

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment Reserved on: 31.3.2011
Judgment Pronounced on: 08.04.2011

+ **I.A. Nos.4700/2011 (O.6 R.17 CPC) &
4016/2011 (O.7 R.11 CPC) in CS(OS)
No.647/2010.**

Mr. Adesh Kanwarjit Singh Brar**Plaintiff**

- versus -

Ms. Babli Brar & Others**Defendants**

Advocates who appeared in this case:

For the Plaintiff: Mr. Sudhir Chandra Agrawala, Sr. Adv.
With Mr. Ranvir Singh, Mr. Ravi Shankar
Nanda and Mr. Shakil Akhtar, Advs.

For the Defendant: Dr. A.M. Singhvi and Mr. Sandeep Sethi,
Sr. Advs. with Ms. Jyoti Mendiratta,
Ms. Gurkirat Kaur, Ms. Sukanya
Hardika and Ms. Deesha Lodi Kakar,
Advs. for defendant Nos. 1 and 2.
Mr. Shoaib Haider for Mr. N. Waziri,
Adv. for GNCTD (Delhi Police).

CORAM:-

HON'BLE MR JUSTICE V.K. JAIN

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| 1. Whether Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported
in Digest? | Yes |

V.K. JAIN, J

1. Late Harcharan Singh Brar, who died on 6th
September, 2009, had two wives, namely Mrs. Jagir Kaur,

who died in 1992 and Mrs. Gurbrinder Brar (defendant No.2). The plaintiff Adesh Kanwarjit Singh Brar is the son of late Shri Harcharan Singh Brar from his second wife Mrs. Gurbrinder Brar, whereas defendant No.1 Ms. Babli Brar is his sister. Defendant No.3 Ms. Charanjit Kuar Brar is the step sister of the plaintiff being the daughter of late Shri Harcharan Singh Brar from his first wife Mrs. Jagir Kaur.

2. The case of the plaintiff is that late Shri Harcharan Singh Brar was karta of Brar HUF, which owned agricultural land measuring about 2000 acres in Village Serainaga, District Muktsar, Punjab. It is further alleged that on or about September 13, 1951, there was a partition of the ancestral agricultural property, which formed a part of the estate belonging to Brar HUF. Under the partition, agricultural land was divided between the plaintiff, defendant No.2 Mrs. Gurbrinder Brar, Mussammat Uttam Kaur, mother of late Shri Harcharan Singh Brar and late Shri Harcharan Singh Brar. It is further alleged that plot No.6 in Block No.172 of Jarbagh measuring 1404 sq.yds. was purchased and construction on the aforesaid plot was raised from the funds contributed by the plaintiff, his father late Shri Harcharan Singh Brar and his mother Mrs.

Gurbrinder Kaur, defendant No.2 in the ratio of $\frac{1}{4}$, $\frac{1}{4}$ and $\frac{1}{2}$ respectively. These funds were generated by sale of lands, which had fallen to the individual shares of the plaintiff and his parents after the partition effected in the year 1951. It is further alleged that the lease deed was nominally executed in favour of late Shri Harcharan Singh Brar, who had lent his name for the purpose of completing the formalities of execution of the lease deed.

3. It is also alleged that Shri Harcharan Singh Brar has consistently been holding out by his conduct as well as by his admission before Income-tax and Revenue authorities as well as to the private parties that he was the owner only to the extent of $\frac{1}{4}$ th share, the plaintiff held $\frac{1}{2}$ nd share and defendant No. 2 held $\frac{1}{4}$ th share in Jor Bagh property. The plaintiff also claims to be in possession of the ground floor and first floor of the aforesaid property along with his sons, whereas defendant No. 1 is stated to be in possession of the second floor. It is further alleged that after death of Shri Harcharan Singh Brar, during the course of family discussion on 06th September, 2009, with respect to his $\frac{1}{4}$ th undivided share, defendant No. 1, for the first time, claimed that in January, 1999, Shri Harcharan Singh Brar

had executed a gift deed in her favour and she was the owner of the entire property. The plaintiff thereupon conducted an enquiry in the office of the Sub-Registrar and came to know of the gift deed, executed by Shri Harcharan Singh Brar in favour of defendant No. 1 on January 28, 1999, thereby gifting the entire Jor Bagh property to her. In the Gift Deed, Shri Harcharan Singh Brar stated that the suit property was his self-acquired property and he was its absolute owner. The mutation in the name of defendant No. 1 was also carried out by L&DO on the basis of the gift deed, executed in her favour. The plaintiff has sought declaration, declaring the gift deed dated January 28, 1999 as null and void and not binding on him. He has also sought a declaration that he is the owner of half of the land and building at 6, Jor Bagh, New Delhi and that the mutation of the aforesaid property in the name of defendant No. 1 is also null and void. He has further sought partition of the aforesaid property and an injunction restraining defendant No. 1 from creating any third party interest therein.

4. IA No. 4016/2011 has been filed by defendant No. 1 under Order 7 Rule 11 of CPC, whereas IA No. 4700/2011

has been filed by the plaintiff, seeking amendment of the plaint.

5. It is claimed in IA No. 4016/2011 that the prayers made in the plaint are ex facie barred under the provisions of the Benami Transactions (Prohibitions) Act, 1988 and, therefore, the plaint is liable to be rejected. It is further alleged that since the plaintiff has not challenged the perpetual lease deed dated 29th May, 1952, whereby Jor Bagh property was transferred in the sole name of Shri Harcharan Singh Brar and that relief have now become barred by limitation, the plea of Benami transaction claimed by the plaintiff is untenable.

6. In IA No. 4700/2011, the plaintiff has sought permission to add the following paragraphs as para 10-A:

“That the suit property is in nature of joint property being partly owned by the father of plaintiff Shri Harcharan Singh Brar, the mother of the plaintiff Mrs Gurbinder Singh Brar (Defendant No. 2 herein) and the plaintiff in the ration of $\frac{1}{4}$, $\frac{1}{4}$ and $\frac{1}{2}$. Further, that the plaintiff's father Shri Harcharan Singh Barar whose name appears in the perpetual lease deed dated May 29, 1952 held the suit property for the benefit of all the joint owners and as such purchase of the suit property in the name of Shri Harcharan Singh Brar was in trust and for the benefit of the joint purchasers who were his wife (defendant No. 2) and

minor son (plaintiff herein). It is also relevant to mention that at the time of purchase of the suit property, the plaintiff was minor (5 years old) and, therefore, the father of the plaintiff Shri Harcharan Singh Brar held the suit property to the extent of 50% of the suit property in fiduciary capacity in trust and for the benefit of his minor child (the plaintiff herein) and the defendant No. 2 to the extent of 25% of the suit property.”

7. The plaintiff has contested IA No. 4016/2011, whereas IA No. 4700/2011 has been opposed by the defendants.

8. Order 7 Rule 11 of CPC, to the extent it is relevant, provides that the plaint shall be rejected where the suit appears from the statement made in the plaint to be barred by any law.

9. The Court while considering an application for rejection of the plaint can look into only the averments made in the plaint and the documents filed by the plaintiff. The defence taken by the defendant is not to be considered while examining such an application and validity of the documents filed by the plaintiff also cannot be examined at this stage.

10. In **Avtar Singh Narula & Anr. Vs. Dharambir Sahni & Anr.** 150 (2008) DLT 760 (DB), this Court reiterated

that the power to reject the plaint has to be exercised sparingly and cautiously though it does have the power to reject the plaint in a proper case.

In **Popat and Kotecha Property v. State Bank of India Staff Assn.** 2005 7 SCC 510, Supreme Court noted that the real object of Order 7 Rule 11 of the Code of Civil Procedure is to keep irresponsible law suits out of the Courts and discard bogus and irresponsible litigation. It was further held that dispute questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 of CPC.

11. Section 4(1) of the Benami Transactions (Prohibitions) Act, 1988, to the extent it is relevant, provides that no suit to enforce any right in respect 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. *Benami* transaction has been defined in Section 2(a) of the Act to mean any transaction in which property is transferred to one person for a consideration paid or provided by another person.

12. The plea of the applicant/defendant No. 1 is that

since the case setup by the plaintiff is that plot No. 6, Jor Bagh was leased by L&DO in the sole name of Shri Harcharan Singh Brar though half of the consideration for acquisition of the plot came from his funds, the plaintiff is setting up a *benami* transaction which is hit by Section 4(1) of Benami Transactions (Prohibitions) Act, 1988.

13. Sub-Section (3) of Section 4 of Benami Transactions (Prohibitions) Act, 1988 provides that nothing in this Section shall apply 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. Relying upon the aforesaid provision, it was contended by the learned counsel for the plaintiff that since Shri Harcharan Singh Brar, being father of the plaintiff, stood in a fiduciary capacity viz-a-viz the plaintiff, who at the time of acquisition of plot No. 6, Jor Bagh was about five-year-old and the half of the aforesaid property was acquired for the benefit of the plaintiff, the suit is not hit by the prohibition contained in Section 4 of Benami Transactions (Prohibitions) Act, 1988.

14. The learned senior counsel for the plaintiff has also

relied upon Section 88 of Indian Trusts Act, 1882, which, to the extent it is relevant, provides that where a person, bound in a fiduciary character to protect the interests of another person, by availing himself of that character, gains for himself any pecuniary advantage or enters into any dealings under circumstances in which his own interests are or may be adverse of such other person, thereby and gains for himself a pecuniary advantage, he must hold the advantage so gained by him for the benefit of such other person. Illustration (h) to the Section states that if a guardian buys up for himself encumbrances on his Ward's estate at an undervalue, he holds, for the benefit of Ward, the encumbrances so bought and can only charge him with what he has actually paid.

It would be appropriate to note here that though the provisions of Section 81, 82 and 94 of Indian Trusts Act, 1988 were repealed by Benami Transactions (Prohibitions) Act, 1988, the provisions of Section 88 were not repealed.

15. If the plaintiff is able to bring his case within the purview of sub-Section (3) of Section 4 of Benami Transactions (Prohibitions) Act, 1988 and/or Section 88 of Indian Trusts Act, 1888, it would be difficult to say that the

suit is barred by Section 4 (1) of Benami Transactions (Prohibitions) Act, 1988 and, therefore, the plaint is liable to be rejected on this ground.

16. It is alleged that in the plaint and is otherwise an undisputed fact that plot No. 6 Jor Bagh was leased on 29th May, 1952. It is also alleged in the plaint that the plaintiff is aged about 61 years. If the plaintiff was aged about 61 years in the year 2010 when the suit was filed, he would be three-year-old when Plot No. 6, Jor Bagh was leased by from L&DO in the year 1952. The plaintiff thus was a minor and of a very tender age when this plot was acquired from L&DO. It has been pleaded and is otherwise an admitted case that Shri Harcharan Singh Brar was father of the plaintiff. Thus, the plaintiff has pleaded that he is the son of late Shri Harcharan Singh Brar and was about three-year-old when plot No. 6, Jor Bagh was acquired from L&DO. As noted earlier, the plaintiff has pleaded that half of the consideration for purchase of the aforesaid plot was paid out of the funds generated by sale of lands which fell in his share in the partition held on September 30, 1951.

17. For the purpose of deciding an application under Order 7 Rule 11 of CPC, the averments made in the plaint

have to be taken as correct and it is not permissible for the Court to go into the plea taken by the defendants in the written statement and/or the documents filed by them.

18. Admittedly, the parties to the suit, being Hindus, are governed by the provisions of a Hindu Minority and Guardianship Act, 1956. Section 6 of the aforesaid Act, to the extent it is relevant, provides that the natural guardian of Hindu minor, in respect of the minor's person as well as in respect of minor's property is the father. Shri Harcharan Singh Brar, therefore, was the natural guardian of the plaintiff when Plot No. 6, Jor Bagh, New Delhi was acquired from L&DO. In my view, if the child is aged about 3/5 years, it would be difficult to dispute that the father, being his natural guardian, stands in a fiduciary capacity vis-a-vis the minor child.

The word 'fiduciary' used in Section 3(2)(b) of Benami Transactions (Prohibitions) Act, 1988, has not been defined either in this Act or in Indian Trusts Act. Black's Law Dictionary (8th Edn.) defines fiduciary relationship amongst others as a relationship between guardian and ward. It also includes a relationship where one person assumes control and responsibility over other. It is further

stated that one is said to act in a “fiduciary capacity” when the business which he transacts or the monies or properties, which he handles, is not his own or for his own benefit but for the benefit of another person. Walker has defined ‘fiduciary’ as under:

“A ‘fiduciary’ is a person in a positing of trust, or occupying a position of power and confidence with respect to another such that he is obliged by various rules of law to act solely in the interest of the other, whose rights he has to protect. He may not make any profit or advantage from the relationship without full disclosure. The category includes trustees, Company promoters and directors, guardians, solicitors and clients and other similarly placed.”

If there is a transaction, involving a conflict of interest and duty in the person in whom confidence is reposed by another person, fiduciary relationship springs into existence. The law, in my view, reposes faith in the father, vis-à-vis the minor child, by appointing/recognizing him as the guardian of his child. The fiduciary relationship between a minor child and his father is thus created on account of their very relationship and a statutory recognition of the father as natural guardian of the child. Moreover, it cannot be disputed that it is the father who, as

his natural guardian exercises control on the child and is primarily responsible for his welfare. He is under a moral obligation to protect and safeguard the interest of his minor child. The law does not permit him to misuse his position as guardian of the child by using the funds of the child to acquire a property in his own name. If he does so, he betrays the trust which law reposes in him, by vesting him with the position of guardian of his child. A child of three/five years, who in law is in the custody and care of his father, he being his natural guardian, is incapable of even understanding and appreciating a property transaction not to talk of taking a rational view with regard thereto. It is the father, who being the natural guardian not only of the person, but also of the property of the minor child, has to deal with the property of the minor. While doing so, the father is duty bound to act in the best interests of the minor and it is this relationship of trust and confidence which creates the fiduciary relationship between them. It, therefore, appears to me that since there was a fiduciary relationship between the plaintiff and Shri Harcharan Singh Brar, he was duty bound to act in the best interest of the plaintiff and could not have abrogated the funds of the

plaintiff to his personal use by obtaining lease deed of the entire plot in his sole name. If the father of a minor child, who lacks not only legal capacity to contract, but also the maturity and rationale required for handling his property, misuses the confidence reposed in him and acquires the property in his sole name, despite paying half of the consideration from the funds belonging to the minor child which he controls on account of his being the natural guardian of the minor, he holds the property to the extent it is acquired from the funds of the minor, for the benefit of the minor, his position towards the minor being akin to that of a trustee.

19. It was contended by the learned senior counsel for the applicant/defendant that since trust of immovable property can be setup only by way of a registered instrument or by a Will, as provided in Section 5 of Indian Trusts Act, 1982, and no such instrument was executed in this case, it cannot be said that Shri Harcharan Singh Brar was a trustee for the plaintiff. I, however, find no merit in this contention. A careful perusal of Clause (b) of sub-Section 3 of Section 4 of the Benami Transactions (Prohibition) Act, 1988 would show that it excludes, from

the operation of Section 4(1) and 4(2), two types of transactions, firstly where the person holding the property is a trustee for another person and the other where the person holding the property though not trustee in the strict sense of the expression, stands in a fiduciary capacity vis-à-vis the person for whose benefit the property is held by him.

In ***Sarabjit Singh Anand and Others v. Manjit Singh Anand and others***, 2008 INDLAW DEL 1289 the Court was of the view that the word “trustee” in Clause (b) of sub-Section 3 of Section of the Benami Transactions (Prohibition) Act, 1988 can also imply existence of a relation of active confidence or a fiduciary one and, therefore, the exception is not limited to a trustee of a registered trade trust and covers even persons other than trustees but sharing a fiduciary relationship. Hence, a transaction in which the property is acquired by a person, who stands in a fiduciary capacity vis-à-vis another person also constitutes an exception to sub-Section (1) and (2) of Section 4. It would be pertinent to note here that in that case, the property was alleged to have been purchased by the parents in the name of a major son. Still the Court was of the view that the transactin before it was a benami transaction as

pleaded, which was saved by Section 4 (3) (b) of the Act and, therefore, the plaint may not be rejected.

20. It was also contended by the learned senior counsel for the defendant that neither any trusteeship nor any fiduciary relationship has been pleaded by the plaintiff and, therefore, no such plea can be set up during arguments. I, however, find no merit in this contention. The fiduciary capacity of father vis-à-vis a minor child arises on account of their relationship and the father being statutorily recognized/appointed as the guardian of the minor child. Such capacity need not be expressly pleaded in so many words when the facts which give rise to such a capacity have been pleaded by the person setting up a fiduciary capacity. As noted earlier, it has been pleaded that the plaintiff was 61 years old at the time of filing of the suit, which would mean that he was about 3 years old when lease deed in favour of late Shri Harcharan Singh Brar was executed by the L&DO. It has also been pleaded that late Shri Harcharan Singh Brar was father of the plaintiff and half of the consideration for purchase of Jor Bagh Plot came from the funds of the plaintiff. It has also been pleaded that the lease deed was obtained by late Shri Harcharan Singh

Brar in his sole name despite half of the consideration having come from the coffers of the plaintiff. Therefore, it was not necessary for the plaintiff to say in so many words that there was a fiduciary relationship between him and late Shri Harcharan Singh Brar.

21. Illustration (h) to Section 88 of the Indian Trusts Act, 1882 clearly shows that the guardian of a ward holds the position of a fiduciary vis-à-vis the ward and is duty bound to protect his interest. If he avails any pecuniary advantage for himself by virtue of his fiduciary character, the advantage so gained by him is held by him for the benefit of the ward. As noted earlier, the father of a minor child is his natural guardian. The expression 'ward' as defined in Guardians and Wards Act, 1890 means a minor for whose person or property or both there is a guardian. Since a Hindu father is the natural guardian not only for the person but also for the property of his minor child, it cannot be disputed that the relationship of a father and a minor son is that of a guardian and a ward. Consequently, the provisions of Section 88 of Indian Trusts Act would apply to such a relationship and a father, in his fiduciary character as the guardian of a minor child is duty bound to protect

his interest and cannot gain any advantage for himself at the costs of and to the detriment of his child. If the father obtains any financial advantage, to the detriment of his minor child, that advantage accrues to the benefit of the minor child and not his father. In fact, the provisions of Section 88 of Indian Trusts Act when read with illustration (h) indicate in no uncertain terms that a father stands in a fiduciary capacity vis-à-vis his minor child. The suit, therefore, is not hit by Section 4 of the Benami Transactions (Prohibition) Act, 1988.

22. In **Canbank Financial Services Ltd. v. Custodian and others, (2004) 8 SCC 355**, Supreme Court held that the list of persons specified in Section 88 of the Trusts Act is not exhaustive and that the heart and soul of the matter is that wherever as between two persons one is bound to protect the interests of the other and the former availing of that relationship makes a pecuniary gain for himself, the provisions of Section 88 would be attracted irrespective of any designation, which is immaterial. It is difficult to dispute that the father of a Hindu child being natural guardian not only of his person but also of his property is duty bound to protect the financial interest of

his child and would be covered in the expression “other person bound in a fiduciary character to protect the interest of another person” used in Section 88 of the Indian Trusts Act. In fact, there cannot be any reasonable dispute about this proposition when the matter is examined in the light of illustration (h) to this Section.

In ***P.V. Shankara Kurup v. Leelavathy Nambiar***, (1994) 6 SCC 68, Supreme Court, inter alia, observed as under:-

“3....That apart under Section 88 of the Indian Trusts Act, 1882, an agent or other person bound in a fiduciary character to protect the interests of the principal and the former would hold the property for the benefit of the principal or the person on whose behalf he acted as an agent. The question of benami, therefore, does not arise, though Section 4 of the Benami Transactions (Prohibition) Act, prohibits such a plea. Sub-section (3)(b) provides that:

“Nothing in this section shall apply,—

(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.”

Section 7 does not repeal Section 88 of Trust Act. When an agent was employed

to purchase the property on behalf of his principal and does so in his own name, then, upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal. The property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The petitioner has acted as an agent, as a *cestui que trust*, is a trustee and he held the property in trust for the respondent in his fiduciary capacity as an agent or trustee and he has a duty and responsibility to make over the unauthorised profits or benefits he derived while acting as an agent or a trustee and properly account for the same to the principal.”

Since Section 88 of the Indian Trusts Act refers not only to an agent but also to any other person, who is bound in fiduciary character to protect the interest of another person and the father does hold such a character vis-à-vis his minor child, the question of benami does not arise in respect of a transaction where property is purchased by the father in his own name though from the funds of his minor child.

In ***Sunitha v. Ramesh, 2010 (3) KLT 501***, a Division Bench of Kerala High Court while considering relationship of husband-wife, inter-alia, observed that trustees, executors, administrator, director of a corporation or society, medical or religious adviser, husband and wife,

ward and guardian, agent and principal etc. can safely be held to be a fiduciary relation for the purpose of Section 51© of the Code of Civil Procedure. As observed by Kerala High Court in ***Treesa Irish W/o Milton Lpez v. the Central Public Information Officer, the Appellate Authority, the Central Information Commission and Union of India, ilr 2010 (3) Kerala 892***, at the heart of fiduciary relationship lie reliance, de facto control and dominance and a fiduciary relationship exists when confidence is reposed on one side and there is resulting superiority and influence on the other. Since father holds a domain position vis-à-vis his minor child and exercises not only de jure but also de facto control on him as well as his property and practically takes all decisions on behalf of his minor child, a fiduciary relationship definitely exists between them.

In ***Firm Makhanlal Girwarlal v. Harnarain and Others, AIR 1960 MP 56***, the Court was of the view that there exists fiduciary relationship between father and son, it is manifested in Section 8 of Hindu Minority and Guardianship Act, 1956.

23. The learned counsel for the defendant has relied upon the decision of this Court in ***Anil Bhasin v. Vijay***

Kumar Bhasin and others, 102(2003) DLT 932 where the case of the plaintiff was that defendant No.3, son of late Smt. Raj Rani Bhasin held the property as the trustee and stood in a fiduciary relationship qua his mother. During the course of the judgment, this Court observed that it is only those instances of fiduciary capacity such as property of partnership firm held in the name of one of the partners or property which Mr. X wanted Mr. Y to buy in the name of Mr. X but in violation of that instruction, Mr. Y buys it in his own name. This judgment does not consider the relationship of a father vis-à-vis his minor child. In the present case, the property is alleged to have been purchased by the father in his own name using the funds of his minor child who on account of his tender age and being in control and under guardianship of his father was incapable of looking after his own interest and whose interest the father was duty bound to protect and preserve. This judgment was distinguished by this Court in ***Sarabjit Singh Anand and Others (supra)*** and it was pointed out that in this case the benami transaction was undertaken in the year 1997 i.e. after enforcement of the Benami Transaction (Prohibition) Act, 1988. Consequently, the prohibition

under Section 3(1) of the Act was in force at that time. In this case, the Court did not say that with the repeal of Sections 81 and 82 of the Indian Trusts Act, the party relying upon a benami transaction (in cases where Section 4(3)(a) and (b) is invoked) cannot be permitted to prove the said benami transaction and the existence of conditions 4(3)(a) and 4(3)(b) of the Act. The Court was of the view that in **Anil's case** (supra), the Court gave only illustrations while dealing with what constitute acting in a fiduciary capacity and the observations of the Court constitute merely an obiter since the Court was not dealing with all possible situations in which a person can be said to be acting in or be placed in a fiduciary capacity in relation to another.

24. The learned counsel for the defendant has next referred to the decision of this Court in **Ram Prakash Kathuria v. Ved Prakash Kathuria and other, 2007 V AD (Delhi) 694**, wherein it was alleged that the property was purchased by defendant No.3 (son of Smt. Sita Devi) out of his own funds though in the name of Smt. Sita Devi. Relying upon Section 3 of the Benami Transaction (Prohibition) Act, 1988, this Court held that the basis of the suit was ill founded. This judgment, however, does not

apply to a transaction where the property is acquired by the father in his own name from the funds of the minor child. If the property is acquired by the father or mother in the name of a minor child, the child may not be said to be acting in a fiduciary capacity vis-à-vis his parent, but, where the property is acquired by the parents in his/her name from the funds of the minor child, the parent acquiring the property in his/her name does act in a fiduciary capacity vis-à-vis the child.

25. The learned counsel for the defendant has also referred the decision of this Court in ***Aarti Sabharwal v. Jitender Singh Chopra & Ors.*, 162 (2009) DLT 38** where the property was alleged to have been held by the mother as benami for her son. During the course of the arguments, it was contended before this Court that the mother was holding the property in fiduciary capacity for the son. The Court noted that this was neither pleaded nor substantiated even prima facie nor any document filed along with the plaint and from a reading of plaint, no case was made out to show that mother was in fact holding the property in any fiduciary capacity for defendant No.1, who was her son. There is nothing on record to indicate that the defendant

No.1 in that case was a minor child. There is nothing in the judgment to indicate that the property was purchased by the mother from the funds of the son. On the other hand, in the case before this Court, there is a specific averment in this regard in the plaint and the plaintiff has also filed a number of documents in support of his claim that half of the consideration for purchase of Jor Bagh plot was paid from the funds owned by him. Therefore, this judgment does not help the defendant in any manner.

26. Learned counsel for the defendant has lastly referred to the decision of Supreme Court in ***a. Rajagopal Reddy (dead) by L.Rs. and others v. Padmini Chandrasekharan (dead) by L.Rs., AIR 1996 SC 238*** wherein it was held that Section 4 of the Benami Transaction (Prohibition) Act, 1988 does not have retrospective application. This judgment, to my mind, has not applicability to the facts of the present case.

27. For the reasons given in the preceding paragraphs, it cannot be said that the suit is barred by Section 4 of the Benami Transaction (Prohibition) Act, 1988.

28. As regards the plea that the plaintiff has not challenged the lease deed executed by L&DO in the name of

late Shri Harcharan Singh Brar, the contention of the learned counsel for the plaintiff was that he need not challenge the lease deed, since has already sought a declaration that the plaintiff is the owner of ½ of the suit property, in order to obtained the reliefs. The application does not indicate under which provision of law, the reliefs claimed by the plaintiff are not available to him without challenging the lease deed executed by L&DO in favour of late Shri Harcharan Singh Brar. Therefore, the plaint is not liable to be rejected on this ground.

29. For the reasons given in the preceding paragraphs, I find no merit in I.A. No.4016/2011 and the same is hereby dismissed.

30. As regards I.A. No.4700/2011, the plaintiff by way of proposed amendments wants to specifically plead that late Shri Harcharan Singh Brar held the suit property for the benefit of all the joint owners and the purchase was in trust and for the benefit of the plaintiff and defendant No.2. He also wants to specifically plead that he was 5 years old at the time of purchase of the aforesaid property. He further wants to plead that late Shri Harcharan Singh Brar held the suit property in fiduciary capacity in trust and for

the benefit of the plaintiff to the extent of 50% and benefit of defendant No.2 to the extent of 25% of the property.

31. It is settled proposition of law that an amendment should generally be allowed, unless it is shown that permitting the amendment would be unjust and would result in prejudice to the opposite party which cannot be compensated by cost or would deprive him of a right which has accrued to him with the lapse of time. Errors or mistakes, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or Written Statement. If there is no undue delay, no inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and the application for amendment is not *mala fide* or will not prejudice the opposite party, the amendment should ordinarily be allowed.

32. Since I am of the view that a fiduciary capacity in such a transaction arises on account of relationship which a father has with a minor child and considering that all the facts necessary to constitute a fiduciary capacity have already been pleaded by the plaintiff, the proposed amendment is merely by way of elucidation in order to plead

the case of the plaintiff more specifically and in express words. Therefore, I see no reason to refuse the proposed amendment. No new case is sought to be set up by the proposed amendment. Since the facts constituting foundation of the proposed amendment have already been pleaded, neither the defendants will be taken by surprise nor will any prejudice be caused to them by allowing the proposed amendment. It was contended by the learned counsel for the defendant that the amendment cannot be allowed if it has the effect of taking away a vested right, which has accrued in favour of opposite party due to passage of time. The case of the plaintiff is that he came to know of the gift deed executed by late Shri Harcharan Singh Brar in favour of defendant No.1 only after the death of Shri Harcharan Singh Brar on 6th September, 2009. If this is so, the suit may not be barred by limitation even if the proposed amendment is allowed. No additional relief is being sought by way of proposed amendment. In any case, it is not possible at this stage to say that the proposed amendment will have an effect of taking away some vested right, which have accrued to the defendant on account of omission of the plaintiff to plead these facts in the initial

pleadings.

33. Section 16(c) of the Specific Relief Act, 1963 provides that specific performance of a contract cannot be enforced in favour of a person, who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant. Despite the provisions of Section 16(c) having been held to be mandatory, an amendment to plead that the plaintiff had performed or had always been ready and willing to perform the essential terms of the contract, which were required to be performed by him has been allowed in a number of cases.

In Gajanan Jaikishan Joshi vs. Prabhakar Mohanlal Kalwar, (1990) 1 SCC 166 in his suit for specific performance of the agreement, the plaintiff/appellant had not pleaded that he was willing to perform his part of the contract. The defendant filed written statement taking a plea that the suit was not maintainable for non-compliance of the provisions of Section 16(c) of Specific Relief Act. When the matter was listed for

arguments on the preliminary issue as to whether the suit was maintainable, the plaintiff/appellant applied for leave to amend the plaint by incorporating an amendment in the plaint that he was and had always been ready and willing to perform his part of the agreement. The application was rejected by the trial court and a revision filed against that order was dismissed by the High Court. Allowing the appeal filed by the plaintiff, Supreme Court observed that no fresh cause of action was sought to be introduced by the amendment applied for and all that the plaintiff sought to do was to complete the cause of action for a specific performance for which relief he had already prayed. The Court was of the view that since no fresh cause of action was sought to be introduced by the amendment, there was no question of causing any injustice to the defendant/respondent. In taking this view, the Court relied on its earlier decision in (1957) 1 SCR 595, where the Court was of the view that all amendments ought to be allowed which satisfy the two conditions: (a) not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. The Court was of the view that the amendments

should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. In ***Shri Lakhi Ram (Dead) Through Lrs. v. Shri Trikha Ram & Ors., (1998) 2 SCC 720***, similar amendment was allowed during the course of an appeal filed by the defendant who had contended that the suit was barred by Section 16(c) of Specific Relief Act as the plaintiff did not aver in the plaint that he was ready and willing to perform his part of the contract. The High Court, however, set aside the order of the appellate court allowing the amendment. During the course of arguments, in the appeal filed by the plaintiffs against the decision of the High Court, it was contended on behalf of the defendant that amendment by introducing averments under Section 16(c) of Specific Relief Act cannot be granted in a suit which is defective on account of absence of such averments. Allowing the appeal filed by the plaintiff and setting aside the decision of the High Court, Supreme Court held that the amendment inserting the relevant averments under Section 16(c) of the Specific Relief Act does not change the cause of action and would be a legally

permissible exercise.

34. I.A. no. 4700/2011 is, therefore, allowed, subject to payment of Rs.25000/- as costs. Amended plaint has taken on record.

35. The application stands disposed of.

CS(OS) No.647/2010

Written statement to the amended plaint can be filed within four weeks. Replication, if any, thereto can be filed within two weeks thereafter. The parties shall appear before the Joint Registrar on 25th May, 2011 for admission/denial of documents.

The matter be pleaded before the Court on 31st May, 2011 for framing of issues and disposal of all pending applications.

(V.K. JAIN)
JUDGE

APRIL 08, 2011
BG/VKM