

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

% **Date of Decision: 03rd November, 2020**

+ **RFA (OS) 63/2018**

SAVITA ANAND

.....Appellant

Through: Mr. Gaurav Puri and Ms. Gayatri
Puri, Advocates

versus

KRISHNA SAIN & ORS.

....Respondents

Through: Mr. Arun Mohan, Senior Advocate
with Mr. Akshay Makhija & Ms.
Mahima Malhotra, Advocates

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

HON'BLE MS. JUSTICE ASHA MENON

[VIA VIDEO CONFERENCING]

JUSTICE ASHA MENON

1. The present appeal has been filed by the plaintiff before the learned Single Judge, being aggrieved by the dismissal of her suit vide the impugned judgement dated 18th July, 2018.

2. The suit was filed by Smt. Savita Anand, (hereinafter referred to as the “appellant”) for partition and permanent injunction against three defendants, namely, her mother Smt. Krishna Sain (who has since expired during the pendency of the appeal and will be referred to for convenience as ‘D1’), her sister Smt. Sarita Mullick (hereinafter referred to as ‘D2’) and her brother Sh. Sanjeev Sain (hereinafter referred to as ‘D3’).

Partition was sought of property bearing number E-27, Block No. B-1 Extension, Mohan Co-operative Industrial Estate, New Delhi, ad measuring 1422.81 sq. yds (for short, “suit property”).

BACKGROUND FACTS

3. Briefly stated the case of the appellant was that the suit property belonged to her father late Yashpal Sain and as one of his legal heirs, she was entitled to 1/4th share in the said property, upon the demise of her father. The case set out in the plaint was that late Yashpal Sain had come to India from Lahore, Pakistan on Partition of the country and had set up a business called M/s. Asiatic Syndicate from which he had made his living. At the same time, he had received some compensation for property left in Pakistan with which he, along with one Sh. Luthra, purchased a plot of land bearing Khasra No.33/16/1, measuring 5 Bighas 10 Biswas situated in village Sahibabad, Mathura Road, Delhi, thus “restoring” part of the ancestral property left in Pakistan. This land was part of the Mohan Small Industrialists Co-operative Society (“Society”, for short) of which Sh.Yashpal Sain was a founder-member. However, the land purchased by Sh. Yashpal Sain, as also the lands of other members, was acquired by the Government of Delhi on 10th November, 1960. As per the policy of the Government, Sh.Yashpal Sain received compensation for his land that was acquired. He also applied for the allotment of an alternate plot. The Government suggested that he becomes a member of an industrial cooperative society and if he was already a member of one such society, to apply to it directly for allotment. Since he was a founder member of the Society, Sh. Yashpal sought allotment of the very plot of land that had

been acquired for the purposes of the industrial estate. Sh. Yashpal was allotted a plot of land measuring 5494 sq. yards in Block 'A' of Mohan Co-operative Society in 1963, but subject to payment and completion of some formalities. Unfortunately, before the money could be paid and the formalities concluded, Sh. Yashpal Sain died on 17th October 1963.

4. After Shri Yashpal Sain died, his wife (D1) applied for the allotment of a plot to the Society and a plot was allotted to her, which is the suit property. The appellant claimed in the plaint that though this allotment was made in her individual name, D1 received the suit property for the rehabilitation of her family and to take care of the appellant and the other minor children as the Karta of the family as it was paid for out of joint family funds in which all legal heirs of late Yashpal Sain had equal shares. Therefore, she had taken the plot ad measuring 1422.81 sq. yds, being the suit property, in trust on behalf of all the legal heirs of late Yashpal Sain, two of whom were minors, and including D1 and the appellant who had 1/4th share each in his assets including the suit property. It was pleaded further that in recognition of the use of the property for the joint benefit of all legal heirs of late Yashpal Sain, a subsequent partnership was created by D1 with her children and each had 1/4th share in the receipts of the partnership. Thus, the appellant claimed partition of the suit property and a division by metes and bounds or in the alternative, by sale of the property and sharing of the proceeds of sale in equal shares.

5. In response to this plaint, D1, D2 & D3 filed their common written statement disputing all the averments of the appellant. They claimed that the suit property was the self-acquired property of D1 and did not form

part of the estate left by late Yashpal Sain. In fact, according to them, Shri Yashpal Sain had not been successful in his numerous business ventures and was in dire financial straits when he fell sick and had no estate to leave for his legal heirs at the time of his demise on 17th October, 1963 and that the suit property being the absolute property of D1 was not available for partition. Though it was admitted that late Yashpal Sain had come along with his parents and family members to India after Partition, it was claimed that there was no joint family property left at Lahore nor was a new Hindu Undivided Family (HUF) created in India owning properties. It was from his earnings from the coal business commenced by him under the name and style of Oriental Coal Corporation, that late Yashpal Sain purchased a plot of land at Mathura Road measuring 5 Bighas 10 Biswas, which was subsequently acquired by the Delhi Government for the purposes of an industrial estate.

6. It was denied that the suit property had been purchased from joint funds. It was asserted that the allotment was a new allotment in the name of D1 as the allotment of the industrial plot by the Society in the name of late Yashpal Sain had been cancelled as due to lack of finances, he had been unable to pay the sum of ₹22 lacs by January 1963 towards the allotment. The application moved by D1 seeking allotment of the same plot to her was declined as not being available for such allotment. D1 claimed that her two brothers and two brothers-in-law had paid to her ₹16,000/- each out of which she made the initial payment of ₹16,000/- on 25th November, 1963 to the Society. Thus, they rejected the claim of the appellant that this plot was ancestral property or joint family property. It was also submitted that D1 alone had paid ₹86,786.11 for the suit

property and it was denied that she had purchased it on behalf of the legal heirs of late Yashpal Sain or that she had held it in trust for them. She asserted that she had absolute title to the plot in question and even when the partnership was constituted the land was never transferred to it. Thus the appellant had no right whatsoever in the suit property and had no cause of action to file the instant suit.

FINDINGS IN THE IMPUGNED JUDGEMENT

7. The learned Single Judge after examining the pleadings on 26th February, 2013 observed as to how the plaintiff/appellant could claim a share in the suit property merely on the basis of her late father being a member of the Society in question, given the dicta of the courts. It also noted that the learned counsel for the defendants/respondents had raised the plea, though not expressly pleaded, that the claim of the plaintiff/appellant was hit by the Prohibition of Benami Property Transactions Act, 1988 ('Benami Act', for short) and these aspects required to be considered. On 27th August, 2013, the learned Single Judge accordingly framed the following preliminary issue:

“Whether the suit as framed, is barred in view of the Benami Transactions (Prohibition) Act 1988?”

8. Dealing with the question whether the appellant could claim a share in the suit property, relying on the judgement of this court in ***Swayam Sidha Cooperative Group Housing Society versus Financial Commissioner Delhi and Others***, 159 (2009) DLT 455, the learned Single Judge concluded as follows:

“14. In view of the aforesaid position, the plaintiff cannot claim any right, title or interest in the Suit Property as her inheritance in the estate of her late father. At the time of the demise of the plaintiff’s father, he had not acquired the Suit Property. It did not form a part of his estate and, therefore, the question of the plaintiff acquiring any share in the same by survivorship does not arise.”

9. With regard to the plea of the appellant that D1 was the Karta of the joint family, the learned Single Judge observed that there was neither any averment nor any material to establish that Shri Yashpal Sain (father) was carrying on any ancestral business as the Karta of an HUF and rather he had set up a proprietorship firm in the name of M/s. Asiatic Syndicate. Finding no foundation for this claim of the appellant that her mother had also acted as the Karta of the family, the learned Single Judge found it to be *“plainly bereft of any merit”*. It was also observed that in the present case, there was no positive averment as to when the HUF was formed by D1 and a mere statement that D1 had held the property for the benefit of the family led nowhere. It was observed that the pleadings are insufficient and vague to sustain a case of the suit property being an HUF property.

10. As regards the issue that the suit was barred under the Benami Act, the learned Single Judge concluded that the claim of the appellant that by virtue of her funds having been used for paying the consideration for the suit property she had a title to the suit property, fell foul of the provisions of the Act, as any suit or claim or action to enforce any such right was prohibited by Section 4 of the said Act and in the light of mere bald

statements about an HUF, the transaction would also not come within the Exception provided under Section 4(3)(a) of the said Act.

11. The learned Single Judge concluded that the appellant did not have 1/4th share in the suit property, the suit was barred under the Benami Act, and the plaintiff had no right, title or interest in the suit property and that the facts as stated in the plaint did not give rise to any issue that required trial. Accordingly, the suit was dismissed by the impugned judgement dated 18th July, 2018.

GROUND OF APPEAL

12. Aggrieved by these conclusions, the appellant has filed the instant appeal on the grounds that the learned Single Judge had misconstrued the facts as pleaded by the appellant, as her case had always been that in view of Section 8 of the Hindu Succession Act, 1956, as Yashpal Sain had died intestate, when his movable and immovable assets had devolved upon the appellant and respondents in equal proportions and as the same had been used for the purchase of the suit property by D1, she did so, standing in a fiduciary capacity, utilising joint funds of all the legal heirs of late Yashpal Sain, for their joint benefit. Moreover, the conversion of the property from leasehold property to freehold property by the Delhi Development Authority (DDA) had been possible only with the joint efforts and labour of all the parties to the suit, reflecting their common interests and rights in it. The suit had been necessitated only because of the mal-intention of the D1 to oust the appellant of her rightful share in the suit property by alleging that she had exclusive rights in the suit property and claiming to have executed an alleged *Will*. Merely because

there was no allotment in the name of the father at the time of his death, even if accepted as correct, would not result in divesting the appellant of her share in the suit property. The court had wrongly accepted the version of the respondents that the property was the self-acquired property of D1. It had also overlooked the important fact that false affidavits had been placed on the record by D1 regarding the sources of finance for the purchase of the suit property as the appellant had filed another affidavit disputing the claim of the D1 along with an application under Section 340 Cr.P.C..

13. It is further stated in the grounds of appeal that the issue as framed was never a part of the pleadings and the objection to its framing as being outside the scope of the pleadings had been raised by appellant. Therefore, both, the framing of the preliminary issue, and the decision thereon, were erroneous and liable to be set aside. In any case, this question was a mixed question of fact and law and a disputed question could not be determined as a preliminary issue. The application of the law in the impugned judgement was also wrong as it is only when a person buys property with his own money in the name of another person without any intention to benefit such a person, that the transaction would be a *benami* transaction. But in the instant case, from the very beginning, D1 had purchased the plot disclosing an intent that it was for the benefit of the entire family as was evident from her letter dated 29th October, 1963. This intent was reinforced later on when a partnership was created to share equally the returns from the use of the plot as a warehouse. Finally, the learned Single Judge also erred in holding that the appellant's case did not fall under the Exception (a) to Section 4(3) of the Act, as the written

submissions filed by the appellant made it abundantly clear that she claimed that her case fell under the Exception (b) of Section 4 (3), which was not considered by the court. The finding on the nature of the property without any discussion on the source of the funds was also clearly bad in law and therefore, the findings were liable to be set aside

ARGUMENTS

14. The main argument that was advanced by Shri Gaurav Puri, learned counsel for the appellant was that the case ought not to have been dismissed without trial as there were many factual issues that were to be proved by leading evidence. It was argued that the fact pertaining to the allotment of the industrial plot in the name of D1 in lieu of the value of shares/industrial plot allotted to late Yashpal Sain, is a disputed question of fact which required evidence. It was submitted that D1 was a housewife with no funds of her own and the mere assertion by the appellant of contributing to the purchase of the suit property was insufficient to non-suit her as it was a matter of evidence as to the existence of any *benami* transaction and as to the real intentions of the parties. Consequently, the suit could not have been dismissed without trial.

15. It was also pointed out that in the written statement there was no denial of the fact that a plot at Mathura Road had been purchased by late Yashpal Sain with savings from his business which he had commenced for the welfare of his family. There was admission in the written statement that compensation had been also received after acquisition of the said plot and it was this compensation that had been used to purchase

the plot allotted to him in the Society, as admittedly the sum of ₹14,101.88p received as compensation had been adjusted in the consideration of ₹18,786.88p for the allotment of the plot in question. Therefore, the suit property was in the nature of joint family property in which the appellant had an equal share.

16. He urged, that D1 in her letter to the Society, after the death of her husband who was the member, had actually sought the allotment of the very same plot that had stood allotted to her husband. In other words, the allotment to the mother (D1) was only on account of the allotment originally made to the father. The learned counsel also submitted that the Bombay Cooperative Societies Act, 1925 ('Bombay Act') was applicable to the allotment in the instant case, whereunder Section 27(1) provides that membership and interest in the membership in a society was inheritable. As the mother (D1) had sought the allotment only of the plot that had originally been allotted to late Yashpal Sain, she got the suit property only in the capacity as legal heir of the deceased member, and to which all the other legal heirs were also equally entitled to, and so, D1 could not have exclusive title to the suit property and the right of the appellant to 1/4th share had to be recognized and given to her.

17. The learned counsel submitted that it was because 2 children were minors and the appellant herself was only 18 years of age at the relevant time that the mother's name alone was mentioned in the allotment letter, but that fact could not defeat the rights of the appellant in the suit property. In the written submissions on behalf of the appellant, it was further claimed that even in the absence of any HUF of Yashpal Sain, on his death, she was entitled to a 1/4th share from the estate of late Yashpal

Sain, in accordance with the Succession laws. In any case, on the demise of D1, the appellant was entitled to a share in the suit property.

18. Shri Arun Mohan, Senior Advocate arguing on behalf of the respondents, who were defendants to the suit, based on the written submissions that have been filed, described the litigation as an abuse of the process of the court and submitted that the court must deal with it with a heavy hand. Learned senior counsel submitted that the appellant has not been able to produce a single document that would show that a plot had been actually allotted in the father's name which could have been inherited by all the legal heirs. He asserted that there were no admissions in the written statement to the effect that the late Yashpal Sain had any HUF or that the funds of such HUF had been utilized by him to purchase any property. According to him, the court was fully empowered to dismiss a case that was frivolous, either by using its powers under Order VII Rule 11 of the Code of Civil Procedure, 1908 (CPC) or by exercising its inherent powers under Section 151 CPC and the learned Single Judge was justified in throwing out the appellant's case. Relying on several judgements cited in the written submissions, learned senior counsel urged that the court ought not to entertain vague claims set out in vaguer pleadings and without any supporting documents to *prima facie* disclose a claim in immovable property and waste precious judicial time.

19. With regard to the factual matrix, it was contended by learned senior counsel that when the Government acquired the 5 Bighas 10 Biswas of land at Mathura Road, no doubt compensation of a sum of ₹14,101.88p was awarded. This amount was to be adjusted towards the value of the industrial plot that would have been allotted to Yashpal Sain

as an alternative plot for the acquired land as a member of a co-operative society. But this land acquired and released to the Society was to be allotted to members only upon payment of consideration of ₹22 lacs and completion of other formalities, which could not be completed by him on account of his ill health. It could not be said that any actual allotment of land had taken place and even if Yashpal Sain at the time of his death had a membership that was not heritable as held in *Swayam Sidha* (supra) which has been correctly followed by the learned Single Judge. In any case, the allotment of the suit property to D1 could not be traced to the allotment made to late Yashpal Sain which had been cancelled. Several documents were pointed out to submit that the allotment to D1 was an independent allotment and was not a follow-through of the original allotment to late Yashpal Sain and that the suit property was the exclusive property of D1 and the family had always accepted that position. According to the learned senior counsel, the appellant cannot now withdraw all these admissions. Thus, it was prayed that the appeal be dismissed.

DISCUSSION

20. We have heard the learned counsel for both sides and have carefully considered the material on record, and shall deal with the contentions one by one.

21. The purpose of a trial is no doubt to allow the parties to prove their pleas by leading evidence. However, the court has the power to dispense with oral evidence where the facts are admitted, the case rests on documents which are admitted or where the case is to be decided on

interpretation of such admitted documents. In the present case, the determination of the rival claims is possible on the basis of the admitted documents that have been placed on the record. The material documents relate to the allotment of the suit property. That these stand in the name of D1, is not disputed. What is claimed is that D1 had held the suit property in trust and in the interest of her family and in the capacity as Karta of the HUF. The claim of the appellant is that on the demise of her father, D1 and her children had inherited his assets in equal shares and as D1 had no resources of her own, joint funds had been used to purchase the property. Therefore, the matter required a trial. We do not share this view. It may be noticed that the pleadings do not disclose what assets had been left behind by late Yashpal Sain. Therefore, there is no detail as to what share had come into the hands of the appellant or to the other legal heirs. So what evidence can be brought on record in the absence of the relevant averments? But again, even if such evidence was to be brought on record in the face of the Benami Act, it would be an exercise in futility. The learned Single Judge rightly framed the preliminary issue and decided that the matter required no trial.

22. No doubt the defendants had not pleaded that the claim of the appellant was hit by the Benami Act. However, it is recorded in the order of 26th February, 2013 that the learned counsel for the defendants had raised the issue orally which was considered by the court and a preliminary issue was accordingly framed. Even if it had not been raised, the powers of the court cannot be curtailed to consider whether the matter before it is maintainable or is liable to be rejected under Order VII Rule 11(d) CPC. The constant refrain of the appellant has been that D1 was a

housewife and had no source of income and that the compensation awarded to her father, as also her share in the assets inherited from her father, had been used by D1 to pay the Society for the suit property. If this is accepted at face value, there is no running away from the fact that yet all the documents of title qua the suit property are only in the name of D1. There can be no clearer case of a *benami* transaction. Under the Benami Act, even prior to its amendment, Section 4 prohibited any suit to enforce any right in respect of a property held *benami* against the person in whose name such property stood. The suit of the appellant, with the facts as set out by her, is completely barred by law. There is no error in the impugned judgement in respect to the framing of and the finding on the preliminary issue.

23. In order to get over this bar, the appellant has tried hard to bring her claim within the four corners of the pre-amendment Exceptions provided in Section 4 of the Benami Act, which reads as follows:

“4. (1)-----

(2)-----

(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 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 trustee or towards whom he stands in such capacity.”*

24. It is no longer *res integra*, that after the enactment of the Hindu Succession Act, 1956, there can be no automatic presumption that the acquisition of property by a Hindu male took on the colour of HUF property with his son/daughter and grandchildren. As was held by the Supreme Court in ***Yudhishter vs Ashok Kumar***, (1987)1 SCC 204, the position which traditionally existed with respect to an automatic right of a person in properties inherited by his paternal predecessors-in-interest upto three degrees above and of his successors-in-interest upto three degrees below, has come to an end after 1956 and a person inherits a property from his paternal ancestors, not as an HUF property in his hands but as a self-acquired property of the person who inherits the same. There are two Exceptions to this, viz, (i) either a HUF and its properties was existing even prior to the passing of the Hindu Succession Act, 1956 and which continued even after passing of the Hindu Succession Act, 1956, or (ii) the self-acquired property is thrown by the owner into a common hotchpotch whereby such property or properties thrown into a common hotchpotch become Joint Hindu Family properties/HUF properties. However, in order to claim the properties as being HUF/Joint Hindu Family properties, a plaintiff has to establish to the satisfaction of the court as to the date and year when the HUF was established before 1956 and that it continued after 1956 or the date when a particular property was thrown into the common hotchpotch and hence a HUF/Joint Hindu Family created with effect from that date.

25. It was therefore imperative for the appellant to have pleaded these facts. That she has not done. Rather vacuous statements have been made in the plaint that there was some joint family property lost in Pakistan

during Partition, and being a registered refugee, late Yashpal Sain had received some compensation which he used to set up a business for rehabilitating himself and his family. There is no clear and cogent pleading of facts as to the existence of an HUF before and or the creation of one after 1956. The plaint discloses nothing about any property that was joint family property. Even if the court was to assume that there may have been some property lost at the time of Partition for which the late Yashpal Sain had received some compensation, these facts are insufficient to establish the constitution of/existence of an HUF of late Yashpal. The pleadings are sparser in respect of an alleged HUF of which D1 was supposedly the Karta. The learned Single Judge could not but have concluded that there was neither any pleading establishing the existence of an HUF nor were there any documents reflecting on the same. Clearly the case of the appellant is not covered under Section 4(3)(a) of the Benami Act, as rightly held by the learned Single Judge.

26. The appellant has sought to claim that she was not asserting her rights as flowing from an HUF, but was claiming them as the legal heir of late Yashpal Sain under the Hindu Succession Act, 1956. But for that, she had to state in the plaint the details of the assets left behind by him. Instead she has pleaded a case that the suit property was joint family property, as late Yashpal Sain had purchased a plot at Mathura Road for setting up a factory, using funds received as refugee compensation, and it was only with the money received after that plot was acquired, that the plot in the Society was purchased. Therefore, the chain so developed could only lead to the conclusion that the suit property was purchased with joint funds and therefore, the appellant was entitled to a share. But in

the absence of details of the year of receipt of such refugee compensation, it is not possible to connect the purchase by late Yashpal Sain of 5 Bighas 10 Biswas plot of land at Mathura Road in 1960, with receipt of any such compensation. In any case, that plot stood acquired by the Govt. of Delhi in 1963 and all rights of Yashpal Sain in it stood extinguished and whatever compensation was awarded was only to him. Thus, all this effort of the appellant to trace a right either in some HUF property or a joint family property has been futile.

27. Before the learned Single Judge the case of the appellant was that she had paid for the suit property by contributing her share in the assets inherited from her father and argued that upon the death of her father, an HUF got created by her mother who held the suit property in the capacity of the Karta of the HUF. But when the learned Single Judge has rejected the claim of the appellant that her case fell within the Exception in Section 4(3)(a) of the Benami Act, the appellant now argues that the learned Single Judge had wrongly applied the provisions of Section 4(3)(a) as in fact her case fell within the Exception under Section 4(3)(b) of the Benami Act, as D1 had held the suit property in a fiduciary capacity.

28. To establish a fiduciary relationship of the mother (D1) with her children, the appellant has once again used the same facts and chain of reasoning. It was submitted that the compensation paid to Yashpal Sain for the acquisition of his land, was ploughed back for the purchase of the suit property and since all the legal heirs were entitled to inherit the assets of Yashpal Sain on his death, she had a 1/4th share in the suit property and therefore, D1 held it only in a fiduciary capacity for all of the legal heirs

and the allotment of the suit property and the documentation in the sole name of D1 could not nullify her rights in it. It was sought to be pointed out that D1 in her letter to the Society had herself stated that she was seeking the allotment of the very plot of land earlier allotted to her husband and was seeking it only to be able to take care of her children and therefore, it was clear that she was allotted the plot of land only in a fiduciary capacity. The appellant emphasized that her siblings were minor at that time and she herself was barely 18 years old, but still contributed her share in her father's assets towards the cost of the suit property. These facts were enough to establish that D1 was holding the suit property in a fiduciary capacity.

29. However, we are unable to accept this submission. Being a mother, D1 would have naturally assumed the role of the caretaker of her children including the appellant after the death of her husband. By setting out a ground for allotment of a plot to her, it cannot be assumed that D1 had entered into a fiduciary relationship with her children. Fiduciary relationships have legal connotation and are not equivalent to filial relationships. Fiduciary relationships or capacity involve the existence of a duty or obligation that is more than parental duties or obligations.

30. What constitutes fiduciary relationship has not been defined in the statutes. Recourse has been taken by the courts to the meanings given in dictionaries to deal with specific fact situations. The Supreme Court had occasion to discuss what constituted fiduciary relationship in ***CBSE vs Aditya Bandopadhyay***, (2011) 8 SCC 497 while considering the relationship of the examining bodies and students. After considering the definitions of “fiduciary relationship” in *Black's Law Dictionary*, the

American Restatements (Trust and Agency), the Corpus Juris Secundum, Words and Phrases, and considering the decisions in Bristol and West Building Society vs. Mothew [1998 Ch. 1] In Wolf vs. Superior Court [2003 (107) California Appeals, 4th 25], the Supreme Court concluded:

“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.

40. There are also certain relationships where both the parties have to act in a fiduciary capacity treating the other as the beneficiary. Examples of these are: a partner vis-à-vis another partner and an employer vis-à-vis employee. An employee who comes into possession of business or trade secrets or confidential information relating to the employer in the course of his employment, is expected to act as a fiduciary and cannot disclose it to others. Similarly, if on the request of the employer or official superior or the head of a department, an employee furnishes his personal details

and information, to be retained in confidence, the employer, the official superior or departmental head is expected to hold such personal information in confidence as a fiduciary, to be made use of or disclosed only if the employee's conduct or acts are found to be prejudicial to the employer.

41. In a philosophical and very wide sense, examining bodies can be said to act in a fiduciary capacity, with reference to the students who participate in an examination, as a Government does while governing its citizens or as the present generation does with reference to the future generation while preserving the environment. But the words “information available to a person in his fiduciary relationship” are used in Section 8(1)(e) of the RTI Act in its normal and well-recognised sense, that is, to refer to persons who act in a fiduciary capacity, with reference to a specific beneficiary or beneficiaries who are to be expected to be protected or benefited by the actions of the fiduciary—a trustee with reference to the beneficiary of the trust, a guardian with reference to a minor/physically infirm/mentally challenged, a parent with reference to a child, a lawyer or a chartered accountant with reference to a client, a doctor or nurse with reference to a patient, an agent with reference to a principal, a partner with reference to another partner, a Director of a company with reference to a shareholder, an executor with reference to a legatee, a Receiver with reference to the parties to a lis, an employer with reference to the confidential information relating to the employee, and an employee with reference to business dealings/transaction of the employer. We do not find that kind of fiduciary relationship between the examining body and the examinee, with reference to the evaluated answer books, that come into the custody of the examining body.”

31. Though the Supreme Court was in ***RBI vs Jayantilal N Mistry & Others***, (2016) 3 SCC 525 considering the question of disclosure by the Reserve Bank of India of information received by it from other banks about clients/loan defaulters, etc., under the Right to Information Act, 2005, it is apposite to refer to its observations on what constitutes fiduciary relationship and capacity, as it would help in determining whether D1 stood in such a capacity to the appellant in the present case. It had followed its earlier decision in ***CBSE vs Aditya Bandopadhyay*** (*supra*). It also referred to the definition of fiduciary relationship given by *The Advanced Law Lexicon 3rd Edition 2005* and also set down the scope of fiduciary relationship in paras 57 & 58, which are reproduced for convenience:

“57. *The Advanced Law Lexicon, 3rd Edn., 2005, defines “fiduciary relationship” as:*

“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 [fiduciary] relationship.... Fiduciary relationship usually arises in one of the 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.”

58. The scope of fiduciary relationship consists of the following rules:

“(i) No conflict rule — A fiduciary must not place himself in a position where his own interests conflict with that of his customer or the beneficiary. There must be ‘real sensible possibility of conflict’.

(ii) No profit rule — A fiduciary must not profit from his position at the expense of his customer, the beneficiary.

(iii) Undivided loyalty rule — A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.

(iv) Duty of confidentiality — A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.”

32. The facts and circumstances surrounding the acquisition of the suit property by D1 and its subsequent use do not establish any of the above elements. A parent would be in a fiduciary relationship with an offspring only when the child lacks legal capacity due to minority or disability and the relationship discloses an absolute dependency on the parent for decision making. The appellant was 18 years old and legally major when the suit property was purchased. Her very case is that she consciously allowed her mother to take the property in her own name and voluntarily, even paid for it. There are no facts pleaded to show how D1 had ever established superior control over the appellant and took over her responsibility. No duty or obligation is stated to have been taken by D1 to

advice the appellant or that the appellant was completely dependent on D1 for such advice. Rather, according to the appellant, her husband had all along helped D1 in dealing with the suit property. There is no pleading to the effect that a Trust had been created for the children of late Yashpal Sain and D1 had been appointed its Trustee.

33. In short, there is nothing to show that D1 had taken the allotment of the suit property for the benefit of her family and that she was holding it in trust for her children and that in view of the fiduciary nature of her title, even if the documents are recorded only her name, the appellant had a right to claim a share in the property. The decision in *Marcel Martins Vs. M. Printer and others*, (2012) 5 SCC 342 is distinguishable on facts as in that case, the Municipal Authorities had insisted on mutating the property only in the name of one legal heir whereas the husband and all children of the deceased owner had inherited the property jointly on her death. Here the suit property was not in existence at the time of the death of Yashpal Sain as it was allotted to D1 after his death.

34. While the mother may be ethically and morally bound to do the best in the interests of her children, there is no legal duty placed on her to act solely in the interests of her children (unless minor or disabled), unlike a situation where apart from being a mother, she was required to act as their Trustee in a Trust created for their benefit or was the Karta of an HUF obligated to act in the best interest of the coparceners. When no fiduciary capacity has been established, it is apparent that the appellant's claim is not covered under Section 4(3)(b) either. This Exception is also not available to the appellant to escape the rigours of the prohibition of

Section 4 of the Benami Act and the learned Single Judge rightly held the claim to be barred by law.

35. The Bombay Act does provide in Section 27 that on the death of a member of a society such society may within one year from the date of such member's demise, transfer the share or interest of the deceased member to a person or persons who are either nominated in accordance with the by-laws of the society or is a person who appears to the committee to be the legal heir or legal representative of the deceased member, if duly elected as a member of the society, in either case. For this provision to be attracted, it is clear that first of all the member who has died should have a membership in his name and should have in his lifetime nominated some person to inherit his share or interest or else, the committee must recognize the heir or the legal representative. In both events, such a person has to be elected as a member under the by-laws. Moreover, the interest or a share of the deceased member has to be transferred and there is no automatic inheritance of such share or interest by the legal heirs.

36. In the present case, the appellant has not shown the share certificate or membership number of late Yashpal Sain and nor has she relied on any such by-law of the Society to point out that D1 had been nominated or recognized by the committee as a legal heir. There is no document to show that D1 had been substituted as a member in the society in place of late Yashpal Sain. Nor is there any record of a "transfer" of the interest or share of late Yashpal Sain to his wife D1. Even if it were to be accepted that under the Bombay Act membership of a society was heritable, the moot question is whether late Yashpal Sain had left any

such heritable right on the basis of which the appellant could claim a share in the suit property.

37. The admitted fact is that though he had been allotted a 5494 sq yds plot of land in Block 'A' in the Society, this allotment was cancelled as he could not pay ₹22 lacs and complete the formalities, which he was called upon to do in January 1963 and which he could not complete till his death in October 1963. D1 had moved an application seeking to obtain allotment of the very same plot that had been allotted to her late husband. However it was informed to her by the Society that the specific plot was not available anymore. The Society offered her another plot in Block 'B' which was smaller in size, ad measuring 1422.81 sq yds, provided she paid for it immediately. The offer was not to substitute her name in place of the deceased member, which would have been the case had membership continued despite the allotment having been cancelled.

38. The Society had also not "transferred" the membership/allotment to D1. The allotment was a fresh allotment, of a different parcel of land for a different consideration. The D1 was given a share certificate in her own name and D1 was recognized as an independent shareholder. The 2 plots of land were different and separate and their location and value were distinct. Merely because this allotment happened after the demise of Yashpal Sain would not make the allotment independently made to D1 an allotment to the legal heirs. The learned Single Judge rightly concluded that the father had left no heritable right in which the appellant could have sought a share. The judgement of this court in *Swayam Sidha (supra)* was rightly followed to hold that no inheritable right had accrued to the appellant.

CONCLUSION

39. The appellant appears to be very eager to establish a vested right in the suit property by claiming it to be an HUF property or in the alternative, joint family property. The purchase of 5 Bighas 10 biswas land at Mathura Road in 1960 cannot be connected with any compensation received as a refugee by late Yashpal Sain in the absence of any document to substantiate payment and receipt of such compensation. Nor can the purchase of the property at Mathura Road by him be accepted as a “restoration” of “ancestral” property, when the existence of any such “ancestral” property at Lahore, Pakistan, is itself completely doubtful in the absence of cogent and clear disclosures in the plaint in this regard. There is no reason to presume that it was this compensation that he may have received that was invested in the property that was purchased at Mathura Road. Secondly, the said plot of land at Mathura Road was acquired by the Government in 1960, thus extinguishing all rights of late Yashpal Sain in that land. Though compensation for the same amounting to ₹14,101.88 paise was also awarded to him, such compensation did not take the colour of joint family funds. Even if this compensation was thereafter ploughed back into the purchase of a plot measuring 5494 sq yds in the Society, no conclusion can be drawn that this plot was also of the nature of an HUF property in which the appellant could stake a claim. Most importantly, however, is the fact that Yashpal Sain failed to complete the requisite formalities as a result of which no plot of land was in fact allotted to him. At the time of his death, no plot stood in his name to which the appellant could stake a

claim as his legal heir. Thus on both the threads of arguments, the appellant was rightly held to be not entitled to any share in the suit property.

40. Now we may refer to the submissions made by the respondents that in fact the suit property was the absolute property of D1, since the learned senior counsel referred us to various documents to establish this fact. But we make it clear that we are doing so only in the context of the plea of the appellant that the suit property was Yashpal Sain's and she had a 1/4th share in it being his legal heir. Though it is submitted in the written submissions filed on behalf of the appellant, that now she was entitled to a share being the legal heir of D1, but we are unwilling to expand the scope of the suit.

41. There are several admissions evident in the conduct of the parties, as reflected in the various documents relied upon by the appellant herself, that D1 had received the allotment of the suit property in her individual name and the family had accepted that it was the absolute property of D1 from the time of its allotment in 1963 to the filing of the suit. Whatever may have been the source of the various payments made towards consideration, development charges, electricity charges, all documents that determine the ownership of the suit property stand in the name of D1. The Share Certificate (dated 3rd June, 1964) stands in the name of D1. The receipts for payment of various amounts also stand in the name of D1. The Perpetual Sub-Lease (dated 30th March, 1979) was granted in her name and subsequently the Conveyance Deed (dated 9th October, 2009) was also executed in the name of D1 when the nature of the suit property was converted from leasehold to freehold. Even when the DDA sought to

re-enter the property and cancel the lease, the notices were issued only to D1 as the lease holder and not to any other person as legal heir of Yashpal Sain. D1 alone took legal action including filing of petitions against such action as she alone had the *locus standi* to do so. Thus, the appellant has never asserted any legal right at any point of time as the legal heir along with her mother and siblings before any court or public authority.

42. When D1 appointed the husband of the appellant as her attorney to act on her behalf qua the suit property, documents (executed on 2nd March, 1988 and 16th January, 2004) unequivocally described her as the absolute owner of the suit property. The tenancy agreement with M/s. Bata India Limited, (executed on 4th March, 1988) also described D1 as the absolute owner of the suit property. A loan was raised in the name of D1 against mortgage of the suit property, even if the husband of the appellant had stood guarantor. Finally, the Partnership Deed (executed on 12th July, 1988) also describes D1 as the absolute owner of the suit property even though the partnership was between D1, the appellant and her brother (D3). When the partnership was dissolved, the land was not sought to be divided in the shares of the partners in the partnership business clearly establishing that it was the asset not of the partnership but of D1. All these documents were well within the knowledge of the appellant when they were executed between 1963 and 2011 and the admissions contained explicitly in them, as also disclosed in the conduct of all family members including the appellant and her husband, cannot be permitted to be withdrawn by her merely because it is now convenient to claim otherwise, after the filing of the present suit. Through the

appellant's own conduct it is well proven that D1 was the absolute owner of the property and during her lifetime the appellant could not have claimed a share in the same.

43. In the light of the foregoing discussion, we are unable to find any error in the impugned judgement, which we uphold. The appeal is devoid of merit and is accordingly dismissed. However, there is no order as to costs.

ASHA MENON, J.

RAJIV SAHAI ENDLAW, J.

NOVEMBER 03, 2020

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