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

% **Date of decision: 16th July, 2013**

\+ CS(OS) 1828/2012, IAs No.5183/2013 (of defendant no.1 u/S 151 CPC), 11449/2012 (u/O 39 R-1&2), 22979/2012 (for directions) & 22980/2012 (u/S 151 CPC)

RAMESH ADVANI ..... Plaintiff
Through: Mr. Parmod K. Sharma, Adv.

versus

HIRO ADVANI & ANR ..... Defendants
Through: Mr. Manu Nayar, Ms. Nisha Rawat, Mr. Ajay Vikram Singh & Ms. Priyanka, Advs. for D-1.
Mr. Ritesh Agarwal, Adv. for D-2.

CORAM :-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. The plaintiff has sued for declaration that he is a co-owner of property bearing No.BA-238, Tagore Garden, New Delhi and for partition thereof and permanent injunction restraining the defendant no.1 from dealing with the said property, pleading:-

(i). that the plaintiff Shri Ramesh Advani and the defendants Shri Hiro Advani and Mrs. Manju Keswani are the only children of Shri Leelaram Jagatrai Advani who after his retirement from the post of Supdt. CPWD purchased plot No. BA-238, Tagore Garden, New Delhi *ad measuring* 80 sq. yds. from Delhi Development Authority (DDA) in the year 1964 from his "self

acquired funds" but in the name of his eldest son i.e. defendant no.1 Shri Hiro Advani;

(b). it was at that time a Joint Hindu Family comprising of the said Shri Leelaram Jagatrai Advani as head of the family, his wife Smt. Lachmi Advani, their two sons i.e the plaintiff and the defendant no.1 and their daughter i.e. defendant no.2;

(c). that a two and a half storeyed building was constructed by Shri Leelaram Jagatrai Advani thereon immediately after purchasing the plot "out of his self acquired own funds";

(d). that since construction aforesaid the family has been living therein jointly; the marriage of defendant no.2 was performed by Shri Leelaram Jagatrai Advani in 1966 "out of his own funds"; thereafter the defendant no.2 and subsequently the plaintiff were also married;

(e). the ground floor was let out by Shri Leelaram Jagatrai Advani to a tenant;

(f). that after the intestate death of Shri Leelaram Jagatrai Advani in 1976 the defendant no.1 started living on the ground floor and the plaintiff on the first floor of the house along with the mother, with the *barsati* floor let out to a tenant by the mother of the parties;

(g). *barsati* floor was also got vacated by the mother and was used by the children of the family for studying purpose;

(h). that the mother also died intestate in the year 1990;

(i). since the demise of the mother, the plaintiff and the two defendants are the joint owners having 1/3rd share each in the said property 'which is their parental property' with common use of the *barsati* floor;

(j). that the defendant no.1 has been taking Rs.1,750/- per year from the plaintiff in cash to pay Property Tax with the last such payment being made in March, 2011;

(k). that the elder son of the plaintiff shifted to another house in the neighbourhood after his marriage in the year 2006; the younger son of the plaintiff is living abroad; in the circumstances the plaintiff from time to time went and resided in his elder son's house in the neighbourhood while continuing to live on the first floor of the said property;

(l). that on 31st May, 2012 the plaintiff and his wife had gone to their elder son's house in the neighbourhood in the evening and stayed for the night there but when returned in the morning of 1st June, 2012, their entry was denied by the defendant no.1 and his family; the complaint to the Police and other authorities did not help; and

(m). that all the belongings of the plaintiff are still lying on the first floor.

Hence this suit.

2. Summons of the suit and notice of the application for interim relief were issued to the defendants and vide *ex parte ad* interim order dated 6th June, 2012 which continues to be in force the defendant was restrained from dealing with or parting with the first floor of the property; a Court Commissioner was appointed to make an inventory of articles lying on the first floor which could throw light on the person who has been in occupation thereof in the recent past with authority to take photographs and make enquiries from the neighbours; however the Court Commissioner could not enter the premises since the same were locked and the defendant no.1 stated that he had misplaced the key; accordingly vide subsequent order dated 8th June, 2012 order for breaking up of the door to the first floor was issued.

3. Both the defendants have filed written statement, with the defendant no.1 contesting the claim of the plaintiff and the defendant no.2 supporting the plaintiff.

4. The defendant no.1 in his written statement has contested the claim in suit pleading:-

(i). that the suit has neither been valued properly for the relief of declaration claimed nor has the appropriate Court fees been paid thereon;

(ii). that the defendant no.1 had sent a legal notice dated 16th September, 2003 asking the plaintiff to vacate the first floor, which was duly delivered and the suit claim is barred by time;

(iii). that there was no Joint Hindu Family though the family was living jointly;

(iv). the defendant no.1 was gainfully employed in Federation of Associations of Small Industries of India in the year 1960 as a Stenographer and was in the year 1964 when the plot was acquired, drawing a salary of about Rs.400/- per month;

(v). the plot aforesaid was allotted to the defendant no.1 by the DDA under the LIG Scheme;

(vi). that the defendant no.1 deposited Rs.300/- in cash with the DDA on 7th October, 1963 and upon allotment vide letter dated 13th January, 1964 DDA asked the defendant no.1 to deposit further amount of Rs.2,590/- for execution of the Lease Deed; the defendant no.1 deposited the said amount on 30th March, 1964 and on 3rd July, 1964 deposited Rs.149/- towards charges for Stamp Duty and receipts for all the said amounts are in the name of defendant no.1 and on the basis thereof perpetual Lease Deed dated 29th September, 1964 was executed by the DDA in favour of the defendant no.1;

(vii). that the construction on the aforesaid plot was started in the year 1965 by the defendant no.1 with his own savings and loan was applied for from the Life Insurance Corporation of India (LIC) against the three policies held by the defendant no.1 and by mortgaging the said plot on 29th August, 1966;

(viii). that in reply to query of the LIC the defendant no.1 vide his letter dated 15th June, 1966 informed LIC that the property to be mortgaged was his self acquired property and he was the

exclusive owner thereof and that his father and brother had no share therein;

(ix). that Completion Certificate was issued in the name of the defendant no.1; property recorded in the MCD in the name of the defendant no.1 and leasehold rights in the land underneath the property converted into freehold on 11th October, 1993 again in the name of defendant no.1;

(x). that the residence of the plaintiff in the said property of the defendant no.1 was out of love and affection and as a licensee;

(xi). that the ground floor was let out by the defendant no.1 only and proceedings for eviction of the tenant on the ground floor were filed and pursued by the defendant no.1 only;

(xii). that the *barsati* floor was never given on rent and has always been in possession of the defendant no.1;

(xiii). that the Property Tax was always paid by the defendant no.1 by cheque and the defendant no.1 never took even a single rupee from the plaintiff for Property Tax;

(xiv). that the plaintiff with his family shifted to a house in the neighbourhood in the year 2006-2007 soon after the marriage of the elder son of the plaintiff on 3rd October, 2006 and their names in the Electoral Rolls of the year 2009 and 2012 are also at the address of the said other property; the telephone earlier installed in the name of the plaintiff was also in October, 2006 shifted to the other property; and,

(xv). that the plaintiff and his wife on 31st May, 2012 suddenly wanted to take possession of the first floor.

5. The plaintiff has filed a replication, (a) controverting that the suit is not properly valued and service of legal notice dated 16th September, 2003; (b) denying for want of knowledge that the defendant no.1 was employed since the year 1960 and pleading that it was the father of the parties who had applied to the DDA in the name of the defendant no.1 and had paid all the amounts therefor and the challans of deposit filed by the defendant no.1 with his written statement are in the handwriting of the father; (c) pleading that all the records are in the name of the defendant no.1 because the application for allotment and the allotment were in the name of the defendant no.1; (d) pleading that the defendant no.1 had himself executed an affidavit dated 23rd December, 1974 affirming and declaring that he was a member of the Joint Hindu Family headed by father also resident of the suit property and that his father had purchased the said plot and raised construction thereon and which affidavit also bears the signature of the father of the parties and the defendant no.1 in admission/denial has falsely denied his signature and signatures of the father thereon; (e) pleading that at the time of allotment and construction all the parties were unmarried and the decisions were taken and all the funds managed by the father only and the father may have taken loans against the LIC policies in the name of the defendant no.1; (f) pleading that all the loans were repaid by the father and it was for this reason only that affidavit dated 23rd December, 1974 was executed by the defendant no.1; (g) pleading that prior to shifting into the said property the family was residing in the government accommodation allotted to the father; (h) pleading that the

conversion of lease hold rights in the land underneath the property into freehold was not in the knowledge of the plaintiff; (i) that the defendant no.1 never claimed to be the sole owner of the property; (j) pleading that though the father had let out the ground floor and was collecting the rent thereof but since the lease deed with the tenant was in the name of the defendant no.1 the eviction proceedings were initiated against the tenant in the name of the defendant no.1; (k) pleading that the plaintiff and his wife have throughout been living on the first floor ; (l) pleading that the address in the Electoral Rolls was got changed since the plaintiff and his wife were then staying with the younger son at Bangalore and to ease receipt of correspondence.

6. The Court Commissioner in his report dated 6th July, 2012 has reported:-

(A). that the walls of all the rooms on the first floor were damp due to water seepage; the plaster on the walls was cracked and the paint peeling off;

(B). that the plaintiff identified his belongings lying in all the rooms which include a wooden bed, TV cabinet, diwan, cupboards, old clothes, utensils and old books; the defendant no.1 did not deny the said articles to be belonging to the plaintiff but denied that the plaintiff and his family were residing on the first floor;

(C). that certain bank account statements and phone bills of the year 2005 in the name of the plaintiff's son were also found;

(D). the calendar on the wall was of the year 2007; and,

(E). that looking at the condition of the premises it appeared that the said portion of the house had been locked since a very long period of time and the condition thereof was such that no person could possibly be living therein in the recent past.

The keys of the lock on the door of the first floor have been deposited by the Court Commissioner in this Court.

7. Arguments on the applications of the plaintiff for interim relief restraining the defendant no.1 from interfering in the use and enjoyment by the plaintiff of the first floor and common use of the *barsati* floor and of delivery of keys of the first floor lying deposited in this Court and for this Court to on its own compare the signatures purportedly of the defendant no.1 on the affidavit dated 23rd December, 1974 and the admitted signatures of the defendant no.1 on the Court record and for sending of the said documents to a recognized Government Forensic Science Laboratory for comparison were heard on 21st May, 2013 when the counsel for the plaintiff was asked to address also on the aspect of maintainability of the suit in view of the bar of the Benami Transactions (Prohibition) Act, 1988 (Benami Act) (though no such plea was taken by the defendant no.1) and arguments on the said aspect also heard and order reserved.

8. I will first take up the aspect of the maintainability of the suit in view of the bar of the Benami Act in as much as if the suit were to be found to be not maintainable, the question of adjudicating the applications aforesaid would not arise.

9. The claim of the plaintiff in the suit, in a nutshell, is that the property aforesaid was acquired and built by the father of the parties from his self acquired funds but in the name of the defendant no.1 and the family then was a Joint Hindu Family.

10. The Benami Act was enacted to prohibit *benami* transactions and the right to recover property held *benami* and for matters connected therewith or incidental thereto. Section 2(a) thereof defines *benami* transaction as a transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 4 thereof bars any 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 and at the instance of a person claiming to be the real owner of such property.

11. In the light of the aforesaid provisions, it was enquired from the counsel for the plaintiff whether not the claim of the plaintiff, of the subject property being transferred by the DDA to the name of the defendant no.1 for consideration paid or provided by the father and of the plaintiff as such being the real owner of 1/3rd share in the property by inheritance, against the defendant no.1 in whose name the property is held, is hit by the bar of the Benami Act and if that were to be the case of the plaintiff whether not, even if there was to be any truth therein, the said property is liable to acquisition under Section 5 of the said Act.

12. The counsel for the plaintiff has contended (a) that the case of the plaintiff is covered by the exception provided in Section 4(3) of the Benami

Act; and, (b) reliance is placed on ***Marcel Martins Vs. M. Printer*** (2012) 5 SCC 342.

13. Section 4(3) of the Benami Act makes the bar contained in Section 4 (1) & (2) inapplicable.

> *"(3)*
> *(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.*

14. Though the counsel for the plaintiff has not elaborated but it is obvious that for the plaintiff to fall in the exception provided in clause (a) supra, the plaintiff has to plead/prove/establish:-

(I). the existence of a Hindu undivided family;

(II). that the defendant no.1 and in whose name the property is held is a coparcener of the said Hindu undivided family; and,

(III). that the property is held by the defendant no.1 for the benefit of the coparceners in the family.

15. Similarly, for the claim of the plaintiff to fall in the exception provided in clause (b) supra (and invoking which the plea of benami was held to be not applicable, in ***Marcel Martins*** supra) the plaintiff has to plead/prove/establish:-

(i). that the defendant no.1 in whose name the property is held is a trustee of or was otherwise standing in a fiduciary capacity earlier of / towards the father and now of / towards the plaintiff and the defendant no.2; and,

(ii). the property was held by the defendant no.1 earlier for the benefit of the father and now for the benefit of the plaintiff and the defendant no.2 for whom he is the trustee or towards whom he stands in such fiduciary capacity.

16. The bar imposed by the Benami Act is invariably found to be got rid of by pleading a case to be under either of the aforesaid two exceptions. The question which arises for consideration is, whether such a plea has been made by the plaintiff and even if be so, whether a mere plea of the case falling in exceptions aforesaid is enough for the case to be set down for trial and which, experience of life shows generally drags on for several years, putting a clog on the property and thereby depriving the recorded owner thereof from exercising rights with respect thereto and often compelling him/her to settle with the claimants, negating the enactment of Benami Act and allowing litigation before the Courts to be used as a tool of coercion or oppression.

17. I am of the opinion that though undoubtedly where the pleadings make out a case for prohibition of the Benami Act to be inapplicable, the case ought to be set down to trial but not at the mere asking. The Court is required to study the pleadings carefully to judge whether the same

constitute the case of exception or is merely a pretence to somehow get the suit listed for trial and to use litigation as a tool of oppression/coercion.

18. When we look at the pleadings in the present case, there is no plea even for invoking either of the exceptions aforesaid. The relevant pleas in the plaint are:

> *"That Shri Leelaram Jagatrai Advani was gainfully employed with C.P.W.D. He retired from the post of Superintendent from C.P.W.D. After his retirement, he purchased a plot No.BA-238, Tagore Garden, New Delhi-110027 measuring 80 sq. yds. from his own self acquired funds, but in the name of his eldest son-defendant no.1. It was at that time a Joint Hindu Family. The family at that time comprised of Shri Leelaram Jagatrai Advani as the Head of the family, his wife Smt. Lachmi Advani, his two sons Hiro Advani, (defendant no.1), Ramesh Advani (plaintiff) and his daughter Manju Keswani @ Hardevi Advani (defendant no.2)."*
>
> *"That a two and a half storey building was constructed by Shri Leelaram Jagatrai Advani immediately after purchasing the plot out of his self acquired own funds which is the suit property in the present suit."*
>
> *"That after construction of the building, the family has been living therein jointly."*
>
> *"But even after the marriage of plaintiff and defendant No.1, the family has been living jointly in the same house. However, the ground floor was let out by Shri Leelaram Jagatrai Advani to a tenant."*
>
> *"That Shri Leelaram Jagatrai Advani died intestate in 1976 leaving behind him following legal heirs:-*
>
> *(a) Smt. Lachmi Advani (Widow)*
> *(b) Mr. Hiro Advani (Son)*

(c) Mrs. Manju Keswani & Hardevi Advani (daughter). (Her name prior to marriage was Hardevi Advani which was changed by her husband and in-laws after marriage to Manju Keswani).
(d) Mr. Ramesh Advani (Son)"

"Unfortunately in 1990, Smt. Lachmi Advani also died intestate, leaving behind her the following legal heirs:-

(a) Mr. Hiro Advani (Son)
(b) Mrs. Manju Keswani & Hardevi Advani (daughter). (Her name prior to marriage was Hardevi Advani which was changed by her husband and in-laws after marriage to Manju Keswani).
(c) Mr. Ramesh Advani (Son)"

"All the parties are joint owners of the suit property, the same being their parental property, to the extent of 1/3rd undivided share in the suit property."

"That the suit property is a joint property of the parties wherein the plaintiff and defendant No.1 and 2 are joint owners having one-third undivided share each. Since the suit property is a joint property purchased and constructed by the father of the parties, but purchased in the name of defendant no.1 being the eldest son, the father of the parties had even submitted an affidavit to the authorities in this regard and the said affidavit was duly signed and verified by the defendant no.1."

It would thus be seen that though it is pleaded that at the time of acquisition of the plot the family of the plaintiff was a joint Hindu family also comprising of the defendant no.1 but there is no plea of the defendant no.1 being a coparcener or of the property being held by the defendant no.1 for the benefit of the coparceners in the family.

19 The exception in Section 4(3)(a) to the applicability of the Benami Act uses the term 'Hindu Undivided Family' as well as 'coparcener'. The Supreme Court in ***State of Maharashtra Vs. Narayan Rao*** (1985) 2 SCC 321 has held that a joint family may consist of female members also but a Hindu coparcenary is however a narrower body than the joint family; only male members who acquire by birth interest in the joint or coparcenary property can be members of the coparcenary or coparceners. The exception contained in 4(3)(a) of the Act restricts its benefit only to property held by a "coparcener in a Hindu Undivided Family" as opposed to any "Member' of such family. It is so because such coparceners are recognized by law to jointly by birth inherit rights in the joint property of the family and in the event such property stands in one of their names for the benefit of others, the Benami Act is declared to not come in the way. Such a principle however cannot be extended to all / any members of such family who do not have any vested right in the property and to whom such property devolves in their independent / separate capacity by way of intestate succession under the Hindu Succession Act. The pleading of the plaintiff is of a joint family of which the mother and sister of the parties were also members and not of coparcenary. Section 4(3)(a) though uses the word Hindu Undivided Family, but being in the nature of an exception to the general rule of prohibition of the right to recover property held *benami*, has to be construed strictly so as not to make the prohibition redundant. From the use of the word coparcenary in conjunction with Hindu Undivided Family in Section 4(3)(a), the reference to Hindu Undivided Family has to be read as a reference to a coparcenary and which as aforesaid as held by the Supreme Court is a narrower body than the

joint family. Thus the plea in the plaint of the existence of a joint Hindu family and in the absence of any plea of coparcenary cannot be read as a plea of exception carved out in Section 4(3)(a).

20. Though it is pleaded that the family at the time of acquisition of the plot was a joint Hindu family but it is nowhere pleaded that the plot was acquired or construction raised thereon from the funds of the family. Rather the plea is of the plot having been acquired and the construction being raised from the self acquired funds of the father and the father exercising the rights over the property as owner and the plaintiff and the two defendants becoming the 1/3rd owners each of the property on the intestate demise of their father and mother and being their only class I heirs under the Hindu Succession Act.

21. Mulla's commentary on Hindu Law, 18th Edition under para 214 thereof explains the genesis of coparcenery as under:-

> *A coparcenary is created in the following manner: A Hindu male A, who has inherited no property at all from his father, grandfather, or great-grandfather, acquires property by his own exertions. A has a son B, B does not take any vested interest in the self-acquired property of A during A's lifetime, but on A's death, he inherits the self-acquired property of A. If B has a son C, C takes a vested interest in the property by reason of his birth, and the property inherited by B from his father A becomes ancestral property in his (B's) hands, and B and C are coparceners as regards the property. If B and C continue joint, and a son D is born to C, he enters the coparcenary by the mere fact of his birth. Moreover, if a son E is subsequently born to D, he too becomes a coparcener.*

22. The Supreme Court in ***Makhan Singh Vs. Kulwant Singh*** (2007) 10 SCC 602 held that there is no presumption of a property, being joint family

property, only on account of existence of a joint Hindu family and the person who asserts so has to prove that there was a nucleus with which joint family property could be acquired. Thus from the mere plea of existence of a joint Hindu family at the time of acquisition of the plot and construction thereon and from the absence of any plea of a nucleus and rather the assertion of the property having been acquired by the father from his self acquired funds, it has but to be held that there is no plea in the plaint of the property at the time of acquisition / construction being of a coparcenary or of the defendant no.1 holding the same for the benefit of coparceners in the family.

23. Thought the Hindu Succession Act has been amended w.e.f. 2005 making females also coparceners but the father of the parties is stated to have died much prior to the said amendment, in the year 1976 and as per the law then applicable the mother of the parties and the defendant no.2 being the sister would not have inherited any rights in the property and the share of the father in the property would have devolved on the plaintiff and defendant no.1 by survivorship. However the pleading is of the property on the demise of the father being inherited by all his class I heirs i.e. including the mother and the sister and which also is a clear indication of absence of any coparcenery or the property being of any coparcenary.

24. The Supreme Court in ***Mayor (H.K.) Vs. Vessel M.V. Fortune Express*** (2006) 3 SCC 100 and recently followed by the Division Bench of this Court ***Santosh Malik Vs. Maharaj Krishan*** MANU/DE/0448/2012 while upholding the order of rejection of the plaint on the ground of the claim therein being barred by the Benami Act, held that the plaint has to be

read meaningfully and not formally and it is the duty of the Court to see whether a real cause of action has been made out in the plaint or something illusory has been projected and that after so reading, vexatious plaints have to be thrown out. In fact during the course of hearing it was repeatedly asked from the counsel for the plaintiff whether there was anything else to show that there was a coparcenary in fact in existence at any time; whether any Income Tax returns thereof were filed; whether there was any other joint property of the parties earlier or now. The counsel candidly admitted that there is none.

25. Merely because a person at the time of acquisition of the property may be residing with his parents and siblings and merely because the sale consideration has flown from the parents or from some other siblings is not enough to bring a case within the exception aforesaid to the prohibition contained in Benami Act. It cannot be lost sight of that *benami* transactions prevalent earlier, generally were between family members and hardly ever in the name of absolute strangers, and if pleas as in the present case were to be held to be falling within the exception clause, would negate the legislative intent of prohibiting actions to enforce rights in respect of property held *benami.*

26. I have considered whether the long admitted possession at least from the year 1967 till 2006-2007 i.e. of nearly 40 years of plaintiff of the premises can be said to raise any presumption of jointness or of the intent but I am unable to hold so. Such possession has to be seen in the context of Indian conditions where siblings especially brothers living together, even after their marriages, in a house belonging to one of them, is not uncommon.

27. As far exception (b) supra is concerned, it was imperative for the plaintiff to plead a relationship of trust between the defendant no.1 and earlier the father and/or that of defendant no.1 was standing in a fiduciary capacity and holding the property for the benefit of the father. There are no such pleas in the plaint. The plaintiff has merely relied on ***Sri Marcel Martins***. The Supreme Court in the said judgment has held that 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.

28. Having said that, it becomes important to see the factual context in which the said observations were made. In that case it was not in dispute that the title to the property even though as a tenant originally vested in the common ancestor of the parties who had died intestate and was transferred in the name of one of the heirs only at the instance of the Municipal Corporation to avoid procedural complications and all the legal heirs had made contributions towards the sale consideration for conversion of the tenancy rights into ownership rights and it was in these facts that the Supreme Court held the plea of *benami* to be not available and held the case to be falling in the exception. The present is however not a case of parties acquiring title to the property from a common ancestor; rather the case is that the common ancestor from his self acquired funds had acquired the subject property in the name of the defendant no.1. The said plea, even if

were to be ultimately proved, is squarely in the teeth of the prohibition in the Benami Act.

29. I would be failing in my duty if do not refer to the Division Bench dicta in ***Manjeet Singh Anand Vs. Sarabit Singh Anand*** MANU/DE/1205/2009 where rejection of the plaint on the ground of claim therein being barred by the Benami Act was denied on the existence in the plaint of the plea of existence of a joint family and which was held to imply Hindu Undivided Family, observing that though the case of the plaintiff therein was weak and not likely to succeed but holding the same to be no ground for ousting the plaint under Order VII Rule 11 of the CPC. However in that case there were averments in the plaint of the property being held for the benefit of coparcerners in the family and the defendant holding the property as a trustee for the benefit of all the family members and which as aforesaid are lacking in the present case. I therefore do not consider myself bound by the said judgment. Mention in this regard may also be made of another Division Bench of this Court in ***Babita Pal Vs. Jagdish Bansal*** 196 (2013) DLT 792 where also a plea for summary dismissal of the suit for reason of the claim therein being barred by the Benami Act was rejected for the reason that the real import of the transaction and the relation between the parties could be determined only after trial. However, I do not consider myself bound thereby also for the reason discussed in detail in my recent pronouncement dated 04.07.2013 in CS(OS) No.1026/2010 titled ***Peeyush Aggarwal Vs. Sanjeev Bhavnani*** and for which reason it is not deemed necessary to burden this judgment therewith.

30. That brings me to the only document in this regard filed by the defendant no.1 and qua which application aforesaid has also been filed by the plaintiff for examination of the signatures by this Court and/or for reference of the signatures to an expert. The counsel for the plaintiff in this regard has also relied on paras 36 to 39 of ***Ajit Savant Majagavi Vs. State of Karnataka*** AIR 1997 SC 3255.

31. In the said affidavit purportedly of the defendant no.1, the defendant no.1 has deposed that he is a member of the Joint Hindu Family headed by the father; that the father had purchased the plot and constructed on the same in his name; that the expenses incurred on the house were being borne by and income therefrom being also received by the father as head of the joint family.

32. The question which arises is whether the said affidavit would take the suit away from the clutches / prohibition of the Benami Act.

33. I am unable to see how. If the same were to be permitted, it would amount to the Courts permitting the Benami Act to be defeated merely by the real owners obtaining execution of such documents from the *benami* owners; rather the said affidavit is an unequivocal admission of the property being *benami* and rights wherein cannot be enforced by the plaintiff claiming to be the true owner of a share in the property by inheritance from the father. The said affidavit nowhere advances the case of the existence of the coparcenary of which the plaintiff and the defendant no.1 can be said to be coparceners.

34. Even otherwise, without any special circumstances and which are not pleaded, there cannot be any question of a grown up son being a trustee of the father or standing in a fiduciary capacity qua the father.

35. Thus whichever way one looks at, the claim in the suit is barred by the Benami Act.

36. Faced therewith the counsel for the plaintiff had contended that the plaintiff has been in possession of the first floor and even if not having any rights in the property, cannot be dispossessed therefrom without due process of law.

37. However the report as aforesaid of the commission issued at the instance of the plaintiff is of the first floor though containing the belongings of the plaintiff being not in use for the last several years. The Commissioner, as directed, has also taken photographs and a perusal whereof also supports the said report. In any case no objections against the said report have been filed. Moreover, once it is held that the plaintiff has no right in the property and was living therein as a licencee of the defendant no.1 and once it is found that the plaintiff on the date of institution of the suit was not living in the property, mere finding of the goods and articles belonging to the plaintiff in the said premises would not entitle the plaintiff to be put back into possession. Reference in this regard may be made to Section 65 of the Indian Easement Act, 1882 which provides the remedy of dispossessed licensee as for compensation only and not for repossession. I have had an occasion to discuss this aspect in detail in a recent judgment in ***Keventer Agro Limited***

Vs. Kalyan Vyapar Pvt. Ltd. MANU/DE/1479/2013 and need is thus not felt to reiterate the same here.

38. The suit is accordingly dismissed as barred by the provisions of the Benami Act. Resultantly all pending applications are also dismissed; however in the circumstances no costs.

Decree sheet be drawn up.

RAJIV SAHAI ENDLAW, J

JULY 16, 2013
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