Gopal L. Raheja of Mumbai and Sandeep G. Raheja of Mumbai, Indian Inhabitant Vs Vijay B. Raheja of Mumbai and Others

Appeal No. 334 of 2005 in Notice of Motion No. 3185 of 2004 in Suit No. 3121 of 2004 and Cross Appeal (L) No. 4 of 2005

Court: Bombay High Court

Date of Decision: April 25, 2007

Acts Referred:
Benami Transactions (Prohibition) Act, 1988 â€" Section 4, 4(1), 4(3), 7#Civil Procedure Code, 1908 (CPC) â€" Order 39 Rule 2#Trusts Act, 1882 â€" Section 82, 88, 94

Citation: (2007) 4 BomCR 288

Hon'ble Judges: R.M.S. Khandeparkar, J; D.Y. Chandrachud, J

Bench: Division Bench

Advocate: Aspi Chinoy, Janak Dwarkadas and P.K. Samdani and P.K. Shroff, Subodh Joshi and Radhika Kalpatrai, instructed by Parimal K. Shroff and Co, for the Appellant; N.H. Seervai, instructed by J. Sagar and Associates for Respondent Nos. 1 to 4, I.M. Chagla and L.C. Pereira, S.V. Doijode and Meenakshi Iyer, Doijode, instructed by Associates for Respondent Nos. 5 and 7, D.J. Khambatta instructed by Raval Shah and Co. for Respondent No. 8 and M.S. Doctor, instructed by S.R. Rawell and Co., for the Respondent

Judgement

D.Y. Chandrachud, J.
This appeal arises out of an order passed by a Learned Single Judge on 14th March 2005 while disposing of a

Motion for interim relief in the suit. The Plaintiffs are in appeal. The reliefs claimed:

2. The suit out of which these proceedings arise, came to be instituted in order to seek the following reliefs:

(i) A declaration that Defendant Nos. 1, 2 and/or 6 to 9 hold 50% of the shares and 50% of the Directorships of the Fifth Defendant-Company

through which the First and the Second Defendants have acquired the property which forms the subject matter of the suit, in trust for and for the

benefit of the Plaintiffs;

(ii) A decree against the Defendants to transfer 50% of the issued share capital of the Fifth Defendant to the Plaintiffs and to appoint half the

Directors of the Company from amongst the Plaintiffs and their nominees against payment of a half of the price of the property;

(iii) An injunction restraining the Defendants from alienating or developing the property without first transferring to the Plaintiffs 50% of the shares

of the Company and appointing half the Directors from amongst the Plaintiffs and their nominees;

(iv) An injunction restraining the Defendants from alienating or encumbering shares of the Fifth Defendant and from exercising any right or receiving

any benefit in regard thereto.

The dispute:

3. A tract of land admeasuring 3 acres, situated on the junction of Kasturba Road and Vittal Mallya Road in Bangalore, is described in Exhibit "A"

to the Plaint as forming the matter in dispute. The case of the Plaintiffs revolves around a brief communication dated 27th September 2003

addressed by the First and Second Defendants to the Plaintiffs and confirmed by the Plaintiffs with an endorsement at the foot of the document.

The communication is to the following effect:

Sub : UB City Property of 3 acres bearing Khatta No. 24 situate at the corner of Kasturba Gandhi Marg and Vithal Mallya Road, Bangalore.

We confirm that we are buying the above property in a company called Mont Blanc Hotels Pvt. Ltd. and to make you a partner, we are giving you

equal shares on the same terms and conditions and equal directorship in Mont Blanc Hotels Pvt. Ltd. as our group holds. Both our groups confirm

that Marriott shall have equity stake in the company. We shall carry out the amendments to the Memorandum of Article, in 30 days and shall then

give the equity to you.

The case of the Plaintiffs is that they were interested in commencing a hotel at Bangalore and were negotiating with United Breweries (Holdings)

Ltd. (""UB"") for the acquisition of the land in question. The Plaintiffs seek to establish a case to the effect that (i) The agreement that was arrived at

between them on the one hand and the First and Second Defendants on the other, was that the land would be acquired by the First and Second

Defendants through a nominee Company on behalf of the Plaintiffs and themselves; (ii) On the acquisition of the land, the Plaintiffs would be

allotted equal shares and Directorships in the acquiring Company; and (iii) A Deluxe Five Star Hotel would be constructed and operated by both

the parties together as partners in collaboration with Marriott International. The transaction between the parties, in other words, is according to the

Plaintiffs, one in which upon the land being purchased the Plaintiffs on the one hand and the First and Second Defendants on the other, would be

equal partners in regard to the property acquired, the development of the land and the conduct of the Hotel. The material averments in that regard

are contained in Sub-paras (b) and (g) of para 4 and in Sub-para (i) of para 6 of the Plaint which read thus:

The Defendants had agreed that on the said property being acquired they would give the Plaintiffs equal shares and directorships in the acquiring

company and that a five star deluxe hotel would be constructed and operated on the said property by both the parties together as partners, with

participation by M/s. Marriott International (""the said Hotel project""). As stated hereinafter the said Agreement between the parties was recorded

in a writing dated 27th September, 2003 and the Plaintiffs had at all times been fully involved in preparing/finalising the Agreements to be entered

into between UB and the acquiring Company and other documentation for the transaction/acquisition. The Plaintiffs say that having regard to the

Agreement between the parties Defendants Nos. 1 and 2 were required to act on behalf of the Plaintiffs, in the matter of acquisition of the said

property for construction of a hotel thereon and in the matter of the said Hotel project. It was inter alia agreed between the Plaintiffs and

Defendants Nos. 1 and 2 that:

(i) The Plaintiffs and Defendants Nos. 1 and 2 would act jointly in the matter of purchase of the said property and in the development thereof and

in the running of the hotel proposed to be constructed thereon (i.e. ""the said Hotel project"").

The agreement set up by the Plaintiffs involves: (i) Acquisition of the property by a Company formed by the First and Second Defendants; (ii)

Allotment of shares to the Plaintiffs in the Company and appointment of an equal number of Directors; (iii) Construction upon and development of

the property; and (iv) Conduct of the Hotel as part of a project that was envisaged between the Plaintiffs on the one hand and the First and

Second Defendants on the other as partners.

4. According to the Plaintiffs, the obligations assumed by the First and Second Defendants under the agreement dated 27th September 2003 were

of a fiduciary character and trust and, in violation of their obligations under the agreement, the First and Second Defendants wrongfully sought to

exclude the Plaintiffs from the benefits of the agreement. Essential to the Plaintiffs'' case is the averment that they were interested in bidding for the

property and that it was as a result of the representation held out to them by the First and Second Defendants that they desisted from submitting a

separate bid for the acquisition of the property.

5. On 29th September 2003, the Fourth Defendant, which is a Company promoted by the First and Second Defendants entered into an agreement

for the purchase of the property at and for a consideration of Rs. 43.50 crores. A guarantee was furnished by HDFC for the payment of the

balance due under the agreement of Rs. 32 crores. HDFC in turn, was to advance this balance against the security of land and a personal

guarantee of the Directors of the Fourth Defendant. The agreement recorded that the property was being purchased by the Fourth Defendant to

construct and operate a Five Star Deluxe Hotel jointly with the Marriott group and contained various covenants intended to effectuate the due

fulfillment of that purpose. The Plaintiffs claim that on 30th September 2003, an amount of Rs. 1 crore was paid by them to the Second Defendant

in cash. The receipt of consideration in cash is denied and forms the subject matter of a serious dispute between the parties. According to the

Plaintiffs several meetings took place between them and the First and Second Defendants between the months of October 2003 and February

2004. According to the Plaintiffs, they requested the First and Second Defendants in these meetings to carry out changes in the Memorandum and

Articles of Association of the Fourth Defendant to reflect the joint venture agreement between the parties. However, the First and Second

Defendants are alleged to have deferred a decision on the ground that Marriott wanted changes as well and all amendments would be made at one

and the same time. Drafts of the proposed agreement with UB and of the transaction documents to be executed by the Fourth Defendant with

Marriott were forwarded by the First and Second Defendants to the Plaintiffs during this period.

6. On 22nd October 2003, the Board of Directors of UB passed a resolution authorising the sale of the plot to the Fifth Defendant instead of the

Fourth Defendant. On 19th January 2004, the agreement between the Fourth Defendant and UB was cancelled and an agreement was entered

into between the Fifth Defendant and UB for the same consideration of Rs. 43.50 crores. The Fourth Defendant was a confirming party to the

agreement. The property was conveyed under a Deed of Conveyance executed on 26th March 2004 to the Fifth Defendant against the balance

payment of Rs. 32 crores by the Fifth Defendant.

7. The Plaintiffs had addressed a letter on 11th March 2004 for the completion of the formalities of the transfer of 50% shares and Directorships in

the Fourth Defendant and followed this by a further communication dated 3rd April 2004. On 12th April 2004, the First Defendant purportedly

informed the Plaintiffs that ""in the absence of funds from you and any agreement being reached between us"", it was impossible to meet the ''time

lines'' specified by UB and Marriott as a result of which the First Defendant had to withdraw from the project. According to the First Defendant,

no agreement was ever reached between the parties at any stage.

8. By a letter dated 15th April 2004, the First Plaintiff stated that it was the First and Second Defendants who had deferred amendments to the

Memorandum and Articles of Association on the ground that issues pertaining to Marriott were yet to be sorted out. According to the Plaintiffs,

they were never requested to provide funds and it appeared from market sources that the First and Second Defendants were proceeding ahead

with the purchase from UB. By a communication dated 20th April 2004, the First Defendant claimed that the Plaintiffs had been informed of the

cancellation of the transaction by a letter of 20th March 2004. The Plaintiffs disputed this in a letter of 7th May 2004 and claimed that they had

paid an amount of Rs. 1 crore in cash to the First and Second Defendants. On 20th May 2004, the Second Defendant denied receipt of any

amount in cash and claimed that neither the First nor the Second Defendant was involved in the property. Interlocutory proceedings:

9. The suit was instituted in October 2004. On 15th December 2004, an ad-interim order was passed by D.G. Deshpande, J., appointing a

Receiver of the property, shares and records of the Fifth Defendant. An injunction was issued in terms of prayer Clauses (b)(ii) and (iii) of the

Motion, while at the same time requiring the Plaintiffs to deposit an amount of Rs. 12 crores. In an appeal against the ad-interim order, the Division

Bench substituted the order of the Learned Single Judge by consent, by an order of injunction restraining the Defendants from encumbering,

alienating or parting with the possession of the property and from alienating or encumbering the shares of the Fifth Defendant or from exercising

any rights or receiving any benefits in respect thereof. Any further development on the property was to be subject to the result of the Notice of

Motion and no equity was to be claimed on account of such development.

10. The Notice of Motion was disposed of by an order of the Learned Single Judge dated 14th March 2005. The Learned Single Judge held that

in the absence of a prayer for a declaration that the First and Second Defendants (and not the Sixth to Ninth Defendants) are the real owners of

the Fifth Defendant, the Plaintiffs would not be entitled to a decree for the transfer of shares of the Fifth Defendant in their favour since the Plaintiffs

had no privity of contract with the Fifth Defendant. Besides, the Learned Single Judge was of the view that sufficient material was placed on the

record to show that the Sixth to Ninth Defendants ""have their own financial standing"" and that they are not nominees of the First and Second

Defendants. The association of the First Defendant with the Hotel project alone could not, according to the Learned Single Judge, lead to an

inference at the interlocutory stage, that it was the First and Second Defendants and not the Sixth to Ninth Defendants who are the owners of the

Company. The Learned Single Judge noted that in the circumstances, a strong prima facie case had not been made out for the passing of a drastic

interim order. The project of the hotel, the Court noted, involves an outlay in excess of Rs. 250 crores and the value of the land was in excess of

Rs. 40 crores. In the circumstances, the Learned Single Judge held that it would not be appropriate to injunct the construction of the hotel or to

pass a blanket order restraining the Defendants from creating encumbrances on the property which may otherwise be required for carrying out a

project of the magnitude involved. The Learned Single Judge, accordingly, disposed of the Motion with the following interim directions: (i) Any

construction by the Fifth Defendant shall be in accordance with the sanctioned building plan; (ii) The creation of encumbrances in the land shall be

subject to the result of the suit and an intimation thereof shall be furnished to any person in whose favour the encumbrance is created; (iii) Any

development carried out on the land shall be subject to the result of the suit; and (iv) The Fifth Defendant shall retain 50% of the authorized capital

with itself during the pendency of the suit.

11. The order of the Learned Single Judge has been challenged in appeal. Cross-objections have also been filed.

12. During the pendency of the appeal Defendant Nos. 6 to 9 are stated to have held and voted at General Meeting whereby the authorised capital

of the Fifth Defendant was sought to be increased from Rs. 20 crores to Rs. 100 crores. Besides, 8,10,10,000 new shares were issued out of

which 7.45 crores shares were allotted allegedly to nominees of Defendant Nos. 1 to 3 (effectively thereby giving them a controlling interests of

74.5% in the Fifth Defendant). The rest of the shares were allotted to the Eighth Defendant. The First, Second and Third Defendants and the

daughter of the First Defendant were appointed Additional Directors of the Fifth Defendant. This was disclosed in the affidavits filed by the First

and Eighth Defendants on 5th April 2006.

13. A Notice of Motion was taken out by the Appellants inter alia under Order 39 Rule 2(a) of the Code of Civil Procedure, 1908, the contention

being that the resolutions that were passed on 27th March 2006 and 31st March 2006 were in breach of the orders dated 22nd March 2005 and

25th October 2005 by which the Respondents were restrained from exercising any rights or receiving any benefits in respect of the shares held in

the Fifth Defendant. On 15th November 2006, the Division Bench allowed the Motion in the following terms:

(a) We hold that each of the Respondents has willfully disobeyed and has thereby committed contempt of the order of this Court dated 25-10-

2005. On the issue of punishment the matter is adjourned to 24-11-2006 at 3.00 p.m.

(b) The Notice of Motion is made absolute in terms of prayer (d).

(c)(i) Respondent No. 5 is restrained from dealing with or utilizing the amounts received by it towards allotment of the new shares in any manner

whatsoever including paying the same to any party or parties.

(ii) Respondent No. 5 shall within a period of eight weeks from today deposit all the amounts received by it towards allotment of the new shares

pursuant to the said resolutions in Court. Thereupon the Prothonotary & Senior Master, High Court, Bombay, shall invest the same in fixed deposit

of a Nationalized Bank initially for a period of one year and thereafter for like periods of one year each.

(iii) The parties are at liberty to make an application or adopt any other proceedings in respect of the said amounts.

(d) Each of the Respondents shall pay the costs of this Notice of Motion fixed at Rs. 10,000/-to the Appellants within a period of eight weeks

from today.

14. The Division Bench while making the Motion absolute in terms of prayer Clause (d) set aside the resolution increasing the authorised capital,

the issue of shares and the appointment of the First and Second Defendants and their nominees as Directors.

15. By an order dated 20th December 2006, the Division Bench noted that an unconditional apology was tendered on behalf of the Respondents

on affidavit. The Sixth Defendant had in an affidavit filed before the Court stated that the entire amount that had been brought in had been spent by

the Fifth Defendant leaving a balance of only about Rs. 2.50 crores. However, the Sixth Defendant stated that the amounts which were introduced

by the new shareholders on 31st March 2006 and already utilised by the Fifth Defendant may be treated as an unsecured interest free loan

provided for the Fifth Defendant. The Division Bench while holding that it was not inclined to impose a sentence of imprisonment observed thus:

By agreeing to keep the money deposited with Respondent No. 5 as an interest free unsecured deposit the Respondents have gone a step further

than what was suggested by Mr.Chinoy and by us during the hearing as recorded in our judgment. We will consider this as a genuine expression of

regret.

10. Even assuming that Respondent No. 5 does not deposit the entire amount received by it towards the share subscription money it would at least

have to deposit a sum of Rs. 2.50 crores in this Court. The interest which accrues on this amount of Rs. 2.50 crores would not be payable to any

of the other Respondents ever in view of paragraph 5 of the said affidavit dated 6.12.2006. Even taking the rate of interest at a conservative 8%

per annum based on the rate of interest payable on bonds issued by the Reserve Bank of India it would entail a loss of about Rs. 20 lakhs per

annum.

11. Moreover, the balance amount of about Rs. 72.5 crores is also not to bear any interest while it remains deposited with Respondent No. 5.

This entails a loss of about Rs. 5,80,00,000/-per annum. The Respondents further agreed and undertook not to withdraw/recall the said amount

without orders of the Court. The undertaking is accepted.

On behalf of the Respondents a statement was also made by Counsel that an amount of Rs. 10 lakhs would be deposited with the Maharashtra

State Legal Services Authority. The Division Bench consisting of Dr. Justice S. Radhakrishnan and Mr. Justice S.J. Vazifdar while holding that the

Respondents had committed a contempt of the order dated 25th October 2005, imposed, in addition, a fine of Rs. 2,000/-.

The nature of the challenge:

16. Essentially, the challenge on behalf of the Appellants is premised on three propositions that were set forth by Counsel at the hearing: (i) Where

a pre-acquisition agreement is arrived at between two parties in pursuance of which one undertakes to the other that if the latter does not bid for

the purchase of immovable property, the former will bid for both, a breach of the agreement would constitute a species of fraud; (ii) Where the

cause of action sounds in fraud, the Court will be bound to make the agreement certain and workable and a lesser degree of scrutiny regarding the

uncertainty or inchoateness will be made by the Court than in an action founded on contract; (iii) If for want of detail or certainty, such an

agreement cannot be specifically enforced as a contract, the equity arising from such a situation creates obligations in the nature of a trust making it

inequitable for the Defendant to retain what he has wrongfully obtained. The trust doctrine, it is urged, will enable the Court to make a declaration

in terms of the agreement or in terms of an equality of shares. The equity, in the submission, arises from the Defendant being an agent for purchase

and it is a breach of the agent''s duty which raises a fiduciary obligation in the nature of a trust.

Submissions:

1. Appellants:

17. The submission of Counsel for the Appellants is that the suit in the present case is confined to the first stage of the agreement - the acquisition

of the plot of land. The litigation is according to Counsel, focused on the allotment of the plot and the acquisition of shares and Directorships; the

second stage of the agreement was the development of the land with which the suit is not concerned. The second stage, Counsel for the Appellants

conceded is ex-facie indefinite. However, it was urged that the cause of action being the failure on the part of the Defendants to make the property

and shares available, the Plaintiffs are not bound to sue for specific performance of the entirety of the contract upon a breach by the Defendants at

a first stage. The first stage, it was urged, was not contingent on a finalised agreement on the second stage and the second stage for the

development of the hotel project would be worked out independently by the parties subsequent to the Plaintiffs being made partners.

18. The next limb of the submission is that the agreement between the parties under which the First and Second Defendants agreed to acquire the

property through a Company which they were promoting is not affected by the provisions of the Benami Transactions (Prohibition) Act, 1988 for

the Act contains an exception where property is held in a fiduciary character. Where a person holds property in a fiduciary character he is bound

to disgorge benefits fraudulently acquired.

19. On behalf of the Appellants, an effort has been made to demonstrate before the Court that each one of the following four defences raised on

behalf of the Defendants is fraudulent, namely, (i) That the Plaintiffs had committed a breach of the agreement dated 27th September 2003 by 29th

September 2003 and that the agreement was not acted upon; (ii) That the First and Second Defendants were constrained to terminate the Fourth

Defendant''s agreement with UB upon the failure of the Plaintiffs to provide funds; (iii) That after 19th January 2004, the First and Second

Defendants were never connected with or involved in the purchase of the plot or the hotel project; and (iv) That the Sixth to Ninth Defendants are

bonafide purchasers without notice of the Plaintiffs'' claim. In the submission of the Plaintiffs, the following circumstances would disclose the falsity

of the defence: (i) The Plaintiffs were never required to bring in funds by the Defendants: On the contrary, the agreement was acted upon

throughout October 2003 during the course of which no such grievance was made; (ii) There was no communication indicating either a breach by

the Plaintiffs or communicating a termination of the agreement dated 27th September 2003, nor was that issue raised in meetings held between the

parties between November 2003 and February 2004; (iii) There is no cogent explanation of how the Fifth Defendant agreed to acquire a plot from

UB on 22nd October 2003 when the Company was not incorporated until December 2005; (iv) There is no explanation by the First and Second

Defendants as to why they would abandon the hotel project on a prime plot merely on account of the failure of the Plaintiffs to bring in funds. Had

the Plaintiffs committed a breach, the First and Second Defendants would have terminated the agreement and openly continued with the project

themselves; (v) If the First and Second Defendants had decided by 22nd October 2003 to terminate the Fourth Defendant''s agreement and

abandon the project, this was inconsistent with the First Defendant''s visit to Washington on 24th October 2003 to finalise the MOU with Marriott;

(vi) Between October 2003 and January 2004, the First and Second Defendants had no reason to submit building plans for the construction of the

hotel and to apply for diverse permissions from the regulatory authorities; (vii) There was no reason why the Fourth Defendant would agree to

surrender its rights under the agreement of 19th January 2004 though a refund of its earnest money of Rs. 11.50 crores was received back only on

17th February 2004; (viii) After the termination of the agreement with the Fourth Defendant, Defendant Nos. 5 and 6 to 9 continued with the

purchase of the plot on identical terms with the same collaborator, the same Architect, the same Advocates and the same lending institution; (ix)

Even after 19th January 2004, the First Defendant had furnished an indemnity to statutory authorities in order to obtain permissions for the

construction of the hotel; (x) On 26th March 2004, two months after the termination, the First Defendant furnished a guarantee of HDFC for Rs.

32 crores to which the only explanation offered by the First Defendant is that he had signed the guarantee without reading its contents; (xi) Though

by a letter dated 20th April 2004 the First Defendant claimed that the Plaintiffs had raised the issue of the purchase for the first time in March

2004, in the earlier letter dated 12th April 2004 the First Defendant alleged that there has always been an ongoing dialogue between the parties;

(xii) The manner in which in March 2006, Defendant Nos. 5 to 9 purported to hand over de jure ownership and management of the Fifth

Defendant to the First and Second Defendants shows that Defendants 6 to 9 are only nominees of the First and Second Defendants. The

explanation of the First and Second Defendants that the Sixth Defendant had approached them with a proposal in March 2006 is belied by another

affidavit in which it is stated that it was in February 2006 that the First and Second Defendants had sought legal advise on the proposal; and (xiii)

Upon the Court setting aside the allotment of shares of the First and Second Defendants and directing the deposit of Rs. 74.50 crores brought in

by the Plaintiffs in the Court, it was the First and Second Defendants who moved the Court to seek permission for the retention of the amount as

an unsecured interest free loan. These circumstances have been pressed in aid to buttress the submission that the course of dealing of the

Defendants is fraudulent and in breach of the fiduciary character assumed by the First and Second Defendants. The agreement between the parties,

in the submission of the Plaintiffs, and the surrounding circumstances are adequate in themselves to invoke the trust doctrine. The invocation of the

trust doctrine by the Plaintiffs is essentially founded on three English decisions: (i) The decision of Harman, J. in the Chancery Division in Pallant v.

Morgan 1953 1 Ch.D. 43; (ii) The decision of Malins, V.C. in Chattock v. Muller 1878 VIII Ch.D. 177; and (iii) The decision of the Court of

Appeal in Banner Homes Group plc v. Luff Developments Ltd. (2000) 2 All ER 117.

2. Respondents" Submissions:

The submissions on behalf of the Defendants, urged by Counsel were thus:

20. (i) The suit before the Court is, in essence, a suit to enforce a partnership or a joint venture, as evident from the pleadings and the reliefs

claimed. Such a suit by its very nature is not maintainable since the enforcement of an agreement to enter into a partnership or a joint venture

cannot be mandated by a decree for specific performance;

(ii) Where despite the existence of adequate contractual remedies, a plaintiff fails to assert a cause of action within well accepted categories, that is

no reason to found a ground of equity particularly in the case of an arms length commercial transaction. The Plaintiffs have ample remedies in

contract and the grant of relief on principles of equity is impermissible, for that would constitute an inequitable use of equity;

(iii) The Plaintiffs invoke the equitable doctrine that the property is held in trust. The law having been codified in the form of the Indian Trusts Act,

1882, Section 88 would be attracted only if a fiduciary duty is owed. In the present case parties entered into a purely commercial transaction.

There is neither any adequate pleading of a fiduciary duty, nor is there any basis for concluding the existence of a fiduciary obligation;

(iv) The doctrine of constructive trust which is evolved in the English cases upon which reliance has been placed cannot be incorporated in India in

view of the express repeal of Section 94 of the Indian Trusts Act, 1882 by the provisions of the Benami Transactions (Prohibition) Act, 1988;

(v) The Memorandum of Understanding arrived at between the parties on 27th September 2003 in fact, posits that the First and Second

Defendants were acquiring an immovable property in a Company promoted by them and, in order to make the Plaintiffs as partners, they would be

given equal shares and Directorships. The transaction does not import any element of agency or a fiduciary obligation but is an assertion of a

unilateral act of two persons to do a commercial thing;

(vi) The agreement between the parties is by its very nature incapable of specific performance. The agreement is inchoate and uncertain leaving

several contractual issues to be worked out. These include the quantum and mode of payment, the amendments to the Memorandum and Articles

of Association of the Company; the development of the property and the management of the hotel;

(vii) There is absolutely no material to indicate that the Plaintiffs were going to bid for the immovable property but, that they were induced not to do

so on the assurance contained in the agreement dated 27th September 2003. On the contrary, in reply to the interrogatories served upon them, the

Plaintiffs only stated that it was in December 2000 and January 2001 that the First Plaintiff had contacted a broker. There is absolutely no material

to indicate that the Plaintiffs were interested in separately bidding for the property themselves in 2003;

(viii) If the Plaintiffs seek a declaration that the Fifth Defendant holds the property but, that the beneficial interest is of the Plaintiffs such a

transaction would be hit by Section 4 of the Benami Act. Absent such a declaration, no relief can be sought against the Fifth Defendant. But for

such a declaration, the suit must fail and if a declaration is implied in the prayer for injunction, it would run contrary to the Benami Act;

(ix) The Fifth Defendant is a bonafide purchaser for value without notice and there is no allegation of any notice qua the Fifth Defendant in the

plaint. There is no material in the plaint to indicate how a fiduciary relationship can be claimed against the Fifth, Eighth or Ninth Defendants, nor is

there any allegation that these Defendants are partners or agents of the Plaintiffs. The plaint does not contain any allegation to the effect that the

funds invested by the Eighth Defendant are in fact or in reality the funds of the First Defendant;

(x) The Eighth Defendant has invested an amount of Rs. 24 crores in the Company and has an independent financial status. The allegation in the

plaint that the Eighth Defendant is a nominee or friend of the First Defendant is a bald allegation and no facts have been pleaded to show that the

source of funds originated in the First Defendant. In other words, relief cannot in any event be granted to the Plaintiffs against Defendants 5 to 9

who are bonafide purchasers for value without notice. 21. Before dealing with the submissions, we would wish to record our appreciation of the

able assistance that we have received from Mr.Aspi Chinoy, Mr. I.M. Chagla, Mr. N.H. Seervai and Mr. D.J. Khabata, Senior Counsel and other

Counsel appearing in the case.

The Agreement:

The document of 27th September 2003 upon which the case of the Plaintiffs is founded is a letter written by the First and Second Defendants to

the Plaintiffs and confirmed in token of acceptance by the Plaintiffs. The contents have been extracted in the earlier part of this judgment. The

essential features were thus:

(i) The document contains a statement of fact that the First and Second Defendants ""are buying"" the property in a Company called Mont Blanc

Hotels Pvt. Ltd. (Fourth Defendant);

(ii) To make the Plaintiffs partners, the First and Second Defendants ""are giving"" the Plaintiffs equal shares on the same terms and conditions and

equal Directorships in the Fourth Defendant as the group of the First and Second Defendants holds;

(iii) Marriott would have an equity stake in the Company and equity would be allotted to the Plaintiffs after amendments were carried out to the

Memorandum and Articles in 30 days. In confirmation, the Plaintiffs appended their signatures at the foot of the letter. 23. The plaint contains the

Plaintiffs'' version of what in essence was agreed upon between the parties. Paragraph 4(b) of the Plaint sets out the Plaintiffs'' case that it was

agreed by the Defendants that on the property being acquired, they would give to the Plaintiffs equal shares and Directorships in the acquiring

Company and that a Five Star Deluxe Hotel would be constructed and operated on the property by both the parties together as partners with the

participation of Marriott International. The specific plea of the Plaintiffs is that it is this agreement which is recorded in the writing dated 27th

September 2003. According to the Plaintiffs, the First and Second Defendants were required to act on their behalf ""in the matter of acquisition of

the property for the construction of a hotel thereon and in the matter of the said hotel project (para 4(g)). The pleadings of the Plaintiffs thus prima

facie demonstrate that the Plaintiffs are before the Court on the plea that there was an agreement for the acquisition and development of the

property and that in order to make the Plaintiffs partners in the hotel project, they would be allotted an equal number of shares and Directorships

as the group of the First and Second Defendants.

24. The agreement is prima facie inchoate and uncertain about the terms on which the property would be developed and the hotel project would

be implemented. But the submission of Counsel appearing on behalf of the Plaintiffs is that the suit seeks an enforcement only of the first stage of

the agreement, namely, that relating to the acquisition of the property and the litigation is confined to the acquisition of the plot and the allotment of

shares and Directorships. Counsel urges that the second stage of the agreement was the development of the property and the implementation of the

hotel project and though as regards that stage the agreement is ex-facie indefinite, the suit is not concerned with that aspect of the transaction. The

submission cannot prima facie at the interlocutory stage be accepted as sustainable, particularly when the material averments contained in the plaint

speak of an agreement which consisted of the acquisition of the property and the development of the hotel project. The reliefs that have been

sought in the suit are prima facie not in respect of a half share in the immovable property in specie but, a declaration that Defendants 1, 2 and 6 to

9 hold half the shares and Directorships of the Fifth Defendant through which the property has been acquired in trust for the Plaintiffs. The suit

seeks a declaration of the shares being held in trust in prayer (a), a mandatory order for the transfer of the shares and allotment of Directorships in

prayer (b) and an injunction in prayer (c).

25. Brevity may well constitute the soul, but it is not necessarily a matter of contemporary practice in commercial transactions. Commercial

persons who enter into complex commercial deals are prima facie, known to provide for all encompassing blue prints to guide them through the

eventualities, foreseen and unforeseen, that confront the implementation of a project. We have paused to ask ourselves whether the understanding

between the parties and the document of 27th September 2003 is reduced to a bare skeleton. Prima facie, material elements of the transaction

were still to be fleshed out. These terms and conditions include inter alia fundamental terms relating to the financing of the project, the price of the

shares, the development of the property and the management of the hotel in the absence of which the agreement remained inchoate and uncertain.

Conscious of this difficulty, the Plaintiffs submitted before the Court that in the case of an agreement which is incapable of founding an action in

contract as a result of its being uncertain or inchoate, the Court must step in, in the exercise of its jurisdiction in equity on an application of the trust

doctrine. That is now an issue to which the Court must turn.

The Trust doctrine:

26. The Indian Trusts Act, 1882, was an Act to define and amend the law relating to private trusts and trustees. The Statement of objects and

reasons notes that while trusts were not unknown in the country, trusts in the strict sense of the term as used by English Lawyers, that is to say,

confidences to the existence of which a "legal" and an "equitable" estate are necessary, were unknown. The object of the Bill was to codify the law

relating to trusts in the wider sense. Section 88 of the Trusts Act provides as follows:

88. Advantage gained by fiduciary. - Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a

fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage, or

where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other

person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Section 94 provided for constructive trusts in cases which were not expressly provided for and was to the following effect:

94. Constructive trusts in cases not expressly provided for. - In any case not coming within the scope of any of the preceding sections, where there

is no trust, but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of

the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

The following elucidation of the basis for recognising constructive trusts appears in the Statement of Objects:

Where no trust is declared but for the purposes of justice the law deems one to have been created, the trust is by English lawyers termed

constructive. Benami transactions, where property is transferred to A for a consideration paid by B, and B makes the payment for his own benefit,

have for centuries been familiar to the people of India; gains made by one person at the cost of another are an everyday source of litigation; and in

no country, owing to the extreme sub-division of immovable property and the partition of inheritances, are constructive trusts more common.

27. Parliament has enacted the Benami Transactions (Prohibition) Act, 1988, ""to prohibit benami transactions and the right to recover property

held benami"". The Law Commission of India in its One Hundred and Thirtieth Report had adverted to the ""misuse and abuse of the provisions of

the Trusts Act"". The report noted that a ""trust"" implied ""some kind of fiduciary relationship with confidence in the trustee to act in a manner useful

to the beneficiary"". Though this was ""the laudable object"", the purpose had, according to the Law Commission, been ""perverted"".4 The Law

Commission recommended a deletion inter alia of the provisions of Section 94 of the Trusts Act. Acting on the Report of the Law Commission,

Parliament in Section 7 of the Benami Transactions (Prohibition) Act, 1988, deleted the provisions of Sections 82 and 94 of the Indian Trusts Act,

1882. Consequently, the statutory provision in relation to a constructive trust has been deleted in the Benami Transactions (Prohibition) Act, 1988.

Sub-section (1) of Section 4 of the Act stipulates that no suit, claim or 4 Para 5.14 of the Report action to enforce any right in respect of any

property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person

claiming to be the real owner of such property. Sub-section (3) of Section 4 carves out certain exceptions and read in conjunction with Clause (b)

provides that nothing in the Act 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. Section

88 of the Indian Trusts Act, 1882 is not overridden by the provisions of the Benami Act. For the purposes of the present appeal, the issue which

will have to be addressed is whether the relationship between the Plaintiffs and the First and Second Defendants was of agency within the meaning

of Section 88 or whether the First and Second Defendants can be regarded as persons bound in a fiduciary capacity to protect the interest of

another person namely, the Plaintiffs. If the First and Second Defendants had then availed themselves of that character and had gained for

themselves any pecuniary advantage or if they entered into dealings under circumstances in which their own interests were adverse to those of the

Plaintiffs and thereby gained a pecuniary advantage, the advantage so gained would have to be held for the benefit of the Plaintiffs.

28. Now it is in this background that the decisions in the three cases upon which reliance has been placed would have to be visited. The first

decision is the judgment in Chattock v. Muller (supra). An estate was offered for sale by auction and both the Plaintiff and the Defendant were

interested in bidding for a portion. The Defendant agreed that if he purchased the whole of the estate or a part, he would cede to the Plaintiff a

certain portion and the mode of ascertaining the price to be paid by the Plaintiff for the part ceded to the Plaintiff was arranged. Parties agreed that

the Plaintiff would not bid, and it was the Defendant who would bid for the estate. Having acquired the estate, the Defendant claimed to reserve to

himself the right to deal with the property at his own discretion. Malins, V.C., held on the evidence that the Defendant had attended the auction

partly on his own account and partly as an agent of the Plaintiff and if he purchased the estate, he must have been held to be a trustee for the

Plaintiff for the portion which was to be ceded to the Plaintiff. In fact, the Defendant had until he revoked his decision, treated the purchase as a

joint purchase. The judgment of the Court contains the following observations:

In a case like this, where the Defendant has acquired the estate or part of it by a fraud on the Plaintiff, I think that the Court would be bound, if

possible, to overcome all technical difficulties in order to defeat the unfair course of dealing of the Defendant, and I should not, in my opinion, be

going too far if I compelled the Defendant to give the whole estate to the Plaintiff at the price given for it, rather than that he should succeed in

retaining it on account of any uncertainty as to the part which the Plaintiff is entitled to have.

Chattock was considered in a decision rendered in 1952 in Pallant v. Morgan (supra). The Plaintiff and the Defendant were holders of certain

estates. An estate was put up for auction and both the parties were conscious of the fact that if each were to bid against the other, no one would

profit except the owner. Parties, therefore, considered it preferable that they would agree before the sale not to compete. Though parties were

near an agreement, they had as a matter of fact failed to arrive at a final understanding. At the auction which was attended by agents on behalf of

the Plaintiff and the Defendant, the Plaintiff''s agent had an authority to bid upto 2000 Pounds, while the Defendant''s agent could bid upto 3000

Pounds. The Plaintiff''s agent refrained from bidding as a result of which the Defendant''s agent acquired the lot on behalf of the Defendant for

1000 Pounds. p was, therefore, a case where the Defendant would have acquired the property even if the Plaintiff were to bid for it because the

authority of the agent of the Plaintiff in regard to the price at which he could bid for the property fell short of the authority granted to the agent of

the Defendant.

Harman, J. held on facts that the agent of the Defendant when he bid for the lot was bidding for both the parties on an agreement that there should

be an arrangement between the parties on the division of the lots if he were successful. Parties had failed to agree on the division and Harman, J.

held that the Court could not compel them to agree. However, there could be a decree that the property was held by the Defendant for himself and

the Plaintiff jointly and if they still failed to agree on the division, the property must be resold, either party being at liberty to bid. Though the details

of the agreement had been left in doubt, that was held not to be fatal to the Plaintiff"s case which rested on the fact that his agent was kept out of

the ring at the auction by a promise that if he did not bid, an agreement would be reached.

29. Both Chattock and Pallant are cases of agency where on the evidence before the Court, the conclusion that was arrived at was that by a pre-

acquisition agreement, parties had agreed that (i) One of the parties would not bid for the property; and (ii) Upon the acquisition of the property, a

portion would be held for the benefit of the party which had refrained from bidding, acting on the strength of the assurance. In Chattock, the Court

went as far as to hold that while overcoming technical difficulties in order to defeat the unfair course of dealing of the Defendant, the Court would

rather give the whole of the estate to the Plaintiff. In the subsequent decision in Pallant, this course of action was not followed and Harman, J., held

that the best course of action would be to have the property resold.

30. The third decision in Banner Homes Group plc v. Luff Developments Ltd. (supra) was rendered by the Court of Appeal in England. Luff had

evinced an interest in acquiring a site for development and entered into negotiations with Banner to form a joint venture. Parties agreed to acquire

the property through the vehicle of a new Company which they would own and in which they would have equal share. Luff thereupon acquired an

off-the-shelf company which was to be the the vehicle for the joint venture. The Company acquired the site with funds provided by Luff

whereupon Banner was informed that Luff was withdrawing from the proposed joint venture. Banner set up the plea that the circumstances in

which the property had been acquired gave rise to a constructive trust over half the share in the Company but the claim was dismissed by the Trial

Judge. The matter was carried to the Court of Appeal. Chadwick LJ, in the course of the judgment spoke of the circumstances in which equity will

impose a constructive trust:

...equity will impose a constructive trust on property acquired by one person, say A, in furtherance of some pre-acquisition arrangement or

understanding with another, say B, that, upon the acquisition of the property by A in circumstances in which B kept out of the market, B would be

granted some interest in the property; notwithstanding that the arrangement or understanding falls short of creating contractual obligations

enforceable at law.

The Court referred to the earlier decisions including the dictum of Lord Diplock in Gissing v. Gissing [1970] 2 All ER 780, in which in the context

of the acquisition of a matrimonial home a resultant, implied or constructive trust was held to have been created by a transaction between the

trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land. The principles on which a constructive trust

would arise from a Pallant v. Morgan equity were emphasized thus in the judgment in Banner Homes:

(1) A Pallant v. Morgan equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant

property by one of those parties to that arrangement. It is the pre- acquisition arrangement which colours the subsequent acquisition by the

defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it.... (2) It is unnecessary that the arrangement or

understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any

need to invoke the Pallant v. Morgan equity; equity can act through the remedy of specific performance and will recognise the existence of a

corresponding trust... (3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party (the acquiring

party) will take steps to acquire the relevant property; and that, if he does so, the other party (the non-acquiring party) will obtain some interest in

that property...(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do)

something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-

acquiring party to acquire the property on equal terms.... (5) That leads,...to the further conclusions: (i) that, although, in many cases, the

advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii)

that, although there will usually be advantage to the one and co-relative disadvantage to the other, the existence of both advantage and detriment is

not essential - either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself

in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where

the non-acquiring party was never in the market for the whole of the property to be acquired; but (on the faith of an arrangement or understanding

that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party.

The judgment in Banner Homes postulates that in order to invoke the Pallant v. Morgan equity, certain fundamental conditions have to be fulfilled.

There has to be a pre-acquisition agreement between the parties under which it is agreed that one of the parties would take steps to acquire the

property and on acquisition the other will obtain some interest therein. Moreover, the non- acquiring party, on the assurance contained in the pre-

acquisition agreement must do or omit to do something which confers an advantage on the acquiring party in relation to the acquisition of the

property. In Pallant v. Morgan, the Plaintiff had not as a matter of fact, suffered any detriment as a consequence of his agent''s agreement not to

bid, because even if the Plaintiff''s agent were to bid for the property, he would have been outbid by the agent of the Defendant. The authorisation

to the agent of the Defendant in regard to the price of the bid being higher than that of the Plaintiff''s agent there was no detriment to the Plaintiff.

Nonetheless as a result of the agent of the Plaintiff not bidding for the property, the Defendant acquired the property at a lower figure. An

advantage or detriment may, therefore, be located in the pre-acquisition agreement by which the non-acquiring party does not submit a bid for the

property. The judgment in Banner took the law a step further by holding that the equity would arise where the circumstances make it inequitable for

the acquiring party to retain the property where for instance, the other party had provided support in relation to the acquisition of the whole which

is of advantage to the acquiring party.

31. In our view, prima facie at the interlocutory stage, it would not be possible to accept the plea of the Plaintiff founded on the Pallant v. Morgan

equity for more than one reason. Firstly, in view of the position of law as it obtains in India, a recourse to the doctrine of constructive trust would

statutorily be impermissible in view of the deletion of the provisions of Section 94 of the Indian Trusts Act, 1882 by Section 7 of the Benami

Transactions (Prohibition) Act, 1988. In Bai Dosabai Vs. Mathurdas Govinddas and Others, , the Supreme Court observed thus:

...many of the principles of English equity have been statutory form in India and have been incorporated in occasional provisions of various Indian

statutes such as the Indian Trusts Act, the Specific Relief Act, Transfer of Property Act etc. and where a question of interpretation of such equity

based statutory provisions arises we will be well justified in seeking aid from the equity source.

Consequently, where a statutory provision in Indian Law incorporates an underlying principle of the equity jurisprudence in England, a Court may

well seek the aid of the ""equity source"" as an interpretative aid. That, however, is not a case in a situation such as the present where by an express

statutory deletion, an equitable principle has been effaced from the statute book in India. In the face of the statutory deletion of the provision

recognising constructive trusts, the Court would be transgressing the limits of its powers to seek the assistance from an equitable principle

originating in England. The duty of the Court is to apply the law as it stands and the intention of Parliament in deleting the provision for a

constructive trust is clearly and unambiguously spelt out by Section 7 of the Benami Act. Indeed, as the Supreme Court observed in Cotton

Corporation of India Limited Vs. United Industrial Bank Limited and Others, .

Where provisions are in pari materia between the English Act and the Indian Act and where local conditions do not materially differ from the

conditions in U.K., one may keeping in view the conditions in our country look at the view taken by the English courts and if consistent with our

jurisprudence, our social conditions, our chalked out path in which the law must move, one can profitably take help of the decision. There would

be nothing wrong in referring to the same. But ignoring all the relevant considerations, one cannot bodily import English decisions in our system to

develop a hybrid legal system and one cannot be so hypnotised by English decisions to overlook legislative changes introduced in Indian law.

32. The second reason for not applying the Pallant v. Morgan equity in the present case is that prima facie, there is no convincing material at the

present stage to indicate that the Plaintiffs were to bid for the property on their own accord and that they had refrained from submitting a separate

bid on the strength of a representation contained in a pre-acquisition agreement of the kind involved in Chattock or Pallant. Ultimately, this is a

matter of trial on the basis of evidence to be led by the parties. On the question as to whether the Plaintiffs had, as a matter of fact, demonstrated

any interest in acquiring the property by entering upon the market, interrogatories were addressed to the Plaintiffs during the pendency of the

proceedings before the Learned Single Judge. In response, the Plaintiffs furnished copies of three letters dated 27th December 2000, 8th January

2001 and 15th January 2001. Even those letters only speak of a meeting with UB and of a site plan.

33. Thirdly, prima facie the document dated 27th September 2003 between the parties does not suggest the kind of the agreement that was

entered into prior to the acquisition between the Plaintiffs and the Defendants in Chattock and Pallant. Both those cases involved a situation where

the Defendant was constituted to be an agent for the acquisition of a portion of the property for and on behalf of the Plaintiffs and in pursuance of

which the Defendants had, in fact, acquired the property by inducing the Plaintiffs not to bid. Prima facie in the present case there is one property

and one hotel. The agreement provides that ""we"" that is the First and Second Defendants were acquiring the property in the Fourth Defendant and

to make the Plaintiffs a partner, the Plaintiffs would be allotted equal shares and Directorships as the group of the First and Second Defendants.

The Plaintiffs do not appear to have been partners when the agreement was arrived at. At this stage, prima facie, we are inclined to agree with the

contention on behalf of the Defendants that the agreement reflects a commercial dealing between two commercial interests and involves an arms

length transaction. The agreement was that the Plaintiffs would be made a partner by the allotment of shares and Directorships. Such an agreement

prima facie would not be susceptible of specific performance. Perhaps, the contractual remedy for breach must sound in damages.

34. Fourthly, the agreement between the Plaintiffs on the one hand and the First and Second Defendants on the other, is an agreement to make the

Plaintiffs partners in the hotel project. In order to effectuate that purpose, the Plaintiffs were to be allotted shares and Directorships in the Fourth

Defendant. The agreement prima facie, does not ex facie reveal that it is for the acquisition of a half share in the immovable property in specie, nor

is any specific material placed in that regard on record. The agreement would disclose an understanding to induct the Plaintiffs as partners in the

hotel project. The property was to be acquired in a Company, the Fourth Defendant, in whom shares and Directorships were to be allotted to the

Plaintiffs. Consequently, the reliefs sought by the Plaintiffs include a declaration that Defendant Nos. 1, 2 and 6 to 9 hold half the shares and

Directorships of the Fifth Defendant through which the property has been acquired in trust for the Plaintiffs, a mandatory order for the transfer of

the shares and allotment of Directorships and an injunction. The agreement, therefore, was to induct the Plaintiffs as partners in the joint venture at

the future point of time. Evidently, the Plaintiffs were not partners when the agreement was signed. The agreement prima facie does not disclose an

acquisition of interest by the Plaintiffs in the immovable property.

35. The case of the Plaintiffs, however, is that there is a relationship of agency under the document of 27th September 2003 and the First and

Second Defendants were bound in a fiduciary character to protect their interest. Section 88 of the Indian Trusts Act, 1882 comprehends first,

certain specified relationships - those of a trustee, executor, partner, agent, director of a company and legal adviser. The second category

comprises of ""a person bound in a fiduciary character to protect the interest of another person"". The categories which have been specifically

provided in the first part of the definition are, therefore, not exhaustive since the subsequent part comprehends a person bound in a fiduciary

character to protect the interests of another. A fiduciary is defined as a trustee, a person holding a character of trustee or a character analogous to

that of a trustee. The concept of a fiduciary involves a relationship founded upon a trust or confidence.8 A lucid statement of the law on what

constitutes a fiduciary or a breach of a fiduciary duty is contain in the judgment of Millett L.J. in Bristol and West Building Society v. Mothew 1998

Ch. 1:

The expression ""fiduciary duty"" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal

consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In

this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southern J. in

Girardet v. Crease & Co. (1987) 11 B.C.L.R. 361:

The word "fiduciary" is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth... That a lawyer

can commit a breach of the special duty [of a fiduciary] ... by entering into a contract with the client without full disclosure...and so forth is clear.

But to say that simple carelessness in giving advice is such a breach is a perversion of words.

The parameters of the expression must be crystalised if the concept is not to be deprived of practical utility. The following statement of law by

Millett L.J. contains what may well now be 8 Law Lexicon by P. Ramanatha Iyer, Third Edition page 1817. regarded as a classical restatement of

the doctrine of when a person may be regarded as a fiduciary:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a

relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single

minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he

must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person

without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary

obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p. 2, he

is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

36. The judgment of the High Court of Australia in Hospital Products Ltd. v. United States Surgical Corporation Choice Inc. (1984) 156 CLR 41,

contains an elaborate discussion of the concept of fiduciary and the circumstances in which a fiduciary duty may be found to exist. Gibbs C.J.

noted that the archetype of a fiduciary is of course the trustee but it is recognised by decisions of Courts that there are other classes of persons

who normally stand in a fiduciary relationship to one another, e.g., partners, principal and agent, director and company, master and servant,

solicitor and client, tenant-for-life and remainderman. On the other hand the Learned Chief Justice sounded a note of caution in importing fiduciary

notions in an arms length commercial dealing:

...the fact that the arrangement between the parties was of a purely commercial kind and that they had dealt at arm''s length and on an equal footing

has consistently been regarded by this Court as important, if not decisive in indicating that no fiduciary duty arose:

Dawson J. in the course of his judgment emphasized that in the decided cases there is a common thread:

There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of

disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of

equity acting upon the conscience of that other.

The same principle was elaborated further:

A fiduciary relationship does not arise where, because one of the parties to a relationship has wrongly assessed the trustworthiness of another, he

has reposed confidence in him which he would not have done had he known the true intentions of that other. In ordinary business affairs persons

who have dealings with one another frequently have confidence in each other and sometimes that confidence is misplaced.... A fiduciary

relationship exists where one party is in a position of reliance upon the other because of the nature of the relationship and not because of a wrong

assessment of character or reliability.

A caution has been administered in precedents, of more than a persuasive authority, on the undesirability of extending fiduciary duties to

commercial relationships and the anomaly of imposing those duties where parties are at an arm''s length from one another. In Barnes v. Addy

(1874) 9 Ch App 244, Lord Selborurne L.C. observed thus:

It is equally important to maintain the doctrine of trusts which is established in this Court, and not to strain it by unreasonable construction beyond

its due and proper limits. There would be no better mode of undermining the sound doctrines of equity than to make unreasonable and inequitable

applications of them. (emphasis supplied).

37. Both the groups comprise of men experienced in the world of trade, commerce and business. The Plaintiffs as well the the First and Second

Defendants have wide and diversified interests in the business of conducting hotels. The present case prima facie involves a dealing between two

commercial interests represented by the Plaintiffs on the one hand, and the First and Second Defendants on the other. Prima facie, both the parties

have entered into a commercial transaction. The remedy for a breach of the contractual obligation would, therefore, sound in a remedy in the law

of contract.

38. Decided cases where the principle of agency or of a fiduciary character have been applied would only emphasize the completely different

situation which obtains in the present case. In P.V. Sankara Kurup Vs. Leelavathy Nambiar, , the Petitioner was the agent and Power of Attorney

of the Respondent-plaintiff and was to look after her property. In a Court auction, the suit property was purchased by the Petitioner in his name

but all the expenses incurred for the litigation till obtaining the sale certificate were credited to the account of the Respondent-Plaintiff. The

consideration for the purchase as well as the improvements on the property were made with the funds of the Respondent for whom the Petitioner

was acting as an agent and Power of Attorney. In these circumstances, the Supreme Court held that the Petitioner had acted in a fiduciary capacity

as an agent and though the sale certificate ostensibly stood in his name, he obtained it while acting as agent for the Respondent. The sale certificate

was obtained without the knowledge of the Respondent and without her consent, by playing a fraud on her. In that context, the Supreme Court

held as follows:

...real purchaser is the respondent, the petitioner as an agent and power of attorney, had purchased the property but ostensibly had his name

entered in the sale certificate, fraudulently and without her consent. That apart u/s 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 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.

Similarly, in Canbank Financial Services Ltd. v. Custodian (2004) 7 SCC 355, the Andhra Bank acting at the request of the Second Respondent

who was a registered stock broker, and its wholly owned subsidiary applied for CANCIGO Units of a face value of Rs. 11 crores and Rs. 22

crores. The payment of the application money was to be made from the Bank Account of the Second Respondent. The certificates were handed

over to the Second Respondent and the interest was credited to his account. There were dealings between the Second Respondent and the

Appellant as a beneficiary which were accepted in discharge of the liability owed to the Appellant. In this context, the Supreme Court held as

follows:

By reason of the said transaction, a cestui que trust was created, inasmuch as Respondents 3 and 4 applied for allotment of CANCIGOs on behalf

of Respondent 2 and not on their own behalf. The trust was created for a purpose, namely, the benefit arising therefrom would be appropriated by

Respondent 2. The principle of cestui que trust is a synonym of a beneficiary . The said principle is not confined to the ingredients of Section 82 of

the Trusts Act. It also covers cases falling u/s 88 thereof. Thus if it be held that the properties were acquired by Respondents 3 and 4 in their own

names in breach of their obligations while acting as an agent of Respondent 2, the case would be covered u/s 88 of the Trusts Act. Section 88 of

the Trusts Act has not been repealed by Section 7 of the Benami Transactions Act. In such a case the Benami Transactions Act would not

operate.

Prima facie in the present case, the parties have been involved in a commercial transaction. We find it difficult to accept the contention about the

existence of a fiduciary relationship on the basis of the material placed before us. The pleadings to establish a case of agency are prima facie

lacking. The use of the words ""behalf of"" in certain areas of the plaint cannot be reflective prima facie of a relationship in which the First and

Second Defendants were to act as agents of the Plaintiffs.

39. During the course of the hearing, Counsel appearing on behalf of the Appellants sought to place reliance on certain transcripts containing a

record of alleged taped conversations with the First and Second Defendants in the course of several meetings held between November 2003 and

February 2004. The case of the Appellants inter alia is that in the course of one of the said meetings, an amount of Rs. 1 crore was paid in cash to

the First and Second Defendants by the Plaintiffs. The First and Second Defendants have denied the payment of the aforesaid amount in cash. At

this stage, we are of the view that it would neither be proper nor appropriate for the Court to rely on the alleged transcripts since the genuineness

and authenticity of the recording would merit determination on the basis of the evidence at the trial of the suit. At the interlocutory stage before a

Learned Single Judge, a Notice of Motion was taken out by the Plaintiffs (Notice of Motion 889 of 2005) to deposit the recording of the

discussion and the transcripts in the Court. By an order dated 16th June 2006, the Notice of Motion was dismissed by the Learned Single Judge.

That order of the Learned Single Judge has not been challenged.

40. While disposing of the Notice of Motion from which the present appeal arises, the Learned Single Judge has passed an equitable order that

would sufficiently protect the rights of the parties. The Learned Single Judge has inter alia directed that the creation of any encumbrances in the

land during the pendency of the suit shall be subject to the result of the suit and the person in whose favour the encumbrances were created would

be informed in writing. The Fifth Defendant has also been directed to retain 50% of the authorised share capital with itself during the pendency of

the suit and it has also been provided that any development on the land shall be subject to the result of the suit. The Learned Single Judge held that

the Plaintiffs had not made out a strong prima facie case so as to entitle them to a drastic interim order in the Notice of Motion. The Learned Single

Judge took note of the fact that the hotel project involves an outlay in excess of Rs. 250 crores and that the value of the land itself is in excess of

Rs. 40 crores. On considering the matter, the Learned Single Judge held that stopping the construction of the hotel would not be appropriate and

the passing of a blanket injunction restraining the Defendants from alienating or transferring the property would cause hindrance in the completion

of the project since, for a project of the magnitude involved it may become necessary for the Fifth Defendant to create encumbrances on the

property. The directions issued by the Learned Single Judge would adequately secure the rights of the parties during the pendency of the suit.

41. As already noted earlier, a Division Bench of this Court consisting of Dr. S. Radhakrishnan and Mr.Justice S.J. Vazifdar has by orders dated

15th November 2006 and 20th December 2006 imposed sanctions on the Defendants for breach of the interim order dated 25th October 2005.

The effect of the directions contained in the order of the Division Bench has to continue upon the disposal of the appeal, pending the disposal of the

suit.

42. The Appeals shall accordingly stand dismissed.