactions (Prohibition) Act, 1988 (in short ‘the Benami Act’).

4. The grounds taken by the respondents to seek rejection of the plaint have been encapsulated in para 5 of the impugned judgment in the following words:-

“5. The defendants seek rejection of the plaint, pleading that (i) R.P. Dhir had a fixed salary with a family of ten children and the defendant no.1 being the eldest son was supporting the father since joining employment in the year 1961;(ii) the defendant no.1, in the year 1963 shifted to United Kingdom (UK) and continued to help the father to meet the expenses of education and marriage of his children; (iii) R.P. Dhir had no sufficient means to acquire the land underneath the property or to raise construction thereon; (iv) it was the defendant no.1 who had applied to the DDA and was the successful bidder and who was allotted the land and who had raised construction thereon; (v) however since the defendant no.1 was residing in UK, he had executed a General Power of Attorney (GPA) in favour of

his father R.P. Dhir for the said purpose and all documents relating to the property also remained in the custody of R.P. Dhir and which documents are being illegally withheld with the plaintiffs; (vi) R.P. Dhir retired from employment in the year 1975; (vii) Anil Kumar Dhir was unemployed and was struggling to find gainful employment after graduation and was supported by defendants no.1,2&3 to start a business and though initially acquired a house with the gains of the business but subsequently suffered loss compelling him to sell the house and continued to be supported by his brothers; (viii) R.P. Dhir had no property and no HUF; (ix) even if it were to be believed that the property was purchased by R.P. Dhir in the name of defendant no.1, the claim of the plaintiffs in the present suit would be barred by Benami Transactions (Prohibition) Act, 1988 and the plaint is liable to be rejected; (x) the suit is also barred by limitation inasmuch as the plaintiffs admittedly had knowledge for more than three years prior to the institution of the petition that the property was in the name of the defendant no.1 and the defendant no.1 was getting the leasehold rights in the land converted into freehold; (xi) Article 113 of the Limitation Act, 1963 is applicable and which provides for limitation of three years; and, (xii) the plaintiffs have not given any particulars or filed any document to show the existence of any HUF.”

5. The reasons that have weighed with the learned Single Judge for allowing the applications filed by the respondents under Order VII Rule 11 CPC and rejecting the suit are primarily premised on the embargo placed by the Benami Act. The plea taken by the appellants that though the suit premises was applied for and allotted in the name of the respondent No.1, but the consideration for acquiring the land and the construction raised thereon was paid for by late Shri R.P. Dhir, has been treated as a plea of *Benami* within the parameters of the Benami Act and the suit has been dismissed by the learned Single Judge, who has held that the appellants can

neither claim an exception to the *Benami* law under the unamended Act, or under the amended Act.

6. For the sake of completeness, it is also considered necessary to refer to an order dated 24.04.2019, passed by the learned Single Judge before passing the impugned judgment on 23.05.2019 and relied on by learned counsel for the respondents, which records the statement made by learned counsel appearing for the appellants that under the amended Act that was enforced w.e.f. 11.08.2016, the appellants would not have any right to the suit premises. In the order dated 24.04.2019, the learned Single Judge had expressed a *prima facie* view as below:-

“9. In my prima facie opinion, even under the unamended Act the plaintiffs have no right and in any case the amended provisions have to be enforced even though the suit is found to have been instituted on 25th February, 2016 i.e. prior to the coming into force of the amended Act with effect from 11th August, 2016.”

7. However, after passing the aforesaid order, being mindful of the fact that it was a dispute between family members, efforts were made by the learned Single Judge to facilitate a settlement between the parties, which did not bear any result and finally led to passing of the impugned judgment, whereby the suit instituted by the appellants was rejected as being barred by law.

8. Mr. Prag Chawla, learned counsel for the appellants has assailed the impugned judgment on the ground that the learned Single Judge has completely overlooked the letters dated 27.04.1987 and 12.03.2001 issued by the respondent No.1, wherein he had stated that though the suit premises stood in his name, it was purchased for the welfare and benefit of the family.

He also referred to an Agreement dated 13.02.1993 executed by the respondents No.1 to 3, admitting *inter alia* that the suit premises had been financed by Shri R.P. Dhir. It was thus contended that the suit instituted by the appellants clearly falls within the ambit of the exception carved out under Section 4(3) of the unamended Benami Act. Learned counsel further contended that since the suit was instituted by the appellants in February, 2016, amendment of the Benami Act w.e.f. 01.11.2016, whereby sub-section (3) of Section 4 was omitted, would hardly be of any significance as the said sub-section was in currency when the suit was instituted and therefore, the exception carved out in the said provision, entitled the appellants to take a plea that the suit fell within the purview of the said sub-section.

9. It was further submitted by learned counsel for the appellants that there was no occasion for the learned Single Judge to have examined the document dated 13.02.1993, to decide as to whether it took a character of a family settlement for partitioning the suit premises as it was never the stand of the appellants that they were claiming any right in the suit premises based on the said family settlement. He emphasised that the entire case set up by the appellants was founded on the plea that the suit premises had been purchased by Shri R.P. Dhir in the name of the respondent No.1, for the use and welfare of the family and therefore, the suit clearly fell within the exception carved out under Section 4(3) of the unamended Benami Act.

10. *Per contra*, Mr. Nilava Bandyopadhyay, learned counsel for the respondents supported the impugned judgment and handed over a set of documents filed by the respondent No.1 in the suit proceedings including copy of the perpetual Lease Deed dated 02.03.1968 of the suit premises executed in favour of the respondent No.1, copy of the General Power of

Attorney dated 10.05.1968 executed by the respondent No.1 in favour of his father authorizing him to deal with the suit premises, e-mails exchanged between the family members and an application dated 04.12.2012, submitted by the respondent No.1 to the DDA for conversion of the suit premises from leasehold to freehold etc. Learned counsel also cited the judgment dated 06.03.2017 passed by a Division Bench of this Court in **RFA(OS) 46/2016** entitled Sagar Gambhir vs. Sukhdev Singh Gambhir (since deceased through his legal heirs) & Anr. to urge that pleadings in the present suit are illusory in nature, devoid of cause of action and are mere bald statements, that do not disclose any material details and on this ground too, the plaint ought to have been rejected as being vague, vexatious and bereft of material particulars, sufficient to demonstrate any actionable pleadings.

11. We have heard the arguments advanced by learned counsel for the parties, carefully examined the impugned judgment and gone through the documents placed on record.

12. The plea taken by Mr. Chawla, learned counsel for the appellants that the bar placed under Section 4 of the Benami Act would not apply retrospectively, is no longer *res integra*. The said proposition had come up before the Supreme Court in R. Rajagopal Reddy (dead) by LRs and Ors. vs. Padmini Chandrasekharan (dead) by LRs reported as **(1995) 2 SCC 630**, wherein Justice S.B. Majmudar, speaking for the other members of a three Judge Bench had arrived at a conclusion that Section 4(1) of the Benami Act does not have any retrospective application. By the same analogy, any amendment to the said enactment by virtue of Act 43 of 2016, that came into effect on 01.11.2016, cannot acquire retrospectivity in a case like the present one where the suit was instituted by the appellants well before the said date,

in February, 2016. We therefore have no hesitation in accepting the submission made by learned counsel for the appellants that the amended Benami Act, wherein sub-section (3) of Section 4 was omitted, would not apply to the instant case. Instead, the unamended Act, which included sub-section (3) to Section 4, would govern the case.

13. Coming to the next submission made by learned counsel for the appellants that there was ample factual narrative in the plaint as also the documents filed by the appellants/plaintiffs that go to demonstrate that the suit instituted by the appellants falls within the purview of the exception carved out in Section 4(3) of the unamended Act, we may note that in the present case, the impugned judgment has been pronounced on separate applications moved by the respondents under Order VII Rule 11 CPC. In order to examine as to whether the plaint is liable to be rejected under any of the provisions enumerated under Order VII Rule 11 CPC, the court is required to peruse only the averments made in the plaint and proceed on a demurrer to examine as to whether on accepting the submissions made in the plaint as they stand, could the suit be said to be barred by any law or not. At that stage, it is impermissible for the court to look into the pleas taken in the written statement or any other evidence. But, a reference can certainly be made to the documents filed by the plaintiffs in support of the averments made in the plaint.

14. In a recent decision of this Bench in the case of Sukruti Dugal vs. Jahnavi Dugal, reported as **2020 SCC OnLine Del. 241**, we had the occasion to examine several decisions of the Supreme Court on the above aspect including T. Arivandandam vs. T.V. Satyapal reported as **(1977) 4 SCC 467**, Roop Lal Sathi vs. Nachhattar Singh Gill reported as **(1982) 3**

SCC 487, I.T.C. Ltd. vs. Debts Recovery Appellate Tribunal reported as (1998) 2 SCC 70, Raptakos Brett & Co. Ltd. vs. Ganesh Property reported as (1998) 7 SCC 184 Saleem Bhai vs. State of Maharashtra reported as (2003) 1 SCC 557 and Popat and Kotecha Property vs. State Bank of India Staff Association reported as (2005) 7 SCC 510, and had summarised the legal position in the following words:-

“12. As can be seen from the aforesaid discussion, a plaint cannot be rejected on the basis of allegations levelled by the defendant in the written statement or for that matter, in an application moved under Order VII Rule 11 CPC, for seeking rejection of the plaint. In exercise of its powers under Order VII Rule 11 CPC, the court is required to look into the averments made in the plaint, which alone are germane. The entire plaint must be read as a whole to determine as to whether it discloses a cause of action. In undertaking the said exercise, the court is not expected to consider a particular plea and instead, the averments made in the plaint in entirety, have to be taken to be correct. Since a cause of action comprises of a bundle of facts, the same are required to be proved by the plaintiff only at the time of the trial. Only the material facts are required to be stated in the plaint without referring to the evidence except in circumstances where the pleadings relate to misrepresentation, fraud, undue influence, wilful default etc. As long as the court is satisfied that the plaint discloses some cause of action that requires determination, the plaint ought not to be rejected. At the end of the day, the court must be mindful of the fact that the underlying object of Order VII Rule 11 CPC is to nip in the bud, irresponsible and vexatious suits. At the same time, the opinion of the court that the plaintiff may not ultimately succeed in the suit, ought not to form the basis for rejecting the plaint.”

15. The material averments made by the appellants in the suit for partition and permanent injunction instituted by them for seeking partition of the suit premises, set out in para 1 of the impugned judgment and extracted above,

would show that the case pleaded by the appellants is as under :-

- (i) Late Shri R.P. Dhir, a government servant who had retired from the post of Under Secretary from UGC, Government of India, had *“for the welfare and benefit of the family members purchased the suit premises/plot from his own resources and earnings from DDA in the year 1966 and thereafter raised construction and built up a single storeyed house in the year 1977”*;
- (ii) At the time of allotment and execution of the title documents, Shri R.P. Dhir and the respondents had decided that the property was being purchased for the welfare and benefit of the family and only for the sake of convenience was the application for allotment and the title documents got executed in the name of the respondent No.1;
- (iii) That in the year 1974, Shri R.P. Dhir had got the building plans sanctioned and constructed a single storey house on the subject land and had borne all the expenses and funds relating to the construction;
- (iv) That on several occasions, respondent No.1 had admitted and acknowledged the fact that the suit premises is a joint family property and he is not the sole owner thereof. For this, reference was made to the letter dated 27.04.1987 written by the respondent No.1 to the DDA and the letter dated 27.04.1987 written by the respondent No.1 to the Assessor and Collector, Municipal Corporation of Delhi. Besides relying on the aforesaid correspondence, the appellants also filed a copy of the letter dated 12.03.2001, written by the respondent No.1 to his siblings, an undated letter written by the respondent No.1 to his siblings suggesting options for partitioning the suit premises and a document dated 13.02.1993 executed by the respondents No.1 to 3 in respect of the suit premises.

16. It is considered necessary to extract below, the relevant paras of the

aforesaid documents:-

Letter dated 12.3.2001 written by respondent No.1 to his siblings (pg. 86)

“Despite the fact that the Vivek Vihar property is in my name, it is our ancestral home and family property and I have no selfish interest in it. I provided a number of documents in the past to support this and respected father had full control and authority to do what he liked with the property.

Soon after respected father’s death, and in the absence of any WILL, it was decided by mutual consent to authorize Ashok and Anil to repair and renovate the ground floor and proceed with the construction of an additional one and a half storeys, out of money left by respected father with further funds to be provided by Ashok and Anil. They were both to be given legal ownership of one floor each and the half storey on the second floor was to remain family property.”

Undated letter written by respondent No.1 to his siblings. (pg. 86)

“I feel that the matter of family property has remained unresolved for far too long. The wording of the General Power of Attorney sent by Anil was not suitable and I sent my comments to all of you on the 28th March, 1994. Since then I have not received any constructive reply from either Ashok or Anil on this matter.

I outline below the options available and would ask all of you to consider it seriously and let me know your comments and suggestions, in writing, so that the situation can be resolved to the satisfaction of all concerned.

OPTION 1) In our family meeting in India in January, 1994, it was decided to construct a further one and half storeys to be financed exclusively by Ashok and Anil. Upon completion Anil and his family will continue to occupy the ground floor and Ashok and his family will occupy the first floor. The storey on the second floor will be kept as common family property.

Upon completion, a suitable Power of Attorney or a long Lease for 999 years will be granted to Anil for the ground floor and a similar document to Ashok for the first floor.”

17. Vide document dated 13.02.1993 executed by the respondents No.1 to 3, they had reduced into writing the agreement arrived at by them in respect of the suit premises wherein it was agreed as follows:-

“4. The land financed by Mr. Ram Prakash Dhir will remain registered in the name of Mr. Kamal Kishore Dhir and all the five brothers are joint owners of the land.

6. Mr. Ram Prakash Dhir is the sole legal and beneficial owner of the said property.

7. Upon sale of the land and building situated at C-324 Vivek Vihar, Delhi, the proceeds of the land and ground floor will be divided equally amongst the five brothers and the proceeds of the five storey will be divided between Mr. Ashok Dhir and Mr. Anil Dhir in the proportion agreed between them.”

18. The aforesaid documents have not only been discussed, but have been extensively reproduced in the impugned judgment. However, the learned Single Judge has held that even if proved, the said documents only go to demonstrate that the parties were attempting to amicably resolve their *inter se* disputes and that the said distribution did not acquire the colour of a legal document. It has been observed that rights in an immovable property cannot be transferred on the basis of such documents, which even if taken at the highest pedestal of being a family settlement, would not be of any relevance since no registered document was executed by the respondent No.1 and the said documents as they stand did not create any title in favour of the plaintiffs in the suit property.

19. For considering the submission made by learned counsel for the appellants to the effect that the case of the appellants/plaintiffs falls within

the exception of sub-section (3) of Section 4 of the unamended Benami Act, we may reproduce hereinbelow, Section 4, as it stood before the amendment:-

“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.”
(emphasis added)

20. An instructive discussion on the scope of sub-section (3) of Section 4 of the Benami Act is found in Marcel Martins vs. M. Printer and Others reported as **(2012) 5 SCC 342**, where the Supreme Court has elaborated the definition of the expression, ‘*fiduciary capacity*’ used in sub-section 3(b) of Section 4 of the Benami Act and concluded that for determining whether a relationship is based on a fiduciary capacity, the court will have to take into consideration the factual context in which the question arises and only in that background, can any finding be returned. We may usefully reproduce

below, the view taken in paras 28 to 38 of the captioned case:-

“28. The critical question then is whether sub-section (3) of Section 4 saves a transaction like the one with which we are concerned.

29. Sub-section (3) to Section 4 extracted above is in two distinct parts. The first part comprises clause (a) to Section 4(3) which deals with acquisitions by and in the name of a coparcener in a Hindu Undivided Family for the benefit of such coparceners in the family. There is no dispute that the said provision has no application in the instant case nor was any reliance placed upon the same by the learned counsel for the respondent-plaintiffs.

30. What was invoked by Mr Naveen R. Nath, learned counsel appearing for the respondents was Section 4(3)(b) of the Act which too is in two parts viz. one that deals with the trustees and the beneficiaries thereof and the other that deals with the persons standing in a fiduciary capacity and those towards whom he stands in such capacity. It was argued by Mr Nath that the circumstances in which the purchase in question was made in the name of the appellant assumes great importance while determining whether the appellant in whose name the property was acquired stood in a fiduciary capacity towards the respondent-plaintiffs.

31. The expression “fiduciary capacity” has not been defined in the 1988 Act or any other statute for that matter. And yet there is no gainsaying that the same is an expression of known legal significance, the import whereof may be briefly examined at this stage.

*32. The term “fiduciary” has been explained by **Corpus Juris Secundum** as under:*

“A general definition of the word which is sufficiently comprehensive to embrace all cases cannot well be given. The term is derived from the civil or Roman law. It connotes the idea of trust or confidence, contemplates good faith, rather than legal obligation, as the basis of the transaction, refers to the integrity, the fidelity, of the party trusted, rather than his credit or ability, and has

been held to apply to all persons who occupy a position of peculiar confidence toward others, and to include those informal relations which exist whenever one party trusts and relies on another, as well as technical fiduciary relations.

The word 'fiduciary', as a noun, means one who holds a thing in trust for another, a trustee, a person holding the character of a trustee, or a character analogous to that of a trustee with respect to the trust and confidence involved in it and the scrupulous good faith and condor which it requires; a person having the duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. Also more specifically, in a statute, a guardian, trustee, executor, administrator, receiver, conservator or any person acting in any fiduciary capacity for any person, trust or estate."

33. Words and Phrases, Permanent Edn. (Vol. 16-A, p. 41) defines "**fiducial relation**" as under:

"There is a technical distinction between a 'fiducial relation' which is more correctly applicable to legal relationships between parties, such as guardian and ward, administrator and heirs, and other similar relationships, and 'confidential relation' which includes the legal relationships, and also every other relationship wherein confidence is rightly reposed and is exercised.

Generally, the term 'fiduciary' applies to any person who occupies a position of peculiar confidence towards another. It refers to integrity and fidelity. It contemplates fair dealing and good faith, rather than legal obligation, as the basis of the transaction. The term includes those informal relations which exist whenever one party trusts and relies upon another, as well as technical fiduciary relations."

34. Black's Law Dictionary (7th Edn., p. 640) defines "**fiduciary relationship**" thus:

"Fiduciary relationship.—A relationship in which one person is under a duty to act for the benefit of the other

on matters within the scope of the relationship. Fiduciary relationships—such as trustee-beneficiary, guardian-ward, agent-principal, and attorney-client—require the highest duty of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognised as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.”

35.Stroud's Judicial Dictionary explains the expression **“fiduciary capacity”** as under:

“Fiduciary capacity.—An administrator who [had] received money under letters of administration and who is ordered to pay it over in a suit for the recall of the grant, holds it ‘in a fiduciary capacity’ within the Debtors Act, 1869 so, of the debt due from an executor who is indebted to his testator's estate which he is able to pay but will not, so of moneys in the hands of a receiver, or agent, or manager, or moneys due on an account from the London agent of a country solicitor, or proceeds of sale in the hands of an auctioneer, or moneys which in the compromise of an action have been ordered to be held on certain trusts or partnership moneys received by a partner.”

36.Bouvier's Law Dictionary defines **“fiduciary capacity”** as under:

“What constitutes a fiduciary relationship is often a subject of controversy. It has been held to apply to all persons who occupy a position of peculiar confidence towards others, such as a trustee, executor, or administrator, director of a corporation or society, medical or religious adviser, husband and wife, an agent who appropriates money put into his hands for a specific

purpose of investment, collector of city taxes who retains money officially collected, one who receives a note or other security for collection. In the following cases debt has been held to be not a fiduciary one: a factor who retains the money of his principal, an agent under an agreement to account and pay over monthly, one with whom a general deposit of money is made.”

37. We may at this stage refer to a recent decision of this Court in **CBSE v. Aditya Bandopadhyay [(2011) 8 SCC 497]** , wherein Raveendran, J. speaking for the Court in that case explained the terms **“fiduciary”** and **“fiduciary relationship”** in the following words: (SCC pp. 524-25, para 39)

“39. The term ‘fiduciary’ refers to a person having a duty to act for the benefit of another, showing good faith and candour, where such other person reposes trust and special confidence in the person owing or discharging the duty. The term ‘fiduciary relationship’ is used to describe a situation or transaction where one person (beneficiary) places complete confidence in another person (fiduciary) in regard to his affairs, business or transaction(s). The term also refers to a person who holds a thing in trust for another (beneficiary). The fiduciary is expected to act in confidence and for the benefit and advantage of the beneficiary, and use good faith and fairness in dealing with the beneficiary or the things belonging to the beneficiary. If the beneficiary has entrusted anything to the fiduciary, to hold the thing in trust or to execute certain acts in regard to or with reference to the entrusted thing, the fiduciary has to act in confidence and is expected not to disclose the thing or information to any third party.”

It is manifest that while the expression “fiduciary capacity” may not be capable of a precise definition, it implies a relationship that is analogous to the relationship between a trustee and the beneficiaries of the trust. The expression is in fact wider in its import for it extends to all such situations as place the parties in positions that are founded on confidence and trust on the one part and good faith on the other.

38. In determining whether a relationship is based on trust or confidence, relevant to determining whether they stand in a fiduciary capacity, the court shall have to take into consideration the factual context in which the question arises for it is only in the factual backdrop that the existence or otherwise of a fiduciary relationship can be deduced in a given case. Having said that, let us turn to the facts of the present case once more to determine whether the appellant stood in a fiduciary capacity vis-à-vis the respondent-plaintiffs.” (emphasis added)

21. It is noteworthy that the aforesaid view was expressed by the Supreme Court in a case where a full blown trial had taken place before the trial court, which included framing of issues, oral and documentary evidence led by the parties followed by the judgment of the trial court whereby the suit instituted by the appellants therein was finally dismissed. In the appeal, the High Court had reversed the finding of the Trial Court and proceeded to decree the suit in favour of the respondents/plaintiffs therein, which made the defendants/appellants prefer an appeal before the Supreme Court urging that the suit instituted by the respondents was squarely hit by the Benami Act. The said appeal was finally dismissed by the Supreme Court holding that the transaction in the said case was saved from the mischief of Section 4 of the Act, as it fell under the exception carved out under sub-section (3) and resultantly, the respondents/plaintiffs were declared to be coparceners of certain properties to the extent of their contribution made therein.

22. In the present case, the stage of evidence had not even been arrived at. In fact, only pleadings in the suit were completed. Issues have also not been framed. Therefore, there was no occasion for the court to determine as to whether the respondent No.1 stood in a ‘fiduciary capacity’ vis-a-vis his

deceased brother, Shri Anil Kumar Dhir, predecessor-in-interest of the appellants/plaintiffs. On perusing the averments made in the plaint, it cannot be said at this stage that the suit is barred by Benami Act. In this context, we may usefully refer to a recent decision of the Supreme Court in Pawan Kumar vs. Babulal Since Deceased through Legal Representatives and Ors. reported as **(2019) 4 SCC 367**, wherein it has been held as below:-

*“13. In the present case, the controversy has arisen in an application under Order 7 Rule 11 CPC. Whether the matter comes within the purview of Section 4(3) of the Act is an aspect which must be gone into on the strength of the evidence on record. Going by the averments in the plaint, the question whether the plea raised by the appellant is barred under Section 4 of the Act or not could not have been the subject-matter of assessment at the stage when application under Order 7 Rule 11 CPC was taken up for consideration. The matter required fuller and final consideration after the evidence was led by the parties. It cannot be said that the plea of the appellant as raised on the face of it, was barred under the Act. The approach must be to proceed on a demurrer and see whether accepting the averments in the plaint the suit is barred by any law or not. We may quote the following observations of this Court in **Popat and Kotecha Property v. SBI Staff Assn.** [Popat and Kotecha Property v. SBI Staff Assn., (2005) 7 SCC 510] : (SCC p. 515, para 10)*

“10. Clause (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Clause (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force.” (emphasis added)

23. If we go strictly by the averments made in the plaint and the documents filed by the appellant/plaintiffs, we are of the opinion that the suit ought not to have been rejected outright under Order VII Rule 11 CPC on the ground that the pleas taken by the appellants/plaintiffs are barred under Section 4(3) of the unamended Benami Act. In our view, the matter would require a more comprehensive consideration after permitting the parties to lead evidence in the case. Order VII Rule 11 CPC was not the appropriate stage for testing the veracity of the pleas taken in the plaint and return any finding on the merits of the said plea taken by the appellants/plaintiffs in the plaint or to extensively examine the underlying intent of the parties on a perusal of the documents filed by the appellants. On a bare reading of the averments made in the plaint read in conjunction with the documents placed on record, we are of the opinion that sufficient material facts have been disclosed requiring determination only after a proper trial. At the stage of deciding an application moved by the respondents under Order VII Rule 11 CPC, there was no occasion for the court to have taken pains to interpret and analyse the documents filed by the appellants/plaintiffs to hold in favour of the respondents.

24. In the instant case where it has been asserted that the suit premises was purchased in the name of the respondent No.1, but from the exclusive contributions made by late Shri R.P. Dhir and therefore in reality, was meant for the benefit of all the family members, the real test would be the source from which the purchase money came from, the nature and status of possession of the property after its purchase, the motive if any for giving the transaction a *Benami* colour, the position of the parties and their *inter se* relationship, between the appellants/plaintiffs and the respondent No.1, the

overall conduct of the parties in dealing with the suit premises after it was acquired, etc. [Refer: Jaydayal Poddar (Deceased) through LRs and Anr. vs. Mst. Bibi Hazra and Ors. reported as **(1974) 1 SCC 3**] It would therefore be imperative to weigh the evidence in the instant case for the court to conclusively decide as to whether the appellants/plaintiffs can succeed in their claim that the respondent No.1 is holding the suit premises in a fiduciary capacity, for the benefit of all the family members.

25. In view of the aforesaid discussion, the present appeal succeeds. The impugned judgment is quashed and set aside. The suit is restored to its original position for being taken further from the stage at which the impugned judgment was passed.

26. The appeal is disposed of alongwith the pending applications, with no orders as to costs.

(HIMA KOHLI)
JUDGE

(ASHA MENON)
JUDGE

MAY 01, 2020
rkb/hsk