

Sunil Buckshee Vs. K.M. Buckshee (Deceased) Through Lr???s and ors.

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SooperKanoon Citation : sooperkanoon.com/1086483

Court : Delhi

Decided On : Sep-26-2013

Judge : Rajiv Sahai Endlaw

Appellant : Sunil Buckshee

Respondent : K.M. Buckshee (Deceased) Through Lr???s and ors.

Advocate for Def. : Mr. N.K. Chauhan, Mr. Nitin Nayyar

Advocate for Pet/Ap. : Ms. Anisha Banerji, Ms. Mrinalini S. Gupta

Judgement :

*IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

26. h September, 2013 % + RFA 442/2004 SUNIL BUCKSHEE Through: Appellant Ms. Anisha Banerji & Ms. Mrinalini S. Gupta, Advs. with appellant in person. Versus K.M. BUCKSHEE (DECEASED) THROUGH LRs & ORS. Respondents Through: Mr. N.K. Chauhan, Adv. for R-1. Mr. Nitin Nayyar, Adv. for R-3. CORAM :HONBLE MR. JUSTICE RAJIV SAHAI ENDLAW RAJIV SAHAI ENDLAW, J 1. The appeal impugns the judgment and decree dated 30.04.2004 of the Court of Additional District Judge, Delhi of dismissal of suit No.350/03/90 filed by the appellant for declaration that he is the owner of residential premises bearing Flat No.8762, Pocket-8, Sector-C, Vasant Kunj, New Delhi to the extent of 40% share therein and for putting him into joint possession thereof along with the defendant No.1.

2. The appeal was admitted for hearing and vide ex parte ad interim order dated 11.08.2004 the respondents / defendants were restrained from selling the property. The counsel for the respondent / defendant No.1 on 06.10.2006 informed that the suit property had been sold by the respondent / defendant No.1 even before the filing of the present appeal. The respondent / defendant No.1 died during the pendency of the appeal. On application of the appellant / plaintiff, vide order dated 24.01.2008 the purchaser from the respondent / defendant No.1 of the property was impleaded as respondent No.3 and the said respondent No.3 was also restrained from creating third party interest in the property during the pendency of the appeal. The legal heirs of the respondent / defendant No.1 were substituted in his place vide order dated 19.01.2011, 28.03.2011 & 16.07.2013. The counsel for the appellant / plaintiff, the appellant / plaintiff in person, the counsel for the legal heirs of the respondent / defendant No.1 and the counsel for the respondent No.3 have been heard. None has appeared for the respondent / defendant No.2 DDA.

3. Though the appellant / plaintiff along with the memorandum of appeal has filed a copy of the plaint as amended vide order dated 10.09.1993 but I am unable to find on the Trial Court record any amended plaint. However since the counsel for the respondents / defendants have not disputed the same to be the amended plaint, the same is taken into consideration. The case of the appellant / plaintiff therein was: (i) that the property aforesaid was allotted by the respondent / defendant No.2 DDA on 20.01.1984 in the name of R.M. Buckshee who was the step brother of the appellant / plaintiff; (ii) that the appellant / plaintiff was also allotted a flat of his own in Vasant Kunj by the respondent / defendant No.2 DDA; (iii) that it was subsequently mutually agreed upon between the appellant / plaintiff and his step brother R.M. Buckshee that the appellant / plaintiff shall surrender the individual flat allotted to him by the respondent / defendant No.2 DDA in pursuance of the common understanding reached between them and in accordance with which the appellant / plaintiff and the said R.M. Buckshee were to jointly utilize the flat allotted in the name of the said R.M. Buckshee for the purpose of joint accommodation and living and in consideration of this the appellant / plaintiff shall pay the second and third installments accruing towards the flat allotted in the name of R.M. Buckshee; (iv) that there existed a HUF of

which R.M. Buckshee was the Karta and the appellant / plaintiff was the coparcener and which was also a factor to occasion the existence of a fiduciary relationship between the said R.M. Buckshee and the appellant / plaintiff; (v) that the appellant / plaintiff in pursuance of the aforesaid understanding, on 13.02.1984 surrendered the flat allotted to him, and paid the second and third installments of Rs.49,600/and Rs.62,000/- respectively to the respondent / defendant No.2 DDA of the said flat allotted in the name of R.M. Buckshee; (vi) that the amount of second and third installments paid by the appellant / plaintiff constituted 40% of the total purchase value of Rs.2,48,000/- of the said flat; (vii) that R.M. Buckshee died on 13.12.1985 and after his death, the respondent / defendant No.1 who was the brother of R.M. Buckshee (who was unmarried) and step brother of the appellant / plaintiff wrongly succeeded to the said flat in the capacity of legal heir of R.M. Buckshee though knowing fully well that substantial payment of money towards purchase of the said flat in the name of R.M. Buckshee had been paid by the appellant / plaintiff for the purpose of joint staying with R.M. Buckshee as was desired by R.M. Buckshee; (viii) that the action of the respondent / defendant No.1 of wrongfully succeeding as the owner of the flat was to deny the appellant / plaintiff his genuine and legal right vested in the said flat; and, (ix) that the respondent / defendant No.2 DDA wrongly permitted the respondent / defendant No.1 to succeed as the owner of the said flat in the capacity of legal heir of R.M. Buckshee even though R.M. Buckshee was not the complete owner of the said flat and without inviting objections from any other claimants and thereby denying the appellant / plaintiff his right to exercise joint ownership over the flat.

4. The respondent / defendant No.1 contested the suit by filing a written statement inter alia on the grounds: (a) that the suit was bad for non-joinder of Lt. Col. M.L. Buckshee another brother of respondent / defendant No.1 and R.M. Buckshee and step brother of appellant / plaintiff; (b) that the suit was barred under the provisions of Benami Transactions (Prohibition) Act, 1988; (c) that the suit was barred by limitation; (d) that the father of the parties died in February, 1952 when the appellant / plaintiff was about two years old and when the financial position of the family was precarious and R.M. Buckshee decided to bring up his step brother, step sisters and step mother, as the respondent / defendant No.1 was then in England and Lt. Col. M.L. Buckshee was in the Army posted in Kashmir; (e) that

the appellant /plaintiff became a Chartered Accountant in the year 1978; (f) that during all this period R.M. Buckshee who was doing very well in life used to send huge amounts to the appellant / plaintiff for his transactions, particularly for purchase of property in Noida and flat in Vasant Kunj; (g) that after some time R.M. Buckshee became dissatisfied with the appellant / plaintiff as he failed to render proper accounts of the money entrusted by R.M. Buckshee to him; (h) that the said flat was allotted to R.M. Buckshee on 11.05.1982 and the installments with respect thereto till his death were paid by R.M. Buckshee from his personal income or through the appellant / plaintiff by remitting funds to the appellant / plaintiff for being deposited with the respondent / defendant No.2 DDA; (i) that the appellant / plaintiff had surrendered the allotment of the flat in his name vide letter dated 13.02.1984 asking for refund of Rs.15,000/- deposited with respect thereto on the ground that the appellant / plaintiff was in dire need of money; (j) denying that there was any mutual agreement between R.M. Buckshee and the appellant / plaintiff, as pleaded in the plaint; (k) that the appellant / plaintiff was not in a position to pay the installments with respect to the flat in the name of R.M. Buckshee; (l) that the salary which the appellant / plaintiff was earning was not enough and the appellant / plaintiff often approached R.M. Buckshee for assistance; (m) that the appellant / plaintiff was always extracting money from R.M. Buckshee for his various needs, for purchase of a flat in Delhi and for purchase of a new Maruti car; (n) that after the demise of R.M. Buckshee, when the respondent / defendant No.1 approached the respondent / defendant No.2 DDA, he had to pay a further amount of Rs.1,34,000/- before the said flat was transferred in his name on the basis of the relinquishment deed executed by Lt. Col. M.L. Buckshee; (o) that it is for this reason only that the appellant / plaintiff after the death of R.M. Buckshee in the year 1985 till the year 1990 did not take any steps with respect to the said flat, neither for paying the balance consideration therefor nor for taking possession thereof; and, (p) that the appellant / plaintiff being a step brother is not a heir of R.M. Buckshee.

5. The respondent / defendant No.2 DDA also filed a written statement pleading: (i) that the suit flat was allotted to R.M. Buckshee on 11.05.1982; (ii) that there was nothing on record to show the understanding between the appellant / plaintiff and R.M. Buckshee as pleaded in the plaint; and, (iii) that R.M. Buckshee died on

13.12.1985 and respondent / defendant No.1 applied for transfer of allocation / allotment in his own favour disclosing that he and his brother Lt. Col. M.L. Buckshee were the only heirs of R.M. Buckshee and Lt. Col. M.L. Buckshee had relinquished his share in the flat in favour of the respondent / defendant No.1; on the basis of the said documents, the allocation / allotment standing in the name of R.M. Buckshee was transferred in favour of respondent / defendant No.1 on 12.02.1990.

6. The appellant / plaintiff filed a replication to the written statement of the respondent / defendant No.1 inter alia pleading: (I) that Lt. Col. M.L. Buckshee was not a necessary or proper party since the flat was in the name of the respondent / defendant No.1; (II) that R.M. Buckshee was monitoring the transactions and accounts of the appellant / plaintiff; (III) that there was jointness in the family dealings and cordiality of relations, with R.M. Buckshee being like a father figure and the Karta of K.C. Buckshee & Sons HUF in handling the accounts of the whole family; (IV) that the financial position of the father of the parties was also very sound; (V) that the monies towards the second and third installments paid by the appellant / plaintiff were out of the personal income of the appellant / plaintiff; and, (VI) that the appellant / plaintiff after the death of R.M. Buckshee did not take any steps with respect to the flat because he wanted to settle the title of the flat amicably through a family settlement.

7. On the pleadings aforesaid of the parties, the following issues were framed in the suit on 18.05.1998:

1. Whether there was any agreement between the plaintiff and late Sh. R.M. Buckshee to acquire the property No.8762, Pocket 8, Sector C, Vasant Kunj, New Delhi jointly?.

2. Whether the plaintiff has acquired right, interest or share to the extent of 40% in the said property?. OPP 3. Whether the suit is properly valued for purposes of jurisdiction?. If not, what should be the proper valuation?.

4. Whether the suit is properly valued for purposes of court fee?. If not, what should be the proper court fee?.

5. Whether the suit is bad for non-joinder of Mr. M.L. Buckshee the real brother of deceased?.

6. Whether the suit is barred under Benami Transactions Prohibition & Right to Recover Property Act?.

7. If issues No.1 and 2 are decided in favour of the plaintiff, whether the plaintiff is entitled to mesne profits?. If so, at what rate and for what period?.

8. If issues No.1 and 2 are decided in favour of the plaintiff, whether the plaintiff is entitled to joint possession as claimed?.

9. Whether the transfer of the property by defendant No.2 in the name of defendant No.1 is illegal and invalid?. If so, to what effect?.

8. The appellant / plaintiff besides examining himself, also examined the witnesses from Syndicate Bank and Bank of Rajasthan. The respondent / defendant No.1 besides examining himself did not examine any other witnesses. Similarly, the respondent / defendant No.2 did not examine any witness.

9. The learned Additional District Judge has in the impugned judgment found / observed / held: (i) that there was no written document executed between the appellant / plaintiff and R.M. Buckshee regarding the mutual agreement as alleged by the appellant / plaintiff; (ii) that though correspondence between the appellant / plaintiff and R.M. Buckshee had been proved on record but such mutual agreement did not find any mention therein also; (iii) that no suggestion in the cross-examination of respondent / defendant No.1 also of any such mutual agreement was given; (iv) that the appellant / plaintiff in the plaint also had not mentioned as to when, where and in whose presence this mutual agreement was entered into between himself and R.M. Buckshee; (v) that at least wife of the appellant / plaintiff would have known of such mutual understanding but even she was not examined; (vi) that there was not even an iota of evidence on record from which any such mutual agreement between the appellant / plaintiff and R.M. Buckshee could be inferred; (vii) that though the correspondence between the appellant / plaintiff and R.M. Buckshee showed writing even with respect to

purchase of car, two wheeler scooter or other money matters but inexplicably there was no mention therein of the alleged mutual understanding with respect to the suit flat; (viii) that the appellant / plaintiff did not even bother to pay the last installment of the suit flat and had there been any such mutual agreement, the appellant / plaintiff would have done so; (ix) that the appellant / plaintiff did not inform the respondent / defendant No.2 DDA also of any such agreement or understanding with R.M. Buckshee; (x) that the appellant / plaintiff in his cross-examination had given the reason of indifference for not moving an application to the respondent / defendant No.2 DDA for inclusion of his name as co-allottee of the said flat or for having not requested R.M. Buckshee to have done so; (xi) that though after the death of R.M. Buckshee there was a family settlement but nothing of the said flat was mentioned therein also; (xii) that the appellant / plaintiff had thus failed to prove any such mutual agreement. (xiii) that from the letters admittedly written by the appellant / plaintiff himself and proved on record it was clear that R.M. Buckshee had been sending amounts to the appellant / plaintiff (and which fact had been admitted by the appellant / plaintiff) -- that the appellant / plaintiff in one of the letters posed a question to R.M. Buckshee as to whether R.M. Buckshee would be showing the second installment of Rs.49,600/- in his Income Tax Return or not -- that when the appellant / plaintiff claims to have paid second installment in the sum of Rs.49,600/- the occasion for him to ask R.M. Buckshee as to how the second installment of Rs.49,600/- was to be shown could only be when the appellant / plaintiff had paid the said installment of Rs.49,600/- out of the funds arranged by R.M. Buckshee; (xiv) that the appellant / plaintiff could not explain as to why he, in the said letter, did not mention of the mutual agreement now being claimed by him; (xv) that the appellant / plaintiff in the cross examination of the respondent / defendant no.1 had suggested that even the last installment was to be paid by the appellant / plaintiff but the respondent / defendant no.1 had surreptitiously paid the same --- it was not the case of the appellant / plaintiff in the plaint or in his evidence that the last installment was also to be paid by him; (xvi) that the appellant / plaintiff had slept over his rights if any for more than five years; (xvii) that the suit had been properly valued for the purposes of Court Fees and jurisdiction and appropriate Court Fees had been paid on the plaint; (xviii) that Lt. Col. M.L. Buckshee was neither a necessary nor a proper

party to the suit and the suit was not bad for his nonjoinder; (xix) that since the appellant / plaintiff had filed the suit on the basis of mutual agreement between him and Lt. Col. M.L. Buckshee and it was not the case of the appellant / plaintiff that he was holding the property benami, the suit was not barred under the Benami Act; and, (xx) that in the circumstances the transfer of the flat by the respondent / defendant no.2 DDA in the name of the respondent / defendant no.1 was not invalid.

10. It was at the outset enquired from the counsel for the appellant / plaintiff as to how the claim of the appellant / plaintiff in the suit, claiming to be the real owner of 40% share in the flat, not an enforcement of such rights against the respondent / defendant no.1 as heir of Lt. Col. M.L. Buckshee in whose name the property to the extent of 40% is alleged to be held benami.

11. The counsel for the appellant / plaintiff responded by contending that the said issue has been decided in favour of the appellant / plaintiff and no cross objection thereagainst has been filed by the respondents.

12. The counsel for the appellant / plaintiff has contended that the learned Addl. District Judge has totally failed to deal with the case pleaded and established by the appellant / plaintiff, of the understanding between the appellant / plaintiff and R.M. Buckshee and the impugned judgment does not also deal with the letters dated 25th March, 1985, 8th / 12th March, 1985, 21st September, 1982 / 5th October, 1982, 30th September, 1985 and 8th March, 1985 proved on record. It is contended that the said letters established a family arrangement between appellant / plaintiff and the deceased R.M. Buckshee.

13. It is further argued that the learned Addl. District Judge has also not dealt with the plea of the appellant / plaintiff in para 6 of the amended plaint of the existence of an HUF of which R.M. Buckshee was the karta and the appellant / plaintiff a coparcener. It is contended that the said plea was taken by way of amendment, in para 6 of the amended plaint and to which the respondent / defendant no.1 had chosen not to file any written statement and is thus deemed to have admitted the existence of the HUF. It is further argued that the existence of the HUF is also established from the order dated 8th January, 1953 of the Claims Officer,

Jalandhar proved as Ex. P14.

14. It is further contended by the counsel for the appellant / plaintiff that the Addl. District Judge has not taken into account the conduct of the respondent / defendant no.1 while obtaining mutation of the flat from the name of R.M. Buckshee in his own name. It is contended that the respondent / defendant no.1 misrepresented before the respondent / defendant no.2 DDA that the documents with respect to the flat had been misplaced when he was fully aware of the custody thereof by the appellant / plaintiff as admitted by him in his cross examination also. It is contended that no disclosure to the respondent / defendant no.2 DDA of the understanding of the appellant / plaintiff with R.M. Buckshee was also made.

15. The counsel for the legal representatives of the respondent / defendant no.1 besides supporting the judgment has contended that the appellant / plaintiff had not proved any payment towards flat by the HUF claimed by him and the averments in the plaint of the HUF were thus irrelevant. He has further argued that though the letters proved on record qua into minute financial details but failed to refer to any understanding as is now being contended. It is yet further contended that the Family Settlement after the demise of R.M. Buckshee proved, also does not mention the subject flat or any such understanding with respect thereto. It is also argued that the appellant / plaintiff in his cross examination had admitted to differences with R.M. Buckshee from the year 1985 and inspite thereof had not taken any action asserting his rights if any in the flat.

16. The counsel for the respondent no.3 purchaser has argued:(a). that the impugned judgment was pronounced on 30 th April, 2004; that this appeal was filed after nearly three months on 26th July, 2004; that prior thereto Conveyance Deed of freehold rights in property was executed by the respondent / defendant no.2 DDA in favour of the respondent / defendant no.1 on 26 th June, 2004 and a Sale Deed dated 8th July, 2004 of the flat executed by the respondent / defendant no.1 in favour of the respondent no.3 subsequent purchaser - therefrom it is contended that the respondent no.3 cannot be said to have purchased the property during the pendency of any lis or litigation (b). that the case pleaded in

the plaintiff was of an understanding to jointly utilize the flat or use of the flat for the purposes of joint staying of the appellant / plaintiff and R.M. Buckshee and not of joint ownership of the flat; it is argued that the case pleaded was of the appellant / plaintiff only having living rights in the flat and not ownership rights in the flat; reliance is placed on Prakash Rattan Lal Vs. Mankey Ram 166 (2010) DLT 629 to contend that the claim in the evidence of ownership rights is thus beyond pleadings and is to be ignored; (c). that no challenge has been made to the action of the respondent / defendant No.2 DDA of transferring the flat in the name of the respondent / defendant no.1; it is contended that the appellant / plaintiff for this reason is not entitled to the relief claimed of mere declaration; (d). that the first installment with respect to the flat was admittedly paid by R.M. Buckshee in February, 1984; the surrender by the appellant / plaintiff of the DDA flat allotted in his name is vide letter dated 13th February, 1984 and the reason for surrender wherein is the dire need of the appellant / plaintiff for the money deposited of Rs.15,000/-; (e). that the appellant / plaintiff became a Chartered Accountant in the year 1978 and admits to have filed his first Income Tax Return in the year 1981-82; (f). that the second and the third installments with respect to the flat were paid on 27th December, 1984 and 29th July, 1985 respectively; (g). that the appellant / plaintiff in none of his Income Tax Returns showed ownership to the extent of 40% of the flat or contribution towards the purchase price of the flat; (h). that had there been any such mutual understanding between the appellant / plaintiff and R.M. Buckshee, the appellant / plaintiff immediately after the demise of R.M. Buckshee on 13 th December, 1985 would have informed the respondent / defendant no.2 DDA of his said rights, especially when the appellant / plaintiff in his cross examination has admitted to differences with R.M. Buckshee and which was not done; (i). that the claim for declaration is thus barred by time; (j). on enquiry it is informed that the 4th installment with respect to the flat was paid in the year 1990 when the possession of the flat was also delivered to the respondent / defendant no.1; (k). on enquiry it is further informed that the suit from which this appeal arises was filed in May, 1990; (l). that the appellant / plaintiff even in his letter dated 31 st August, 1990 to the respondent / defendant no.2 DDA did not refer to any understanding as is now being alleged with R.M. Buckshee; (m). that the monies for the second and third installments of the purchase price of the flat paid

by the appellant / plaintiff had in fact flown from R.M. Buckshee; (n). that the appellant / plaintiff did not challenge the deposition of the respondent / defendant no.1 of the appellant / plaintiff never being in a financial position to pay the installments of the flat in question; and, (o). that the appellant / plaintiff in the cross examination of the respondent / defendant no.1 suggested a Family Settlement to the effect that the said flat would go to the appellant / plaintiff in view of R.M. Buckshees love and affection for the appellant / plaintiff - it is contended that the said suggestion is contrary to the case set-up by the appellant / plaintiff; reliance in this regard is placed on Ramesh Kumar Vs. Furu Ram VI (2011) SLT 419.

17. The counsel for the appellant / plaintiff and the appellant / plaintiff in person, in rejoinder have contended: (i) that the payments from R.M. Buckshee to appellant / plaintiff referred to in the correspondence are towards the appellant / plaintiffs share of rent in the properties; (ii) that the appellant / plaintiff in cross examination had not deposed of differences with R.M. Buckshee but that no step for approaching the respondent / defendant no.2 DDA for adding the name of the appellant / plaintiff as co-allottee along with R.M. Buckshee having been taken owing to indifference; (iii) that Section 269SS was introduced in the Income Tax Act w.e.f. 1st April, 1984 and owing whereto the position as to the payments as made by the appellant / plaintiff towards the second and third installments of the purchase price of the flat was unclear and thus the said payments remained from being mentioned in the Income Tax Return of the appellant / plaintiff; (iv) that R.M. Buckshee was handling the finances of the appellant / plaintiff; (v) on enquiry as to when, the properties of which R.M. Buckshee was sending the appellants / plaintiffs share of rent were purchased, it is informed that the same were purchased in the year 1973-74; (vi) on further enquiry as to when the appellant / plaintiff started working it is informed that though the appellant / plaintiff started working in the year 1979 but the father of the parties who died in the year 1952 i.e. before coming into force of the Hindu Succession Act, 1956 had left properties and which were held by his sons with R.M. Buckshee being the karta, in HUF; (vii) that the reason given in the letter dated 13th February, 1984 of the appellant / plaintiff to the respondent / defendant no.2 DDA of surrender of the other flat in the name of the appellant / plaintiff was obviously false as is apparent from the appellant / plaintiff having admittedly paid the second and third installments of purchase price

of the suit flat; (viii) that the suit flat being disputed, could not have been transferred by the respondent / defendant no.1 to the respondent no.3 subsequent purchaser; (ix) that R.M. Buckshee was standing in a fiduciary capacity vis-vis the appellant / plaintiff; and, (x) reliance is place on Surjit Lal Chhabda Vs. Commissioner of Income Tax, Bombay 101 ITR 776 (778) (SC).

18. I have perused the records and considered the rival contentions.

19. In my view, the claim of the appellant / plaintiff in the plaint is clearly barred by the Benami Act, unless the appellant / plaintiff can be said to fall in one of the two exceptions thereof. The said Act, in Section 2(a) defines a 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 prohibits 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 or against any other person, by a person claiming to be real owner of such property. For the said prohibition to apply, it matters not whether the express words as benami are used or not. The Court, on a meaningful reading of the plaint, is required to see whether the claim therein is prohibited made by the Benami Act. On such meaningful reading of the plaint in the suit from which this appeal arises, the claim of the appellant / plaintiff therein to 40% share in the flat, claiming to be the real owner thereof for the reason of having paid 40% of the sale consideration and against the respondent / defendant no.1 as heir / successor of R.M. Buckshee in whose name the flat according to the appellant / plaintiff to the extent of 40% share was held benami, is a claim barred under the said Act.

20. It matters not whether the issue raised before the Trial Court in this regard has been decided in favour of the appellant / plaintiff and no cross objection has been preferred by the respondents / defendants thereagainst. It is the Court which has to enforce the prohibition contained in the Benami Act and merely because the defendant does not take the defence of the claim being barred by the Benami Act is no reason for the Court to overlook the same.

21. I am unable to agree with the reasoning given in the impugned judgment for holding the suit to be not so barred. Merely because an understanding between

the actual owner and the benami owner is pleaded is no ground for holding the prohibition under the Benami Act to be inapplicable; rather there would always be such understanding or agreement between the benami owner and the actual owner.

22. The counsel for the appellant / plaintiff has contended that it is not the case of the appellant / plaintiff that R.M. Buckshee was the benami owner to the extent of 40% share in the flat but the case of the appellant / plaintiff is of R.M. Buckshee having agreed to transfer 40% share in the flat in the name of the appellant / plaintiff in consideration of the appellant / plaintiff having paid 40% of the sale consideration therefor.

23. That is however not the case pleaded by the appellant / plaintiff. It is not the case of the appellant / plaintiff that R.M. Buckshee had agreed to transfer 40% share in the flat to the appellant / plaintiff. Had there been any such agreement and which had remained to be concluded, the remedy of the appellant / plaintiff was by way of specific performance thereof. The appellant / plaintiff did not seek specific performance of any such agreement. The relief which the appellant / plaintiff sought in the suit was of declaration that he is the owner of the 40% share in the flat.

24. Faced therewith the counsel for the appellant / plaintiff faintly suggested that since all the necessary ingredients have been pleaded, the claim in the plaint be read as that for specific performance.

25. I am afraid that cannot be done. This Court cannot grant relief to the appellant / plaintiff on a case not set-up by the appellant / plaintiff (see *Bachhaj Nahar Vs. Nilima Mandal* (2008) 17 SCC 491, *Srinivas Ram Kumar Vs. Mahabir Prasad* AIR 1951 SC 177 and *Manohar Lal Vs. Ugrasen* (2010) 11 SCC 557. The essential ingredients necessary to succeed in a claim for specific performance are entirely different from as pleaded for the relief sought of declaration. The limitation for seeking the relief of specific performance, the aspect of laches, acquiescence, waiver etc. all come into play to decide the claim of the appellant / plaintiff for specific performance and which have as aforesaid neither been pleaded nor proved.

26. I therefore conclude the claim of the appellant / plaintiff in the plaint to be barred by Section 4 of the Benami Act.

27. However it still remains to be seen whether such claim of the appellant / plaintiff can fall in the exceptions provided under sub Section (3) of Section 4 of such bar. Section 4(3) makes Section 4 (1)&(2) inapplicable where the person in whose name the property is held is a coparcener in a HUF and the property is held for the benefit of the coparcener in the family or 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.

28. The question of applicability of the first of the aforesaid two exceptions does not arise in as much as it is not the case of the appellant / plaintiff that the said 40% share qua which the suit is filed was held by R.M. Buckshee as a coparcener of the HUF. Rather it is the case of the appellant / plaintiff that the said 40% share is the personal individual property of the appellant / plaintiff and the remaining 60% share in the flat and with which these proceedings are not concerned was held by R.M. Buckshee as karta of HUF.

29. As far as second exception to the prohibition in the Benami Act is concerned, a person cannot be said to be a trustee of his brother or standing in a fiduciary capacity towards his brother. I have recently in *Peeyush Aggarwal Vs. Sanjeev Bhavnani* MANU/DE/1856/2013 & *Ramesh Advani Vs. Hiro Advani* MANU/DE/2025/2013 had an occasion to deal with the said aspect in detail and need is thus not felt to burden this judgment with the said discussion.

30. The appellant / plaintiff who is not only well educated in laws as a Chartered Accountant but is found to have appreciated the plea raised by the Court of benami has arguing in person attempted to evade the same by contending that R.M. Buckshee was indeed the trustee and standing in a fiduciary capacity towards the appellant / plaintiff, being the karta of HUF of which appellant / plaintiff was a coparcener and owing to having literally brought up the appellant / plaintiff who was only of two years of age at the time of demise of his father.

31. Again, though there are no pleadings to justify inapplicability of the bar under the Benami Act but I find the appellant / plaintiff to have in para 6 of the plaint pleaded as under:

6. That it shall be pertinent to state that there existed a H.U.F. of which Shri R.M. Buckshee the deceased was the Karta and the plaintiff the coparcener, which was also a factor to occasion the existence of a fiduciary relationship between the deceased R.M. Buckshee and the plaintiff.

32. I have scanned the evidence led by the parties to see whether taking the aforesaid para 6 of the plaint as an anchor, a case of R.M. Buckshee being a trustee and standing in a fiduciary capacity towards the appellant / plaintiff has been established.

33. I do not find so.

34. I have recently in judgment dated 18th September, 2013 in RFA No.329/1997 titled Chanan Kaur & Ajit Singh, also dealing with the aspect of benami, have held motive to be an important circumstance to hold a case of benami to be made out. I am unable to find any motive for the benami transaction to have been established in the present case. It is not as if the appellant / plaintiff was ineligible to be the co-allottee / co-owner of the said flat. Rather it is the case of the appellant / plaintiff that another flat in his own name had been allotted and which he surrendered. The respondent / defendant no.2 DDA has / had a policy of mutation in the name of blood relatives. There was thus no impediment to the name of the appellant / plaintiff being included as a co-allottee along with the name of R.M. Buckshee had the appellant / plaintiff and R.M. Buckshee intended so. There was thus absolutely no reason for the appellant / plaintiff to, while being the actual owner of the 40% share in the flat, allow R.M. Buckshee to be the benami owner thereof. Once that is so, the question of trust and fiduciary relationship does not arise. Mere contribution to purchase price of the property cannot create a fiduciary relationship or relationship of trust and if it were to be so held, it would be in negation of the Benami Act. No intent also, neither of the appellant / plaintiff nor of R.M. Buckshee, of the appellant / plaintiff being intended to be 40% owner of the flat, the whole of which was in the name of R.M. Buckshee; however more in that

respect hereinbelow.

35. Thus it has but to be held that the case of the appellant / plaintiff does not fall in the exceptions contained in Section 4(3) to the prohibition otherwise contained in Section 4 of the Benami Act.

36. Though this appeal is liable to be dismissed for this reason alone but for the sake of completeness I have otherwise also examined the reasoning on which the learned Addl. District Judge dismissed the suit. I am unable to find any error in the finding therein that the appellant / plaintiff has totally failed to establish the existence of any understanding between appellant / plaintiff and R.M. Buckshee as pleaded. Though the counsel for the appellant / plaintiff has also contended that the said understanding was in the nature of a Family Settlement but again that is not the case pleaded. Even otherwise there was no dispute alleged between appellant / plaintiff and R.M. Buckshee which was required to be settled. The transaction pleaded is between the appellant / plaintiff and R.M. Buckshee only and not amongst the entire family.

37. The appellant / plaintiff before me also has been unable to show any reference to the alleged understanding in any of the documents proved. The learned Addl. District Judge is correct in holding that considering that the appellant / plaintiff and R.M. Buckshee were corresponding with each other on all the affairs of the appellant / plaintiff, had there been any such understanding, the same would have definitely been reflected in the correspondence of the contemporaneous time.

38. On going through the Trial Court file I find the appellant / plaintiff to have as part of the said correspondence filed a letter dated 16 th February, 1984 of R.M. Buckshee to the appellant / plaintiff. Though the said letter has not been proved and bears no exhibit mark but having been filed by the appellant / plaintiff can always be read against the appellant / plaintiff. Shri R.M. Buckshee in the said letter wrote to the appellant / plaintiff as under:

You mentioned to me that you can get a loan from your Company for the flat which has been allotted to you. You may, therefore, consider if from the investment point of view, it will be beneficial for you to pay a few installments and then dispose of

the flat with advantage. You may utilize the above remittances for meeting your first installment. The aforesaid letter clearly shows that R.M. Buckshee on the date of writing thereof was not aware of surrender by the appellant / plaintiff on 13 th February, 1984 of the flat allotted in his name. Had R.M. Buckshee been aware of the same or had the appellant / plaintiff surrendered the flat allotted in his name for the reason of an understanding having been arrived at with R.M. Buckshee for use jointly by the appellant / plaintiff and R.M. Buckshee of the flat allotted in the name of R.M. Buckshee, the occasion for R.M. Buckshee to in the letter dated 16th February, 1984 advising as aforesaid to the appellant / plaintiff would not have arisen. The said letter unfortunately remained unnoticed by the Trial Court and no attention thereto was invited by the counsel for the respondents also. The said letter, according to me, totally falsifies the case set-up by the appellant / plaintiff of an understanding having been arrived at with R.M. Buckshee with respect to the flat allotted in the name of R.M. Buckshee. The appellant / plaintiff, I have checked, has not filed any letter which may have been sent by him in response to the letter dated 16 th February, 1984 supra of R.M. Buckshee reminding the R.M. Buckshee that he had already surrendered the flat allotted in his name in accordance with the understanding as pleaded in these proceedings. Rather the said letter shows that the case set-up by the appellant / plaintiff in the suit from which this appeal arises was an afterthought and the present proceeding is an attempt by the appellant / plaintiff to, taking advantage of the payment of two installments of the purchase consideration of the flat in the name of R.M. Buckshee from the bank account of the appellant / plaintiff, lay a claim to proportionate ownership of the said flat.

39. I have also examined the letters dated 21 st September, 1982 / 5th October, 1982, 8th March, 1985, 8th / 12th March, 1985, 25th March, 1985 & 30th September, 1985 qua which it is the grievance of the appellant / plaintiff, the Trial Court has ignored and which the appellant / plaintiff contends, establish a family arrangement. I am unable to agree. It is not as if the Trial Court has ignored the said letters. The Trial Court has rather given a finding that though the appellant / plaintiff and R.M. Buckshee were in correspondence with respect to nearly each and everything but there is no mention in the correspondence of any understanding as alleged with respect to the flat in the name of R.M. Buckshee. I

concur with the said finding.

40. As far as the argument urged on behalf of the appellant / plaintiff, of the conduct of the respondent / defendant no.1 while obtaining mutation of the flat from the name of R.M. Buckshee in his own name, is concerned, the appellant / plaintiff also has not argued that he is under the Hindu Succession Act a natural heir of R.M. Buckshee. No pleading or evidence of the knowledge of the respondent / defendant no.1 of the payment of the second and third installments of the flat in the name of R.M. Buckshee from the account of the appellant / plaintiff has also been established. In these circumstances the respondent / defendant no.1 cannot be blamed for not intimating the said fact to the respondent / defendant no.2 DDA. Similarly there is no pleading or evidence of the knowledge of the respondent / defendant no.1 of any documents of the suit flat being in the custody of the appellant / plaintiff. Even otherwise it stands established that while R.M. Buckshee was at Calcutta the appellant / plaintiff was in Delhi and from the mere possession / custody of the appellant / plaintiff of the documents with respect to the flat in the name of R.M. Buckshee, no inference of any rights of the appellant / plaintiff in the flat can be drawn. Moreover, even if it were to be held that the respondent / defendant no.1 was guilty of any misrepresentation to the respondent / defendant no.2 DDA, the same cannot create any rights in the flat in favour of the appellant / plaintiff.

41. The explanation given by the appellant / plaintiff during the course of hearing though not pleaded or proved, for having not disclosed in his Income Tax Return the payments, if from his own monies, towards the second and third installments of the purchase consideration of the flat in the name of R.M. Buckshee, is also no explanation in law. It cannot be lost sight of that the appellant / plaintiff is a man of accounts and is supposedly competent enough to advise others on their affairs relating to taxation, accounts and finance. If the money towards the second and third installments aforesaid had been out of the personal earnings of the appellant / plaintiff, the same in the normal course would have found mention in the accounts / Income Tax Return of the appellant / plaintiff and which it admittedly does not. The only inference can be that the said monies were of R.M. Buckshee only. The Courts even otherwise would be reluctant to allow a litigant before it to

take a different stand relating to his financial affairs than what has been taken by him before the Income Tax Authorities.

42. I find considerable merit also in the argument of the respondents that had there been any such understanding with respect to the suit flat, the appellant / plaintiff would not have sat quiet for a period of five years after the demise of R.M. Buckshee and even if not interested in the entire flat would have sought a refund of the price contributed by him. Again the only inference is that the said monies were not of the appellant / plaintiff.

43. Merit is also found in the contention of the respondents that from the reason given by the appellant / plaintiff in the letter dated 13th February, 1984 of surrender of the flat in his name, of the same being on account of the appellant / plaintiff being unable to pay the balance price thereof and rather being in need of refund of Rs.15,000/- already paid, belies the plea of the appellant / plaintiff of the monies paid towards the second and third installments of the purchase consideration of the flat in the name of R.M. Buckshee being his own. The explanation given by the appellant / plaintiff therefor, is no explanation. It is clearly borne out that monies were being sent by R.M. Buckshee to the appellant / plaintiff and the appellant / plaintiff paid the second and third installments aforesaid therefrom. It is the case of the appellant / plaintiff that the monies so being sent by R.M. Buckshee to the appellant / plaintiff were in fact of the appellant / plaintiff himself. If that was so, the appellant / plaintiff would not have been without money so as to pay the installments of the flat allotted in his own name. Such flats / allotments have always commanded huge premium and the correspondence reveals that the parties were not oblivious of the said fact. Rather when the parties, in the said correspondence were discussing advantages / disadvantages of retaining a old Ambassador car or buying a new Maruti car, certainly the appellant / plaintiff would not have surrendered the allotment in his favour if had been possessed of his own monies. Conversely, had the reason for surrender been, to by paying part sale consideration of the flat in the name of R.M. Buckshee become joint owner thereof, nothing prevented the appellant / plaintiff from giving the said reason to the respondent / defendant no.2 DDA while surrendering the flat in his own name. There is also no plea or evidence that R.M. Buckshee was

unable to pay the entire price of the flat allotted in his name. I had during the hearing enquired the vocation of R.M. Buckshee and was told that he was occupying a Director level position in the Industrial House of Thapers and was very well off.

44. I therefore do not find any merit in this appeal and dismiss the same; however in the facts no costs. Decree sheet be drawn up. RAJIV SAHAI ENDLAW, J
SEPTEMBER 26 2013 gsr/pp..

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