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CANBANK FINANCIAL SERVICES LTD.

v.

THE CUSTODIAN AND ORS.

SEPTEMBER 3, 2004

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[N. SANTOSH HEGDE, S.B. SINHA AND A.K. MATHUR, JJ.]

The Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992.

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Sections 3, 4, 9A and 13—Units with stipulation making their transfer impermissible—Application for investment by some entities in own name—However, consideration for allotment paid by a stock broker and certificates of units as well as interest thereon, though first received by those entities, later handed over to stock broker—Transfer of these units by stock broker in discharge of his liabilities towards another person who also paid

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remaining consideration for units—Validity and legality of—Held: Stipulation making transfer impermissible was not absolute legal bar—Units were valuable securities capable of being transferred in terms of established business practice, Sale of Goods Act, 1930 or Transfer of Property Act, 1882—Stock broker had transferable beneficial interest in units as cestui qui

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trust was created for his benefit—It was not a case of benami transaction and Benami Transactions (Prohibition) Act, 1988 not applicable—There was no statute forbidding either those entities from entering this transaction or precluding the stock broker from transferring his interest to another person, and both the transactions were legal—The arrangement may be unethical but not illegal—As the transfer took place before coming into force of the 1992

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Act, stock broker had no interest therein which could have been attached by Custodian appointed under that Act—Canbank Mutual Fund (CANCIGO) Scheme, 1988, Conditions 2(k), 2 (r) 5, 10, 19, 22 and 24—Indian Trusts Act, 1888, Sections 7, 58, 82 and 88—Transfer of Property Act, 1882, Sections 6(d) and 10—Sale of Goods Act, 1930, Sections 4, 19 and 20—Benami Transactions (Prohibition) Act, 1988, Section 3, 4 and 5.

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Role of Custodian—His rights are same as that of notified person—Properties of latter neither vest in him nor is he permitted to deal with any property which did not belong to latter on the relevant date—He is not a receiver within the meaning of provisions of Code of Civil Procedure or an Official Receiver or an Official Assignee under the Insolvency laws—He is

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also not Official Liquidator under the Companies Act.

Section 3(3)—Attachment of properties of notified person—It is subject to an encumbrance, if any—Even if a limited right is transferred by a notified person to a third party, the order of attachment must be subject to the said right of the third party—Under all circumstances the right of a third party must be recognised.

Section 9A—Statutory attachment of properties of notified person—All claims relating thereto must be adjudicated by Special Court only.

Sale of Goods Act, 1930—Right, title and interest in movable property—It passes by delivery of possession and upon paying of consideration unless the transaction is forbidden under Section 23 of Contract Act, 1872.

Benami Transactions (Prohibition) Act, 1988—Scope and applicability of Discussed.

Indian Trusts Act, 1888—Section 88—Fiduciary character—Discussed.

Maxims: Cesti qui trust—It is synonym with beneficiary and covers cases falling under Sections 82 and 88 of Indian Trusts Act, 1888.

Words and phrases—Trust—Creation, annexed obligations, nature, transferability and remedies—Meaning of—In context of Indian Trusts Act, 1888.

Appellant and CBMF are subsidiary companies of same nationalised bank. CBMF floated a scheme of investment in units, named 'CANCIGO' with a stipulation making their transfer impermissible. Respondent No. 4, another nationalized bank and Respondent No. 3, its wholly owned subsidiary, on request of Respondent No. 2, a registered stock broker applied for those units aggregating to face value of Rs. 33 crores. However, application money for purchase of those units was paid by Respondent No. 2 himself, and certificates of those units as well as interest thereon, though first received by Respondent Nos. 3 and 4, were also later handed over to him—the latter two not claiming any right, title or interest therein. In respect of purchase/sale of shares and securities of several companies, there were diverse dealings between the appellant and Respondent No. 2, and Rs 25,01,67,129 was due and payable by

A latter to former. In discharge of these liabilities, Respondent No. 2 offered aforementioned units as beneficiary thereof to appellant who accepted the same. Balance consideration of those units viz. Rs. 7,98,32,971, was paid by appellant by a cheque drawn in favour of Respondent No. 3, but the same was credited to account of Respondent No. 2.

B The Special Courts (Trial of Offences Relating to Transactions in
C Securities) Act, 1992 was enacted to deal with serious irregularities in
D security transactions. In terms of this law, Respondent No. 1 was
appointed as Custodian and it declared Respondent No. 2 a 'notified
person'. Also, a Special Court was established with a sitting Judge of
E High Court having exclusive jurisdiction in relation to matters specified
in the Act as also trial of offences arising thereunder. On considering
the claims of appellant and Respondent No. 1 regarding aforementioned
units, this Special Court held *inter alia* that as the transaction was illegal,
the right, title and interest in units remained in Respondent
No. 2 and stood attached in terms of Section 3 of the Act.

D Aggrieved by the above judgment of Special Court, appellant filed
present appeals before this Court contending *inter alia*, that Respondent
No. 2 had beneficial interest in the units having made payment therefor
and obtained possession thereof; that purported bar that a unit holder
cannot create 'any interest' therein or transfer them to a third person
would not apply to transfer of a beneficial interest; that an absolute
restriction on transfer is void under Section 10 of the Transfer of Property
Act; that the beneficial interest of Respondent No. 2 was transferable in
view of Section 58 of the Indian Trusts Act and Section 6(d) of the
Transfer of Property Act; that Respondent No. 2 having transferred the
units in favour of the appellant, he had no interest therein warranting
attachment under the Act; and that repeal of Section 82 of Indian Trusts
Act by Benami Transactions Act, 1988 was of no consequence as
provisions of the Indian Trusts Act, 1882 were not exhaustive.

G Respondent No. 1 contended that no implied trust was created by
and between Respondent No. 2 on one hand and Respondents no. 3 and
4 on the other, and in that view of the matter no beneficial interest could
be created in favour of Respondent No. 2; that in the absence of any
trust Section 58 of Indian Trusts Act would not apply particularly having
regard to provisions contained in Section 7 of the Benami Transactions
H Act where under Section 82 of the Trusts Act has been repealed; and

that having regard to Benami Transactions Act, the right, title and interest in the units remained in Respondent Nos. 3 and 4 and furthermore having regard to terms of issue of the units being non-transferable, no title passed on to the appellant.

Allowing the appeals, the Court

HELD : 1. The Canbank Mutual Fund having regard to the materials on records must be presumed to have issued the CANCIGOs in the names of Respondent Nos. 3 and 4 with full knowledge that they would enure to the benefit of Respondent No. 2. The effect of grant of CANCIGOs by the Canbank Mutual Fund despite such knowledge does not strictly fall for consideration but the same is relevant to determine the nature of illegality of the transaction, if any. It is one thing to say that they could not have done so having regard to the scheme, but it is another thing to say that the same was illegal. A transfer can be held to be invalid provided it is forbidden in law. It is one thing to say that the founders of the Scheme would not recognise any transfer so as to make it liable to pay dividend to a person other than the person in whose name a unit is held but it is another thing to say that it is not legally transferable. Respondent Nos. 3 and 4 by reason of the said transaction held themselves to be the trustees of Respondent No. 2 in relation to the securities in question. They applied for allotment for the benefit of Respondent No. 2. They never enforced any claim in relation to the said securities in the court of law and, in fact, disclaimed any right, title or interest therein. Possession of the securities which are movable properties has been handed over to them. No statutory provision has been brought to notice forbidding such transfer. Respondent Nos. 3 and 4, therefore, were not statutorily prevented from entering into such a transaction. In other words, the concerned parties, namely Canbank Mutual Fund, Respondent Nos. 3 and 4 as well as Respondent No. 2 became parties to an arrangement which may be unethical but not illegal. It is also not a case where a transfer has been made by a company beyond its articles. Appellant has not acted *ultra vires* its articles. Furthermore, it is one thing to say that a transfer is made contrary to Articles but it would not be correct to contend that the same was prohibited by terms of issue.

[93-H; 94-A-B; 95-A-B, H; 96-A-B; 98-H; 99-A]

B.O.I. Finance Ltd. v. Custodian and Others, [1997] 10 SCC 488, applied.

A *Harshad Shantilal Mehta v. Custodian and Others*, [1998] 5 SCC 1 and *V.B. Rangaraj v. V.B. Gopalakrishnan & Ors.*, AIR (1992) SC 453, referred to.

B 2.1. The Rules and Regulations framed by the Canbank Mutual Fund in relation to the issuance of CANCIGO certificates do not have any statutory backing. [85-D]

C 2.2. Permission is not a legal restriction. However, in deserving cases, Trustees may permit addition of names to the existing CANCIGO holding after duly considering the same. Permission/Approval subsequently granted would validate the grant. [86-A]

Graphite India Ltd. and Another v. Durgapur Projects Ltd. and Others, [1999] 7 SCC 645, referred to.

D 2.3. CANCIGOs indisputably are valuable securities. They are otherwise capable of being transferred in terms of the established business practice, the Sale of Goods Act, or Transfer of Property Act. No legal bar has been created in transfer of the said securities. The scheme thus does not and could not have created an absolute legal bar on transfer of the CANCIGOs so as to invalidate the same. [86-B-C]

E 2.4. The Rules and Regulations framed by Canbank Mutual Fund and the notes appended to the CANCIGO Credit Sheet differ in material particulars. Rules and Regulations explain as to why an embargo in transfer has been placed, i.e., not to recognise Respondent No. 3 for the dividends or for other liabilities arising out of transfer. A transfer violating the rules and regulations would only have the effect of the same being not binding the Canbank Mutual Fund. No other legal consequences flow therefrom. The brochure merely states that the transfer is not permitted but provisions exist for grant of such permission. [86-D-E]

G 3.1. Transfer of CANCIGO in favour of the Appellant was valid and legal as by reason of the transfer of possession of the CANCIGOs by Respondent No. 2 in favour of the Appellant, a valid right has been created therein, the same could not have been attached in terms of Section 3(3) of the said Act. [102-G]

H 3.2. Respondent No. 2 did not hold any personal interest which

could come within the purview of Section 6(d) of the Transfer of Property Act. An interest in the CANCIGOs was not created in the Respondent No. 2 for enjoyment in his personal capacity. Section 6(d) of the Transfer of Property Act would apply when a transfer is in violation of such stipulation which would defeat the object thereof. The Special Judge, therefore, committed an error in invoking Section 6(d) of the Transfer of Property Act. [101-B-C]

Nallajerla Krishnayya v. Vuppala Raghavulu, AIR (1958) AP 658, referred to.

3.3. The Appellant having paid a consideration of Rs. 33 crores in relation to the CANCIGOs in question had a just right to possess the same to the exclusion of Respondent No. 2 and in that view of the matter too the Special Court could not have directed the Appellant to hand over the same to the Custodian. The said direction is unsustainable in law. [102-C]

3.4. The Appellant Bank as well as Canbank Mutual Fund are the subsidiaries of Canara Bank. The appellant cannot be estopped from raising either a limited or absolute title in them keeping in view the fact that they had paid a sum of 33 crores of rupees by way of consideration for transfer of interest of Respondent No. 2 in the said CANCIGOs.

[86-E-F]

4.1. By reason of the legal consequences of the relationship of the banker and the customer, *vis-à-vis*, the transaction in question, a beneficial trust has been created. The same would, thus, be transferable as otherwise it would be hit by Section 10 of the Transfer of Property Act. When there exists such a condition, in terms of Section 10, an absolute restraint is void whereas partial restraint is not. [86-G]

Mohammed Raza and Others v. Mt. Abbas Bibi, AIR (1932) PC 158, referred to.

4.2. The parties to the transaction cannot enter into any benami transaction so as to get any property transferred in their names for consideration, i.e., paid by a third party. A presumption, thus arises that the parties never intended that the transaction would be a benami one. By reason of the said transaction, a *cestui qui* trust was created, inasmuch as

A Respondent Nos. 3 and 4 applied for allotment on behalf of Respondent
 No. 2 and not on their own behalf. The trust was created for a purpose,
 namely, the benefit arising therefrom would be appropriated by
 Respondent No. 2. The principle of *cesti qui* trust is a synonym of a
 B beneficiary. The said principle is not confined to the ingredients of Section
 82 of the Indian Trust Act. It also covers cases falling under Section 88
 thereof. Thus, if it be held that the properties were acquired by
 Respondents Nos. 3 and 4 in their own names in breach of their obligations
 while acting as an agent of Respondent No. 2, the case would be covered
 under Section 88 of the Indian Trusts Act. Section 88 of the Trusts Act
 has not been repealed by Section 7 of the Benami Transactions Act. In
 C such a case, the Benami Transactions Act would not operate. [89-D-G]

P.V. Sankara Kurup v. Leelavathy Nambiar, AIR (1994) SC 2694 and
R. Rajagopal Reddy (dead) by LRs. and Ors. v. Padmini Chandrasekharan
(dead) by L.Rs., AIR (1996) SC 238, referred to.

D *Barclays Bank v. Quitclose Investments*, [1970] AC 567; *Re EVTR*
 (1987) B.C.I.C. 647 and *Carreras Rothmans Ltd. v. Freemant Mathews*
Treasure Ltd., (1985) Ch. 207, referred to.

E *Equity & Trusts*, 2nd Edition by Alastair Hudson, page 307, referred
 to.

F 4.3. A beneficial trust indisputably can be transferred. For the said
 purpose, the only legal requirement will be the essence of a trust. The
 right of a beneficiary to transfer his interest being absolute, the transferee
 derived rights, title and interest therein. Furthermore, the doctrine of
 resulting trust was applicable in India even before the Indian Trusts Act
 came into force. Thus, Respondent No. 2 had a transferable interest in
 the CANCIGOs. [89-G-H; 90-D]

G *Hem Chandra Roy Chaudhury v. Suradhani Debya Chaudhurani and*
Others, AIR (1940) PC 134; *Commissioner of Income Tax, Hyderabad v.*
Nawab Mir Barkat Ali Khan Bahadur, AIR (1975) 838 at 845 and *Mussamat*
Ameeronnissa Khanum and Mussamat Parbutty (1871) 14 Moor Ind. App.
 433, referred to.

H 5.1. The allotment of CANCIGOs is not a transfer as thereby

Canbank Mutual Fund had allowed the shares not as owner thereof. The Benami Transactions Act applies when there is a transaction in which the property is transferred. If allotment of CANCIGOs is not a transfer of property, the Act would not apply. Even assuming that Benami Transactions Act as also the bar on the transfer imposed by Canbank Mutual Fund (CBMF) would apply, the properties would remain vested in Respondent Nos. 3 and 4 and Respondent No. 2 would have no interest therein which would attract the provisions of Sub-section (3) of Section 3 of the Act. [90-E; 91-A-B]

Sri Raj Sachdeva v. Board of Revenue, AIR (1959) All. 595; *The Swadeshi Cotton Mills Co. Ltd., In re.*, (1932) Comp. Cas. 411 and *Madura Mills Co. Ltd., In re.*, (1937) Comp. Cas. 71, referred to.

5.2. This Court is only concerned with the validity of the transactions. In a case of this nature a beneficial interest is created within the meaning of the provisions of Section 88 of the Indian Trusts Act in view of the fact that Respondent Nos. 3 and 4 have applied the money of Respondent No. 2 for allotment of CANCIGO in their own names and applied for allotment of the certificates on behalf of Respondent No. 2 and not on their own behalves. It is, therefore, not a case where the transaction was benami in nature. It does not appear also to be a case where the parties entered into a transaction with a view to contravene any law. It is also not a case where any amount belonging to a bank has been utilized by a customer. Respondent Nos. 3 and 4 have not claimed any right; title and interest in CANCIGOs. In view of the aforementioned circumstances, provisions of the Benami Transactions Act would have no application whatsoever. [92-G-H; 93-A-B]

5.3. In this case, the parties to the transactions are public sector undertakings being scheduled banks and their subsidiaries. A presumption would, thus arise that they would not encourage any benami transaction nor would involve themselves therein. [91-G-H]

5.4. This Court is not concerned with the right of a party to take recourse to a remedy but is concerned with a right of a party to possess the property over which it has a lawful title. In such a situation, Benami Transactions Act will have no application in allocation of shares as the same would not come within the purview of transaction relating to a

A transfer of property. [102-F]

5.5. A transaction which falls within the purview of Section 88 of the Indian Trusts Act does not fall within the category of benami transactions in terms of provisions of Benami Transactions Act. [88-F]

B 6.1. The properties of a notified person do not vest in the Custodian. He is not a receiver within the meaning of the provisions of Code of Civil Procedure or an Official Receiver or an Official Assignee under the insolvency laws. He is also not an Official Liquidator under the Companies Act. His right is same as that of the notified person. Only
C when the notified person had a subsisting right in a property, the same being subject to statutory attachment, the custodian can approach the special court for an appropriate direction in relation thereto. In other words, the custodian is not permitted to deal with any property which did not belong to the notified person on the relevant date. [93-F-G]

D 6.2. The position of custodian is the same as that of the notified person himself. If by any law Respondent No. 2 was not precluded from transferring the shares by him, the transfer thereof in favour of the Appellants was legal. The transaction took place on 6.2.1992 i.e. much prior to 6.6.1992 when Respondent No. 2 became notified person. If on
E or after 6.2.1992 Respondent No. 2 had no interest in the CANCEIGOs, the same could not have been the subject matter of attachment of the custody. The custodian could attach the property only when the right, title and interest thereto remain on Respondent No. 2 and not otherwise. [96-D-F]

F 7.1. Attachment under sub-Section (3) of Section 3 of the Act is subject to an encumbrance, if any. Even if a limited right is transferred by a notified person to a third party, the order of attachment, if any, must be subject to the said right of third party. The Special Judge erred in asking unto himself a wrong question that the statutory provisions
G create no right in the third party including the Appellant. [99-B, H]

Harshad Shantilal Mehta v. Custodian and Others, [1998] 5 SCC 1, relied on.

C.B. Gautam v. Union of India & Others, [1993] 1 SCC 78, referred
H to.

V.B. Rangaraj v. V.B. Gopalakrishnan & Ors., AIR (1992) SC 453, A
held inapplicable.

7.2. It is no doubt true that Section 13 of the Act provides for a non-obstante clause but before the said clause is resorted to, it must be shown that there exists a provision inconsistent with the provision in any other Act. In any event, if Respondent Nos. 3 and 4 could transfer or relinquish their right in favour of Respondent No. 2 who in turn could transfer the same to the Appellant, provisions of the said Act would not entitle the custodian to claim a property which ceased to be the property of Respondent No. 2. Here again, the Special Judge committed an error in holding that by reason of Section 4(2) of the Benami Transactions Act, the Appellant is forbidden from raising a defence in respect of the CANCIGOs although such a bar would not apply in the case of the Custodian. [100-B-C] B C

8. The list of persons specified in Section 88 of the Indian Trusts Act is not exhaustive. The expression 'other person bound in fiduciary character to protect the interests of other persons' includes a large variety of relationship. The heart and soul of the matter is that wherever as between two persons one is bound to protect the interests of the other and the former availing of that relationship makes a pecuniary gain for himself, the provisions of Section 88 would be attracted, irrespective of any designation which is immaterial. The said principle would also apply for a banker holding the customer's money. [88-G-H] D E

Fibrosa Spolka v. Akeyjna v. Fairbairn Lawson Combe Barbour Ltd., [1942] 2 All ER 122, referred to. F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 164 of 1994.

From the Judgment and Order dated 22.9.93 of the Special Court (Trial of offences relating to transactions in Securities) at Bombay in Misc. P. No. 13 of 1993. G

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C.A. No. 165 of 1994.

Ms. Sunita Dutt for M/s. Janendra Lal & Co. for the Appellant. H

A Subramonium Prasad for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. :

B *BACKGROUND FACTS:*

C Andhra Bank (Respondent No. 3) is a nationalized bank. Andhra
Bank Financial Services Limited (Respondent No. 4) is a company wholly
owned by Andhra Bank. Canbank Mutual Fund (CBMF) is a subsidiary
company of Canara Bank, another nationalized bank. The Appellant herein
is also a subsidiary of Canara Bank. In or about 1989, Canbank Mutual Fund
floated an open ended investment scheme known as CANCIGO on an assured
return of 12.5% p.a. payable half yearly; the lock in period wherefor was
one year. A stipulation was also made to the effect that transfers are not
permitted. Hiten P. Dalal (Respondent No. 2) was a registered stock broker.
D Respondent No. 3 at his request applied for CANCIGO units of face value
of Rs. 11 crores. Similarly, Respondent No. 4 also at the request of
Respondent No. 2 applied for CANCIGO units of face value of Rs. 22 crores.
Indisputably, the payment of application money for purchase of said CANCIGO
units was to be made, out of the monies lying in the bank account of
E Respondent No. 2. The Respondent Nos. 3 and 4 complied with said request
of Respondent No. 2. The CANCIGO certificates received by the Respondent
Nos. 3 and 4 were handed over to the Respondent No. 2. The interest
accruing from the CANCIGO received by the Respondent Nos. 3 and 4 was
also credited to the account of Respondent No. 2. The said Respondents did
not claim any right, title or interest therein. There had been diverse dealings
F by and between the Appellant herein and the said Respondent No. 2 in respect
of the purchase and sale of shares and securities of various companies. A
sum of Rs. 25,01,67,129 was due and payable by the Respondent No. 2 to
the Appellant herein in respect of the said transactions as on 6th February,
1992. Respondent No. 2 offered the aforementioned CANCIGOs to the
G Appellant herein as a beneficiary thereof. The said offer of the Respondent
No. 2 was accepted in discharge of his aforementioned liabilities to the
Appellant. The Appellant on 6th February, 1992 paid the balance amount of
consideration of the said CANCIGOs, viz., a sum of Rs. 7,98,32,871 by a
cheque dated 11th February, 1992 drawn in favour of the Respondent no.
H 3 but the same was to be credited in the account of Respondent No. 2.

In or about May, 1992 serious irregularities in security transactions were discovered whereupon the Reserve Bank of India constituted a Committee known as 'Jankiraman Committee' to look into the real nature of the transactions and to ascertain the true facts. Investment in CANCIGO by Respondent No. 3 found place in the report of the said Committee wherein it was contended that it had made an application dated 28th August, 1991 for investment in CANCIGOs on behalf of Respondent No. 2 for 11 crores. Pending investigation, the Appellant was advised not to part with the two sets of CANCIGO certificates without the consent of the Reserve Bank of India.

The President of India promulgated an ordinance known as "The Special Courts (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992". It was repealed and replaced by 'The Special Courts (Trial of Offences Relating to Transactions in Securities) Act, 1992 ("the Act")', the Statement of Objects and Reasons wherefor are as under:-

"(1) In the course of the investigations by the Reserve Bank of India, large scale irregularities and malpractices were noticed in transactions in both the Government and other securities, indulged in by some brokers in collusion with the employees of various banks and financial institutions. The said irregularities and malpractices led to the diversion of funds from banks and financial institutions to the individual accounts of certain brokers.

(2) To deal with the situation and in particular to ensure speedy recovery of the huge amount involved, to punish the guilty and restore confidence in and maintain the basic integrity and credibility of the banks and financial institutions the Special Court (Trial of Offences Relating to Transactions in Securities) Ordinance, 1992, was promulgated on the 6th June, 1992. The Ordinance provides for the establishment of a Special Court with a sitting Judge of a High Court for speedy trial of offences relating to transactions in securities and disposal of properties attached. It also provides for appointment of one or more custodians for attaching the property of the offenders with a view to prevent diversion of such properties by the offenders."

A On or about 6th June, 1992 the Respondent No. 2 was declared to be a 'notified person' under the Act.

In terms of the provisions of the Act, a Special Court was established. The Special Court was conferred with exclusive jurisdiction in relation to the matters specified therein as also trial of offences arising thereunder.

B

CLAIM OF THE PARTIES BEFORE THE SPECIAL COURT:

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Both the Custodian and the Appellant filed applications before the Special Court which were registered as Misc. Application Nos. 13 of 1993 and 55 of 1993 respectively.

In its application, the Appellant prayed for the following reliefs:

“(a) that it be declared by this Hon’ble Court that:

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(i) that the property/debt in the CANCIGO covered under the two certificates issued by Canbank Mutual Fund are the property of the petitioners;

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(ii) that the CANCIGOs covered under the said two certificates are not within the purview of the Notification dated 6th June 1992 notifying Respondent No. 2 issued by Respondent No. 1 under sub-section (2) of Section 3 of the said Act.

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(iii) In the alternative to prayer (ii) above, the Respondent No. 1 subject to the directions of this Hon’ble Court is entitled to deal with, dispose of and encash the CANCIGOs under the said two Certificates, pay the same to the Petitioners and permit the Petitioners to appropriate and/ or adjust the net realization thereof in or towards the satisfaction of Petitioners dues from the Respondent No. 1;

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(b) Without prejudice to prayer (a) above and in the alternative, in the event of this Hon’ble Court coming to the conclusion that CANCIGOs under the said two certificates are not the property of the Petitioners and/ or the Petitioners are not entitled to encash them, the Respondent No. 1 and/ or Respondent No. 2 be ordered and directed to pay to the

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Petitioners a sum of Rs. 40,83,32,054 as per particulars more particularly described in Exhibit "F" hereto with further interest at the rate of 24% per annum on the principal amount of Rs. 33 crores from the date hereof till payment and/ or realization;

- (c) that pending the hearing and final disposal of the petition, the Respondent be directed not to deal with, dispose of and/ or encash the CANCIGOs covered under the said two Certificates."

However, the Custodian, in its application, prayed for the following reliefs:

"(a) that Canfina or any other Respondent who may be in possession of the said CANCIGOS worth Rs. 33 crores be ordered and directed by this Hon'ble Court to handover to the Applicant the said CANCIGOS together with any accrued interest thereon.

(b) that the CMF be ordered and directed by this Hon'ble Court to handover to the Applicant the accrued interest of Rs. 2,06,43,836 and all future sums of interest that may accrue on the said CANCIGOS worth Rs. 33 crores.

(c) that pending the hearing and final disposal of his application CMF be ordered and directed by this Hon'ble Court to handover to the Applicant the said accrued interest of Rs. 2,06,43,836 and all further sums of interest that may accrue on the said CANCIGOS worth Rs. 33 crores.

(d) that pending the hearing and final disposal of this application the Respondents be directed to file an affidavit showing how the transactions relating to the said CANCIGOS are reflected in their respective books/accounts."

The Respondent Nos. 2, 3 and 4 did not claim any interest in the said CANCIGOS before the Special Court.

By reason of the impugned judgment, the Special Court allowed the application filed by the Custodian and rejected that of the Appellant herein. Hence these appeals.

A *JUDGMENT:*

B Before the learned Special Judge a contention was raised by the Respondent No.1 to the effect that as the CANCIGOS were allotted in the names of the Respondent Nos. 3 and 4, Respondent No. 2 did not have any interest therein. A further contention was, however, raised that as the Respondent No. 2 was the real owner thereof, he in view of the said restriction on transfer could not have transferred any interest whatsoever (whether limited or absolute) in favour of the Appellant.

C The learned Special Judge noticed that although in its application the Appellant had made out a case to the effect that the CANCIGOs worth 33 crores were held by them by way of security but a different stand was taken before it that they are the absolute owners thereof. It was held that the Appellant having claimed that possession of CANCIGOs were delivered by the Respondent No. 2 as security, they were not and could not have become owners thereof as the Respondent No. 2 had no beneficial interest therein, having regard to the fact that such interest was not admitted by the Custodian and in that view of the matter the question of passing any right, title or interest, legal or beneficial, in the CANCIGOS in favour of the Appellant by the said Respondent would not arise. Relying on a decision of this Court in *V.B. Rangaraj v. V.B. Gopalakrishnan & Ors.*, AIR 1992 SC 453: [1992] 1 SCC 160, the learned Judge opined that the said decision is an authority for the proposition that any transfer contrary to the Articles of Association or terms of issue would not be valid. The learned Judge held that having regard to the fact that the transaction was illegal, the right, title and interest of CANCIGOs remained with Respondent No. 2 and, thus, stood attached in terms of Section 3 of the Act, observing:

G “Under Section 3 of the Special Court Act, any property, movable or immovable, or both, belonging to any person notified stands attached. Therefore there is a statutory attachment of “any property belonging to the person notified”. The definition “any property belonging to the person notified” must necessarily include property in which a person notified has a beneficial interest. By virtue of Section 13 of the Special Courts Act, the provisions of the Special Courts Act prevail notwithstanding anything to the contrary in any other law or contract. Therefore, the Custodian is making a claim under a statutory provision which allows him to do so. That

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statutory provision creates no right in favour of third parties, including the 5th Respondent. Therefore, merely because the Custodian claims on the footing of the 1st Respondent is the beneficial owner does not *ipso facto* give a right to the 5th Respondent to claim that the beneficial interest in these CANCIGO's is transferable."

Analysing the provisions of Section 4(2) of the Benami Transactions Act and Section 13 of the Act, the learned Judge opined:

"Therefore, so far as the Custodian is concerned, he can make a claim to any property even though the same is held benami in some other person. The same can't be done by the 5th Respondent. The provisions of the Benami Transactions Act would squarely apply to the 5th Respondent. It is the 5th Respondent who can't make a claim or bring an action to enforce any right in respect of the CANCIGO's either against 1st or 2nd or 3rd Respondent or the Custodian. Also, by virtue of Section 4(2) of the Benami Transactions Act the 5th Respondent can't be allowed to raise a defence in respect of the CANCIGO's even to the extent of claiming a beneficial interest."

Repelling the contentions of the Appellant as regard applicability of Section 58 of the Trusts Act, it was held that the expressions "any interest" are of very wide amplitude and would, thus, include a beneficial interest.

It was further held:

"It is thus clear that Respondent No.5 could not have purchased the CANCIGO's nor could the beneficial interest in the CANCIGO's be transferred to them. Respondent No. 5 have got thus no right, title or interest in the CANCIGO's and cannot be allowed to hold on to them. This is particularly so as they have now given up their claim that these were deposited with them, as and by way of security. The claim, if any, of Respondent No. 5, against the 1st Respondent, is a mere money claim. The CANCIGO's remain the property of Respondent No. 1 and stand attached. They must be handed over by Respondent No. 5 to the Custodian. It must be mentioned that, even if the 5th Respondent had claimed that the CANCIGO's were deposited with them as security for repayment of debts due by the

A 1st Respondent, the terms of issue would still have prevented any interest being created in their favour.

It was directed:

B “Under these circumstances, Application No. 55 of 1993 is made absolute in terms of prayers (a). Clarified that it is the 5th Respondent who must hand over the concerned CANCIGO’S to the Custodian. Application No. 55 of 1993 is also made absolute in terms of prayer (b). Prayer (a) of Application No. 13 of 1993 stands rejected. So far as prayer (b) of Application No. 13 of 1993 is concerned, the claim of 5th Respondent being a money claim, the same will have to be taken up at time of distribution of assets. As set out in Judgment dated 22nd July, 1993 in Misc. Application No. 96 of 1993, the distribution would have to be in the manner laid down under Section 11 of the Special Courts Act. Therefore so far as prayer (b) is concerned, this Petition is adjourned *sine die*. Office is directed to put this Petition on board when the Court is considering distribution of assets of Respondent No.1.”

SUBMISSIONS:

E Mr. Rohit Kapadia, learned senior counsel appearing on behalf of the Appellant would submit that in the facts and circumstances of this case, Respondent No. 2 having transferred the CANCIGO units in favour of the Appellant, he had no interest therein warranting attachment under the Act. It was urged that the rights of the Custodian are the same as that of the notified person. The learned counsel would contend that as Respondent Nos. 3 and F 4 claimed no right, title or interest of any nature whatsoever in the CANCIGOs despite the fact that they were registered in their names, the Respondent No. 2 must be held to have an interest therein by reason of his having made payment therefor and obtained possession thereof. It was pointed out that even the custodian contended before the Special Court that G the Respondent No. 2 had a beneficial interest and in that view of the matter the question of the Custodian’s application seeking to enforce attachment was not maintainable.

H It was argued that having regard to the provisions contained in Section 58 of the Indian Trusts Act the beneficial interest of Respondent No.2 was

transferable. The purported bar to the effect that a CANCIGO holder cannot create 'any interest' therein or transfer them to a third person would not apply to transfer of a beneficial interest keeping in view the fact that restriction on transfer was on the Respondent Nos. 3 and 4 and not on the beneficial owner. No interest having been created in the Respondent No. 2 by any act or deed of Respondent Nos. 3 and 4, the beneficial interest accrued in him by way of operation of law was transferable. It was contended that in the event it be held that the Respondent Nos. 3 and 4 could not validly transfer any interest in favour of the Respondent No. 2, the question of enforcing attachment would not arise as the legal title thereof would remain vested in the Respondent Nos. 3 and 4. In any event such an absolute restriction on transfer is void under Section 10 of the Transfer of Property Act and, thus, cannot be acted upon.

The learned counsel would contend that findings of the Special Court to the effect that Respondent No. 2 had an interest therein which could not have been transferred in terms of Section 6(d) of the Transfer of Property Act is not correct. It was urged that the question of repeal of Section 82 of the Indian Trust Act by reason of The Benami Transactions (Prohibition) Act, 1988 (for short 'The Benami Transactions Act') would be of no consequence as the provisions of the Indian Trusts Act, 1882 are not exhaustive. It was argued that Section 82 embodied a principle of equity underlying creation of a "Resulting Trust" which was held to be applicable even prior to enactment of the Indian Trusts Act. Reliance in this connection has been placed on *Mussumat Ameeronnissa Khanum and Mussumat Parbutty v. Mussumat Ashrufoonnisa*, (1871) 14 MooIndApp 433.

Mr. Subramonium Prasad, learned counsel appearing on behalf of the Respondent No.1, on the other hand, would submit that no implied trust was created by and between Respondent No. 2, on the one hand, and Respondent Nos. 3 and 4, on the other, and in that view of the matter, no beneficial interest could be created in favour of the Respondent No. 2.

In absence of any trust, Mr. Prasad would argue, Section 58 of the Indian Trusts Act would not apply particularly having regard to the provisions contained in Section 7 of the Benami Transactions Act whereby and whereunder Section 82 of the Trusts Act has been repealed and, thus, the question of there being an implied trust between Respondent No. 2, on the one hand, and Respondent Nos. 3 and 4 on the other, would not arise.

A Having regard to the objects and reasons of the Benami Transactions Act, Mr. Prasad would submit, the right, title and interest in the CANCEGO remained in the Respondent Nos. 3 and 4 and furthermore having regard to the term of issue CANCEGOs s being non-transferable, no title passed on to the Appellant herein in relation thereto. Respondent Nos. 3 and 4, it was contended, were bound by the conditions restricting transfer and in that view of the matter the purported transfer in favour of the Appellant was void.

B

C Section 4 of the Benami Transactions Act prohibits an action by the beneficiary for recovery of the property and, in that view of the matter, the Appellant herein could not have filed an application for the Custodian claiming an interest therein. But the said provision would not apply in the case of the Custodian having regard to the fact that he had a duty to attach the property belonging to a notified person and further in view of the fact that in terms of Section 13 of the said Act, the provisions thereof had an overriding effect over any other law for the time being in force as a result whereof the provisions of the Act would prevail over the Benami Transactions Act. Reliance in support of the said contention has been placed on *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors.*, (2001) 2 SCALE 1.

D

E *ISSUE:*

The primal issue which arises for consideration is as to whether the Respondent No. 2 had any transferable interest in respect of the securities in question.

F *RESTRICTIONS ON TRANSFER :*

The relevant provisions of the CANCEGO Scheme are as under:

G “12(a) Only the holder or any person specifically authorized in this behalf by him and recognized as such by the Trustee, shall be entitled to deal with the Cancigos held by the holder thereof.

12(b) *** **

H 12(c) A Cancigo-holder may dispose of or encash Cancigos only by means of encashment slips in the form prescribed by the Trustee.

12(d) A Cancigo holder desirous of encashing ten or more Cancigos held by him shall apply to the Authorised Office for the purpose in the prescribed form. Upon such a request being found in order, the number of Cancigos desired to be encashed shall be paid to the holder thereof on signing a duly stamped receipt for the amount.

13. The contract for allotment of Cancigo with an Applicant by the Trustees shall be deemed to have been concluded on the Acceptance Date. On such conclusion of the contract for allotment, the Trustees may deliver or send to the Applicant an acknowledgement therefor. The Trustees shall thereafter issue to the Applicant one Cancigo credit sheet representing the Cancigo allotted to the Applicant, or, if the Applicant so desires and the Trustees agree, such number of certificates in such denominations as the Applicant may specify.

Provided that in that event the Trustees may charge such fee for issuing more than one certificate as the Trustees may consider appropriate.

19. Except in the cases hereafter mentioned, no Cancigo shall be transferable, nor shall any holder thereof be entitled to create any interest therein, whether by way of charge or otherwise, or assign or transfer any part thereof, and the Trustee shall not be bound to take any notice of any purported transfer, assignment, charge, encumbrance, trust, or any other interest sought to be created by the holder. Accordingly the Trustee shall recognize only the holder thereof as having any right title or interest in the Cancigo held by such holder.

22. The Trustee shall not be required to maintain any register of Cancigo holders.

25. The Trustee shall not be bound by any notice or take notice of execution of any trust in respect of any Cancigos and they shall recognize only the Cancigo holders in whose name the same shall have been entered as the holder or holders of the Cancigos."

In the Brochure for offer of CANCIGOS, the restriction on transfer of CANCIGOS was stated in the following terms:

A “Transfer of CANCIGO: Transfer of CANCIGO holding from one person to another person is not permitted. However, in deserving cases Trustees may permit addition of name/s to the existing CANCIGO holding after duly considering the same. However, deletion of name of a CANCIGO holder is permitted, generally, in the event of his death and not otherwise.”

B

It is not in dispute that the CANCIGOS stood in the names of Respondent No. 3 and Respondent No. 4.

Note 4 appended to CANCIGO Credit sheet states:

C

“Cancigo holders cannot create any interest in Cancigos or transfer them to a third person.”

PROVISIONS OF THE RELEVANT STATUTES:

D

Indian Trusts Act:

Sections 58, 82 (as it then stood), and 88 of the Indian Trusts Act, 1882 read as under:

E

“58. *Right to transfer beneficial interest.*—The beneficiary, if competent to contract, may transfer his interest, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest:

F

82. *Transfer to one for consideration paid by another.* — Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

G

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act NO.XI of 1859 (to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency), section 36.

H

88. *Advantage gained by fiduciary*— Where a trustee, executor,

partner, agent, director of a company, legal advisor, 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.”

Transfer of Property Act:

Sections 6(d) and 10 of Transfer of Property Act read as under:

*“6. What may be transferred.—*Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force, —

(a) ***

(b) ***

(c) ***

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

*10. Condition restraining alienation.—*Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him: provided that property may be transferred to or for the benefit of a women (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.”

Sale of Goods Act:

Sections 4, 19 and 20 of Sale of Goods Act read as under:

A *"4. Sale and agreement to sell.—*(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

B (2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

C *19. Property passes when intended to pass—*(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

D (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.

E (3) Unless a different intention appears, the rules contained in Sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

F *20. Specific goods in a deliverable state.—*Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods; or both, is postponed."

G *BENAMI TRANSACTIONS ACT:*

H Sub-Section (1) of Section 3 of the Benami Act provides that no person shall enter into any benami transaction. Sub-Section (3) of Section 3 thereof provides that whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both. Section 4 provides for a prohibition to the right to recover

property held benami either by way of claim or by way of defence. Section 5 provides that all properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed.

In terms of Section 7 *inter alia* Section 82 of the Indian Trusts Act, 1882 stood repealed.

THE ACT:

Sections 2(c), 3, and 4 of Special Courts Act read as under:

“2(c) “securities” includes—

(i) shares, scrips, stocks, bonds, debentures, debenture stock, units of the Unit Trust of India or any other mutual fund or other marketable securities of a like nature in or of any incorporated company or other body corporate;

(ii) Government securities; and

(iii) rights or interests in securities;

3. Appointment and functions of Custodian.—

(1) The Central Government may appoint one or more Custodians as it may deem fit for the purposes of this Act.

(2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before 6th June, 1992 notify the name of such person in the Official Gazette.

(3) Notwithstanding anything contained in the Code and any other law for the time being in force, on and from the date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification.

A (4) The property attached under sub-section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.

4. *Contracts entered into fraudulently may be cancelled.—*

B (1) If the Custodian is satisfied, after such inquiry as he may think fit, that any contract or agreement entered into at any time after the 1st day of April, 1991 and on and before the 6th June, 1992 in relation to any property of the person notified under sub-section (2) of section 3 has been entered into fraudulently or to defeat the provisions of this Act, he may cancel such contract or agreement and on such cancellation such property shall stand attached under this Act;

C Provided that no contract or agreement shall be cancelled except after giving to the parties to the contract or agreement a reasonable opportunity of being heard.

D (2) Any person aggrieved by a notification issued under sub-section (2) of section 3 or any cancellation made under sub-section (1) of section 4 or any other order made by the Custodian in exercise of the powers conferred on him under section 3 or section 4 may file a petition objecting to the same within thirty days of the assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President before the Special Court where such notification, cancellation or order has been issued before the date of assent to the Special Court (Trial of Offences Relating to Transactions in Securities) Bill, 1992 by the President and where such notification, cancellation or order has been issued on or after that day, within thirty days of the issuance of such notification, cancellation or order, as the case may be; and the Special Court after hearing the parties, may make such order as it deems fit.

E
F
G The Special Court exercises all jurisdiction, powers and authority as were exercisable, immediately before such commencement by any Civil Court in relation to a matter or claim specified therein.

CANBANK MUTUAL FUND (CANCIGO)-SCHEME, 1988:

H Canbank Mutual Fund framed a scheme known as CANCIGO Scheme.

The said Scheme came into force on 22nd April, 1988. The provisions of the CANCIGO Scheme are applicable to the issue of units called CANCIGOS by Canara Bank acting in its capacity as Trustee of the Canbank Mutual Fund. A

Condition 2(k) defines 'Cancigo Scheme' to mean the Cancigo Mutual Fund (Cancigo) Scheme, 1988 under which Cancigos are issued by the Trustee. 'Holder' in terms of Condition 2(r) to mean a person who has made an application to the Trustee and to whom not less than five Cancigos have been issued or any person or persons nominated by the Trustee in this behalf for the purpose of participating in the Cancigo Scheme. Condition No. 5 provides as to the person eligible to apply for the issue of Cancigos. Condition No. 10 provides that all allotments should be at the discretion of the Trustee. B
C

IS THE CLOG ON TRANSFER ABSOLUTE?

The Rules and Regulations framed by the Canbank Mutual Fund in relation to the issuance of CANCIGO certificates do not have any statutory backing. The CANCIGOs had a lock in period of one year which means that the holder thereof must not encash the securities within the aforementioned period. The question as regard the non-transferability of the units will have to be construed upon reading the scheme in its entirety and in particular the Condition No. 22 thereof, in terms whereof the Trustees were not required to maintain any register of CANCIGO holders. In terms of Condition No. 24, the person whose name is shown in a CANCIGO Certificate would be the only person to be recognized by the Trustees as the holder of such Cancigo and as having any right, title or interest in or to such securities. No Trust created was also to be recognized. D
E
F

Condition No. 19 creating a bar on transfer has to be construed in the aforementioned context. The bar on transfer created was to have the effect that the same would not be binding on Canbank Mutual Fund as it was not bound to take any notice thereof and only the holder shall be recognized as having the right, title or interest on the CANCIGO. G

The expressions contained in Condition No. 19 of CANCIGO Scheme differ in material particulars from the expressions used in the Brochure in terms whereof transfer of CANCIGO from one person to another person is H

A not permitted. Permission is not a legal restriction. However, in deserving cases Trustees may permit addition of names to the existing CANCEGO holding after duly considering the same. Permission/Approval subsequently granted would validate the grant. (See *Graphite India Ltd. and Another v. Durgapur Projects Ltd. and Others*, [1999] 7 SCC 645). CANCEGOs indisputably are valuable securities. They are otherwise capable of being transferred in terms of the established business practice, the Sale of Goods Act or Transfer of Property Act. No legal bar has been created in transfer of the said securities. The scheme, thus, does not and could not have created an absolute legal bar on transfer of the CANCEGOs so as to invalidate the same.

C *EFFECT OF THE BAR:*

D The Rules and Regulations framed by Canbank Mutual Fund and the notes appended to the CANCEGO Credit Sheet differ in material particulars. Rules and Regulations explain as to why an embargo in transfer has been placed, i.e., not to recognize the Respondent No. 3 for the dividends or for other liabilities arising out of transfer. A transfer violating the rules and regulations would only have the effect of the same being not binding the Canbank Mutual Fund. No other legal consequence flows therefrom. We have also noticed that the Brochure merely states that the transfer is not permitted but provisions exist for grant of such permission. The Appellant Bank as well as Canbank Mutual Fund are the subsidiaries of the Canara Bank. The Appellant cannot be estopped from raising either a limited or absolute title in them keeping in view of the fact that they had paid a sum of 33 crores of rupees by way of consideration for transfer of interest of the Respondent No. 2 herein in the said CANCEGOs.

F *EFFECT OF SECTION 10 OF TRANSFER OF PROPERTY ACT:*

G As would appear from the discussions made hereinafter that by reason of the legal consequences of the relationship of the banker and the customer, *vis-à-vis*, the transaction in question, a beneficial trust has been created. The same would, thus, be transferable as otherwise it would be hit by Section 10 of the Transfer of Property Act. When there exists such a condition; in terms of Section 10, an absolute restraint is void whereas partial restraint is not. Section 10 would not be attracted only when the restriction as to alienation is only partial. (See *Mohammad Raza and Others v. Mt. Abbas Bandi Bibi*,

H

AIR (1932) PC 158). A stipulation taking away the whole power of alienation substantially is a question of substance and not of form. Section 10 limits the application of such stipulation.

TRUST WHETHER CREATED:

Chapter IX of the Indian Trusts Act provides for certain obligations in the nature of trusts. A Trust is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner. A trust in terms of Section 4 of the Trust Act may be created for any lawful purpose.

When a real or personal property is purchased in the name of another, a presumption of resulting trust arises in favour of the person who is proved to have paid the purchase money as a result whereof a beneficial interest in the property results to the true purchaser. Law relating to trust has not recognized only a resulting trust but other kinds of trust as well. When an express trust is created by reason of an agreement between the parties and one of them being a beneficiary thereof, the same would be transferable.

A beneficial interest in the trust is created in different situations. (See, for example, *Barclays Bank v. Quistclose Investments*, [1970] AC 567).

In *Barclays Bank* (supra) a company which was substantially indebted to the bank needed funds in order to pay a dividend on its shares. Quistclose Investments advanced the necessary funds on the basis that they were only to be used for this purpose and they were paid into a separate account at the bank, which was made aware of the arrangement. The company went into liquidation before the dividend had been paid. If Quistclose Investments were no more than a creditor of the company, then the funds in the bank would belong to the company and the bank would be entitled to set off the credit balance of the account against the substantially greater indebtedness of the company. If, on the other hand, the funds were held on trust for Quistclose Investments, its proprietary interest therein would enjoy priority over the rights of the bank. The House of Lords held that arrangements for the payment of a person's creditors by a third person give rise to "a relationship of a fiduciary character or trust, in favour as a *primary trust*, of the creditors, and secondarily, if the primary trust fails, of the third person". Once the primary purpose was fulfilled, the third person would be no more

A than an unsecured creditor. However, there was “no difficulty in recognizing the co-existence in one transaction of legal and equitable rights and remedies”. Since the purpose for which the funds had been advanced had failed, the funds were still held on trust for Quistclose Investments, whose beneficial interest was binding on the bank because it had been aware of the basis on which the funds had been transferred.” [See *Equity & Trusts*, 2nd Edition by Alastair Hudson, page 307]

B
C In that case the common intention of both the parties was that the fund in question should be held on trust. The principle in *Barclays Bank* (supra) has been applied both where part of the funds advanced had indeed been used for the specific purpose in question, holding that the creditor was entitled to recover whatever was left (See *Re EVTR* (1987) B.C.L.C. 647) as also where the funds, although advanced for a specific purpose, were paid not by way of loan but rather in satisfaction of a contractual debt. [See *Carreras Rothmans Ltd. v. Freeman Mathews Treasure Ltd.*, (1985) Ch. 207]

D In this case, the Respondent Nos. 3 and 4 acted in consonance of the confidence reposed upon them.

E Had Respondent Nos. 3 and 4 not disclosed that the applications for allotment of CANCEIGOs were for the benefit of the 2nd Respondent herein, Section 88 of the Indian Trusts Act would have been attracted.

F A transaction which falls within the purview of Section 88 of the Indian Trusts Act does not fall within the category of benami transaction in terms of the provisions of the Benami Transactions Act. (See *P.V. Sankara Kurup v. Leelavathy Nambiar*, AIR (1994) SC 2694).

G The list of persons specified in Section 88 of the Indian Trusts Act is not exhaustive. The expression ‘other person bound in fiduciary character to protect the interests of other persons’ includes a large variety of relationship. The heart and soul of the matter is that wherever as between two persons one is bound to protect the interests of the other and the former availing of that relationship makes a pecuniary gain for himself, the provisions of Section 88 would be attracted, irrespective of any designation which is immaterial. The said principle would also apply for a banker holding the customer’s money.

H

A fiduciary would not be liable for any action if there is no concealment by him or no advantage taken by him.

A civilized society furthermore always provides for remedies for cases of what was been called unjust enrichment or unjust benefit derived from another which it is against conscience that he should keep. (See *Fibrosa Spolka v. Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, [1942] 2 All ER 122)-

In *Carreras Rothmans Ltd. v. Freeman Mathews Treasure Ltd.*, (1985) Ch. 207 at page 222, it is stated :

“...equity fastens on the conscience of the person who receives from another property transferred for a specific purpose only and not therefore for the recipient’s own purposes, so that such person will not be permitted to treat the property as his own or to use it for other than the stated purpose.”

The parties to the transactions cannot enter into any benami transaction so as to get any property transferred in their names for consideration, i.e., paid by a third party. A presumption, thus, arises that the parties never intended that the transaction would be a benami one. By reason of the said transaction, a *cestui qui* trust was created, inasmuch as the Respondent Nos. 3 and 4 applied for allotment of CANCIGOs on behalf of the Respondent No. 2 and not on their own behalf. The trust was created for a purpose, namely, the benefit arising therefrom would be appropriated by the Respondent No. 2. The principle of *cestui qui* trust is a synonym of a beneficiary. The said principle is not confined to the ingredients of Section 82 of the Indian Trusts Act. It also covers cases falling under Section 88 thereof. Thus if it be held that the properties were acquired by the Respondents Nos. 3 and 4 in their own names in breach of their obligations while acting as an agent of the Respondent No. 2, the case would be covered under Section 88 of the Indian Trusts Act. Section 88 of the Trusts Act has not been repealed by Section 7 of the Benami Transaction Act. In such a case the Benami Transactions Act would not operate.

A beneficial interest indisputably can be transferred. For the said purpose, the only legal requirement will be essence of a trust. The right of a beneficiary to transfer his interest being absolute, the transferee derived rights, title and interest therein.

A Furthermore, the legal effect of a document cannot be taken away even if the property is chosen to conceal by a device the legal relation. [See *Commissioner of Income Tax, Hyderabad v. Nawab Mir Barkat Ali Khan Bahadur*, AIR (1975) SC 838 at 845].

B In *Hem Chandra Roy Chaudhury v. Suradhani Debya Chaudhurani and Others*, AIR (1940) PC 134, it is held:

C “...No doctrine of the law of India has been indicated to their Lordships which prevents a beneficiary under a trust from dealing with his interest by way of mortgage, though it is true enough that in India such an interest is not technically regarded as an equitable estate....”

D Furthermore, the doctrine of resulting trust was applicable in India even before the Indian Trusts Act came into force. [See *Mussumat Ameeronnissa Khanum and Mussumat Parbutty* (supra)]. We, therefore, are of the opinion that the Respondent No. 2 had a transferable interest in the CANCIGOS.

ALLOTMENT OF CANCIGO — IS IT A TRANSFER?

E The allotment of CANCIGOs is not a transfer as thereby Canbank Mutual Fund had allowed the shares not as owner thereof. The Benami Transactions Act applies when there is a transaction in which the property is transferred. If allotment of CANCIGOs is not a transfer of property, the Act would not apply. [See *Sri Raj Sachdeva v. Board of Revenue*, AIR (1959) All 595] and *The Swadeshi Cotton Mills, Co. Ltd., In re.*, (1932) Comp. Cas 411.

F In *Madura Mills Co. Ltd., In re.* (1937) Comp. Cas 71, Varadachariar, J. stated the law thus:

G “As we have already observed, it is no doubt true that in the hands of a shareholder, a share is property and when a shareholder exchanges his shares with another it may be possible to regard the transaction as amounting to a transfer whether by way of exchange or conveyance: *Cf. Coats v. Inland Revenue Commissioners*, [1897] 2 Q.B. 423. But when the company is for the first time issuing shares, it seems to us that there is no question of property already possessed by the company being thereby transferred to the allottee.”

H

Even assuming that the Benami Transactions Act as also the bar on transfer imposed by Canbank Mutual Fund (CBMF) would apply, the properties would remain vested in Respondent Nos. 3 and 4 and Respondent No. 2 would have no interest therein which would attract the provisions of Sub-section (3) of Section 3 of 'the Act'.

BENAMI TRANSACTIONS ACT — APPLICABILITY:

Benami transactions in India were generally recognized by the Courts. But the same had not been given effect to when the transaction :

- (a) violates the provisions of any law; or
- (b) defeats the rights of innocent transferees for value from the benamidar without notice; or when
- (c) the object of the benami transaction was to defraud the creditors of the real owner and that object has been accomplished; or when,
- (d) it is against public policy.

Benami Transactions, however, used to be effected for various purposes - to avoid taxes, to avoid ceiling laws etc. Blank transfers of shares had also posed serious problems as dividends are paid to the registered shareholders and not to the real shareholders as in the case of benami holdings of shares, but despite the same the transactions have not been declared to be *invalid* in law by any statute including the Benami Transactions Act.

'Benami Transaction' has been defined in Section 2(a) of the Benami Transactions Act to mean any transaction in which property is transferred to one person for a consideration paid or provided by another person. 'Transfer' of property, therefore, is *sine qua non* for attracting the said definition.

In a transfer involving benami transaction, three parties are involved. The benamidar may be a party therein. In this case, the parties to the transactions are public sector undertakings being scheduled banks and their subsidiaries. A presumption would, thus, arise that they would *not* encourage any benami transaction nor would involve themselves therein. In a situation

A of this nature and, in particular, having regard to the fact that a disclosure was made by the Respondent Nos. 3 and 4 in their applications for allotment of CANCIGO; that the same were filed on behalf of the Respondent No. 2 herein, the intention of the parties was not to enter into a benami transaction.

B The Benami Transaction Act is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamidars and destroys substantive rights of real owners who are parties to such transactions and for whom new liabilities are created by the Act. A statute which takes away the rights of a party must be strictly construed. [See *R. Rajagopal Reddy (dead) by L.Rs. and Ors. v. Padmini Chandrasekharan (dead) by L.Rs.*, AIR (1996) SC 238].

D The evil of benami transaction was sought to be curbed by reason of the provisions of the Urban Land (Ceiling and Regulation) Act, 1976, the State Ceiling Laws, Income Tax Act, 1961 as amended by the Taxation Laws (Amendment) Act, 1975 (See Sections 281 and 281A of the Income Tax Act), Section 5 of the Gift Tax Act, 1958, Section 34 B of the Wealth Tax Act and Section 5(1) of the Estate Duty Act (since repealed). It is only with that view the Benami Transactions (Prohibition) Act, 1988 prohibiting the right to recover benami transaction was enacted. Section 5(1) provided that all properties held benami shall be subject to acquisition as different from forfeiture provided for in the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976. But even Section 5 had not been made workable as no rules under Section 8 of the Act for acquisition of property held benami were framed.

F A nationalized bank cannot hold somebody else's property in its name. We do not know as to under what circumstances it applied for allotment of CANCIGOs in its name on behalf of the Respondent No. 2. We have also not been informed at the Bar as to whether there exists such a practice or the same is otherwise permissible. We in these matters, however, are not concerned with an ethical question. We are also not concerned with the misconduct of any officer of the Bank, criminal or otherwise, in this behalf. This Court is only concerned with the validity of the transactions. We have noticed hereinbefore that in a case of this nature a beneficial interest is created within the meaning of the provisions of Section 88 of the Indian Trusts Act in view of the fact that the Respondent Nos. 3 and 4 have applied the money of the Respondent No. 2 for allotment of CANCIGO in their own names

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and applied for allotment of the certificates on behalf of the Respondent No. 2 and not on their own behalves. It is, therefore, not a case where the transaction was benami in nature. It does not appear also to be a case where the parties entered into a transaction with a view to contravene any law. It is also not a case where any amount belonging to a bank has been utilized by a customer. The Respondent Nos. 3 and 4 have not claimed any right, title and interest in CANCIGOS. In view of the aforementioned circumstances, provisions of the Benami Transactions Act would have no any application whatsoever.

ROLE OF CUSTODIAN UNDER THE ACT:

The Custodian has three main functions to perform:

- (i) He has the authority to notify a person in the Official Gazette, on being satisfied on information received that he has been involved in any offence relating to transactions in securities during the period 1-4-1991 to 6-6-1992.
- (ii) He has the authority to cancel any contract or agreement relating to the properties of the notified persons which, in his opinion, has been entered into fraudulently or for the purpose of defeating the provisions of the Act as specified in Section 4.
- (iii) He is required to deal with the properties in the manner as directed by the Special Court.

The properties of a notified person do not vest in the Custodian. He is not a receiver within the meaning of the provisions of the Code of Civil Procedure or an Official Receiver or an Official Assignee under the Insolvency laws. He is also not an Official Liquidator under the Companies Act. His right is same as that of the notified person. Only when the notified person had a subsisting right in a property, the same being subject to statutory attachment, the custodian can approach the special court for an appropriate direction in relation thereto. In other words, the custodian is not permitted to deal with any property which did not belong to the notified person on the relevant date.

ARE THE TRANSACTIONS ILLEGAL?

The Canbank Mutual Fund having regard to the materials on records

A must be presumed to have issued the CANCIGOs in the names of the
Respondent Nos. 3 and 4 with full knowledge that they would enure to the
benefit of the Respondent No. 2. The effect of grant of CANCIGOs by the
Canbank Mutual Fund despite such knowledge does not strictly fall for our
consideration but the same is relevant to determine the nature of illegality
B of the transaction, if any. It is one thing to say that they could not have
done so having regard to the scheme, but it is another thing to say that the
same was illegal. The area of law concerning illegality and resulting trust
has undergone some changes in view of a recent decision of the *House of
Lords in Tinsley v. Milligan*, reported in [1993] 3 All E.R.65. In the said
case, Lord Browne-Wilkinson specified the core applicable principles which
C are as under:

- “1. Property in chattels and land can pass under a contract which
is illegal and therefore would have been unenforceable as a
contract.
- D 2. A plaintiff can at law enforce property rights so acquired
provided that he does not need to rely on the illegal contract
for any purpose other than providing the basis of his claim to
a property right.
- E 3. It is irrelevant that the illegality of the underlying agreement
was either pleaded or emerged in evidence: if the plaintiff has
acquired legal title under the illegal contract that is enough.”

F It was held that illegality being not the source of Milligam’s equitable
rights as her contribution to the purchase price was the source therefor. In
that case, Respondent did not have to rely on her own illegality because she
was entitled to an equitable share in the property in any event because she
had contributed to the purchase price. The principles evolved in *Tinsley*
(supra) apply to the fact of the present case. The said decision was followed
G by this Court in *B.O.I. Finance Ltd. v. Custodian and Others*, [1997] 10 SCC
488.

The Scheme suggests that Canbank Mutual Fund intended to absolve
itself from such responsibilities.

H Does by such contract the holder of a unit is debarred from transferring

a valuable security? The answer to that question must be rendered in the negative. A transfer can be held to be invalid provided it is forbidden in law. It is one thing to say that the founders of the Scheme would not recognize any transfer so as to make it liable to pay dividend to a person other than the person in whose name a unit is held but it is another thing to say that it is not legally transferable. In this case, the Court is not concerned with the question whether in the facts and circumstances of this case the Appellant should have accepted the units of face value of Rs. 33 crores and adjusted a sum of Rs. 25,01,67,129 followed by issuance of a cheque of Rs. 7,98,32,871, but with the question as to whether such a transaction was legally impermissible. The case at hand poses a peculiar problem. Respondent Nos. 3 and 4 applied for allotment of CANCIGOs in their name under the instructions of Respondent No. 2. Respondent Nos. 3 and 4 were not to invest their own money. The consideration paid towards the allotment of the units was paid from the account of the Respondent No. 2. Even the dividends paid to them at the first instance were credited in the account of the Respondent No. 2. Respondent Nos. 3 and 4 had never claimed any right, title or interest in the said securities. Respondent No. 4 in its affidavit dated 26th July, 1993 had categorically stated:

“I say and submit that Respondents No. 4 are neither necessary nor proper parties to the petition inasmuch as Respondents No. 4 have no claim whatsoever in the subject securities.”

A similar statement had been made by Respondent No. 3. Respondent Nos. 3 and 4 did not claim any right, title or interest as evidently the possession of CANCIGOs were delivered in favour of the Respondent No. 2.

Even the Benami Transactions Act while prohibiting benami transactions does not provide that by reason of such a transaction no title whatsoever would pass or the property would vest in the State as for acquisition of benami property recourse to Section 5 of the Act has to be resorted to. In absence of any proceedings taken and a binding order passed in terms of Section 5 of the Benami Transactions Act, only Section 4 of the Act would apply.

Respondent Nos. 3 and 4 by reason of the said transaction held themselves to be the trustees of Respondent No. 2 in relation to the securities in question. They applied for allotment for the benefit of Respondent No.

A 2. They never enforced any claim in relation to the said securities in a court of law and, in fact, disclaimed any right, title or interest therein. Possession of the securities which are movable properties has been handed over to them. No statutory provision has been brought to our notice forbidding such transfer. The Respondent Nos. 3 and 4, therefore, were not statutorily prevented from entering into such a transaction.

B In other words; the concerned parties, namely, Canbank Mutual Fund, the Respondent Nos. 3 and 4 as well as the Respondent No. 2 became a party to an arrangement which may be unethical but not illegal.

C A contract may be unlawful or partly lawful or partly unlawful. If it is lawful, it will be given effect to whereas in case it is wholly unlawful being opposed to the public policy, it would not be. In case a transaction is partly lawful and partly unlawful, if they are severable, the lawful part shall be given effect to. [See *B.O.I. Finance Ltd.* (supra)].

D The said decision is also an authority for the proposition that the position of the custodian is same as that of the notified person himself. If by any law the Respondent No. 2 was not precluded from transferring the shares held by him, the transfer thereof in favour of the Appellants was legal. The transaction took place on 6.2.1992, i.e., much prior to 6.6.1992 when Respondent No. 2 became a notified person. If on or after 6.2.1992, Respondent No. 2 had no interest in the CANCIGOs, the same could not have been the subject matter of attachment of the custody. The custodian could attach the property only when the right, title and interest thereto remain on the Respondent No. 2 and not otherwise.

F In *B.O.I. Finance Ltd.* (supra) the question which fell for consideration of this Court was as to whether ready-forward or buy-back transactions are valid. In that case the nature of transaction was not in dispute. The transaction consisted of two interconnected legs, namely, the first or the ready leg, consisting of purchase or sale of certain securities at a specified price and the second or forward leg, consisting of the sale or purchase of the same or similar securities at a later date at a price determined on the first date. It was held that the first leg of the transaction was not illegal whereas the second leg of the transaction was contrary to the provisions of the Securities Contracts (Regulation) Act, 1956. In the said decision, non-compliance of the direction issued by the Reserve Bank also came up for consideration and this

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Court in no uncertain terms held that whereas non-compliance thereof may result in prosecution but would not result in invalidation of any contract entered into by the bank with a third party.

It was opined :

“60. In the present case the appellants are basing their claim by relying not on the terms of the ready-forward contract, but on the payment of market price against delivery of the securities. The claim to title is independent of the ready-forward agreement.

61. There can be little doubt that the appellants, when they paid the market price and took delivery of the securities had become owners of the same. According to Section 5 of the Transfer of Property Act, 1882, “transfer of property” *inter alia* means an act by which a person conveys property to another person. Section 6 of this Act deals with what property may be transferred. What is relevant in Section 6(h) according to which no transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object, or consideration within the meaning of Section 23 of the Indian Contract Act, or (3) to a person legally disqualified to be transferee. According to Section 23 of the Contract Act the consideration or object of an agreement will be unlawful if it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy, In the instant case the object of the contracts entered into between the banks and the notified parties was for the transfer and, subsequently, re-transfer of the securities. The transfer took place on delivery of securities on payment of market price as consideration. The consideration for the transfer of the securities, in the ready leg, was the payment of market price.

62. The validity of the transfer of the securities has to depend on the provisions of the Transfer of Property Act and the Sale of Goods Act relating to transfer and not to the validity of the agreement preceding the transfer. Like any other moveable goods the securities could validly be purchased on delivery against payment of price as

A per Sections 4, 19 and 20 of the Sale of Goods Act. The price paid, while taking delivery, was the consideration for the transfer of the securities. When the transfer of title has taken place the agreement between the parties preceding this cannot invalidate the transfer..."

B This decision applies in all fours to the fact of the present case.

C Right, title and interest in a movable property can pass by delivery of possession and upon paying of the considerations in view of the provisions of the Sale of Goods Act. Passing up of a title in favour of the transferee would not be illegal, unless it is forbidden by law. For the said purpose, the transaction must attract the wrath of Section 23 of the Indian Contract Act and not otherwise. Section 3 of the Act does not contemplate extinction of right of a third party. For getting the transaction invalidated in law, only Section 4 of the Act can be taken recourse to.

D The constitutional validity of the Act came up for consideration before this Court in *Harshad Shantilal Mehta v. Custodian and Others*, [1998] 5 SCC 1. The vires of the said statute was upheld, *inter alia*, on the ground that by reason thereof the right, title and interest in a property belonging to Respondent No. 3 is not affected. The interest of the Appellant, thus, was not affected by the said Act or by the Benami Transactions Act. Extinction in right, title and interest in a property must be caused as a result of operation of law and not otherwise. Creation of title by an act of parties is subject to law. Once a title vests in a person he cannot be divested therefrom except by reason of or in accordance with a statute and not otherwise. An admission does not create a title; the logical corollary whereof would be that an admission of a party would not lead to relinquishment of his right therein, if he has otherwise acquired a title in the property.

G Title in a property connotes a bundle of rights. Subject to prohibitory or regulatory statute, such rights are capable of being transferred. Apart from the provisions of Benami Transactions Act, no other provision operating in the field which would negate the claim of the Appellant was pointed out. As discussed hereinbefore, the Benami Transactions Act will have no application in the instant case.

H It is also not a case where a transfer has been made by a company beyond its articles. Appellant has not acted *ultra vires* its articles. Furthermore,

it is one thing to say that a transfer is made contrary to Articles but it would not be correct to contend that the same was prohibited by terms of issue.

ATTACHMENT :

Attachment under sub-Section (3) of Section 3 of the Act is subject to an encumbrance, if any. Even if a limited right is transferred by a notified person to a third party, the order of attachment, if any, must be subject to the said right of the third party. In other words, under all circumstances, the right of a third party must be recognized. It is now well-settled, in view of the decision of this Court in *C.B. Gautam v. Union of India & Others*, [1993] 1 SCC 78, that even where a statute provides for compulsory purchase, the property will not vest in the Government free from all encumbrances but would vest subject to the encumbrances.

In *C.B. Gautam* (supra), this Court held:

“36....Reading down is not permissible in such a manner as would fly in the face of the express terms of the statutory provisions. In view of the express provision in Section 269-UE that the property purchased would vest in the Central Government “free from all encumbrances” (emphasis supplied) it is not possible to read down the section as submitted by learned Attorney General. In the result the expression “free from all encumbrances” in sub-section (1) of Section 269-UE is struck down and sub-section (1) of Section 269-UE must be read without the expression “free from all encumbrances” with the result the property in question would vest in the Central Government subject to such encumbrances and leasehold interests as are subsisting thereon except for such of them as are agreed to be discharged by the vendor before the sale is completed...”

In *V.B. Rangaraj* (supra), whereupon reliance has been placed by the learned counsel for the Respondents, transfer was contrary to the Articles of the Company. This Court therein had no occasion to consider the effect of a transaction which is contrary to the terms of issue. The said Act provides for certain statutory consequences which must be kept within the four corners thereof. The Learned Special Judge, therefore, erred in asking unto itself a wrong question that the statutory provisions create no right in the third party including the Appellant herein. The question which should have been posed

A was : Had any right, title or interest of Respondent No. 2 existed on the notified date in the said CANCIGOs authorizing the Custodian to act in terms of Section 3? The answer to that question must be rendered in the negative. It is no doubt true that Section 13 of the said Act provides for a non-obstante clause but before the said clause is resorted to, it must be shown that there

B exists a provision inconsistent with the provision in any other Act. In any event, if Respondent Nos. 3 and 4 could transfer or relinquish its right in favour of Respondent No. 2 who in turn could transfer the same to the Appellant, provisions of the said Act would not entitle the custodian to claim a property which ceased to be the property of the Respondent No. 2. Here

C again, the learned Special Judge committed an error in holding that by reason of Section 4(2) of the Benami Transactions Act, the Appellant is forbidden from raising a defence in respect of the CANCIGOs although such a bar would not apply in the case of the Custodian.

D The Appellant, in our opinion, had also the requisite locus to maintain its application before the Special Court with a view to show that it having an interest in the CANCIGOs, the same is beyond the purview of purported automatic attachment under Section 3(3) of the Act and consequently neither the custodian derived any right to deal therewith nor the special court could issue any direction in relation thereto. In any event having regard to the provision contained in Section 9A of the Act, all claims relating to the

E properties which are claimed to have been statutorily attached must be adjudicated by the Special Court only. The claim petition of the Appellant was, thus, maintainable.

F In *V.B. Rangaraj* (supra), this Court held that shares being movable property, a shareholder has a free right to transfer his shares. Such right can only be taken away by Articles of Association and not otherwise.

G The stand of the custodian, in this behalf, is inconsistent and self-contradictory. If by reason of the embargo placed on transfer of any CANCIGO, the right remains vested in the Respondent Nos. 3 and 4, the question of the same being subject to attachment would not arise. However, if, according to the custodian, right, title and interest in the CANCIGOS vested in the Respondent No. 2, he being a third party can transfer his interest, as he was not bound by the rules for allotment. On the one hand, it is contended that the Respondent Nos. 3 and 4 were bound by the conditions

H imposed by Canbank Mutual Fund and on the other a contention was raised

that they were benamidars. Both cannot stand together. Similarly, a contention has been raised that the condition contained in Note No. 4 of the Credit Sheet is an absolute restraint on alienation, but at the same time it is contended that even the third party cannot transfer his interest (if he has any) in favour of another although a transfer can be given effect to after the expiry of the lock-in period.

Furthermore, in a case of this nature, the Respondent No. 2 did not hold any personal interest which would come within the purview of Section 6(d) of the Act. An interest in the CANCELOS was not created in the Respondent No. 2 for enjoyment in his personal capacity. Section 6(d) of the Transfer of Property Act would apply when a transfer is in violation of such stipulation which would defeat the object thereof. The learned Special Judge, therefore, committed an error in invoking Section 6(d) of the Transfer of Property Act.

In *Nallajerla Krishnayya v. Vuppala Raghavulu*, AIR (1958) AP 658, it is stated:

“5...If, on a construction of the relevant terms of the instrument, the Court comes to the conclusion that rights were created against the property, the matter is taken out of the purview of Section 6(d) of the Transfer of Property Act.”

In *Harshad Shantilal Mehta* (supra), this Court held:

“18. The last question can be answered first. As stated above, Section 3(3) clearly provides that the properties attached are properties which belong to the person notified. The words “belong to” have a reference only to the right, title and interest of the notified person in that property. If in the property “belonging to” a notified person, another person has a share or interest, that share or interest is not extinguished. Of course, if the interest of the notified person in the property is not a severable interest, the entire property may be attached. But the proceeds from which distribution will be made under Section 11(2) can only be the proceeds in relation to the right, title and interest of the notified person in that property. The interest of a third party in the attached property cannot be sold or distributed to discharge the liabilities of the notified person. This would also be the position when the property is already mortgaged or pledged

A on the date of attachment to a bank or to any third party. This, however, is subject to the right of the Custodian under Section 4 to set aside the transaction of mortgage or pledge. Unless the Custodian exercises his power under Section 4, the right acquired by a third party in the attached property prior to attachment does not get extinguished nor does the property vest in the Custodian whether free from encumbrances or otherwise. The ownership of the property remains as it was.

B
C The Appellant having paid a consideration of Rs. 33 crores in relation to the CANCIGOS in question had a just right to possess the same to the exclusion of the Respondent No. 2 and in that view of the matter too the Special Court could not have directed the Appellant to hand over the same to the Custodian. The said direction is unsustainable in law.

SECTION 13 OF THE ACT:

D In *Solidaire India Ltd.* (supra), the Custodian initiated proceedings before the Special Court for recovery of an amount of loan of Rs. 1 crore due to the Respondent No. 1 from the Appellant therein. The suit was decreed and only during pendency of appeal, the Appellant became sick. The question which arose for consideration was as to whether in view of the Sick Industrial Companies (Special Provisions) Act, 1985, no proceeding could have been initiated or continued under the said Act. Referring to Section 13 of the Act, this Court held that the provisions of the said Act would prevail over the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985.

F We are here not concerned with the right of a party to take recourse to a remedy but are concerned with a right of a party to possess the property over which it has a lawful title. In such a situation, Benami Transactions Act will have no application in allocation of shares as the same would not come within the purview of transaction relating to a transfer of property. G Transfer of CANCIGO in favour of the Appellant was, thus, valid and legal as by reason of the transfer of possession of the CANCIGOs by Respondent No. 2 in favour of the Appellant, a valid right has been created therein, the same could not have been attached in terms of Section 3(3) of the said Act.

H The Custodian thought it expedient not to invoke the provisions of Sub-

section (2) of Section 4 of the said Act. He was at liberty to do so. Even now he is free to do so, if so advised.

A

CONCLUSION:

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. These appeals are allowed. In the facts and circumstances of this case, however, there shall be no order as to costs.

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V.S.S.

Appeals allowed.