
(2010) 05 P&H CK 0167

In the Punjab And Haryana At Chandigarh

Case No : Regular Second Appeal No. 3937 of 2005 ;Cross Objection No. 9 of 2006

Air Vice Marshal Mahinder Singh Rao(Retd.)

APPELLANT

Vs

Narender Singh Rao & Others

RESPONDENT

Date of Decision : 21-05-2010

Acts Referred:

Benami Transactions (Prohibition) Act, 1988 — Section 4
Registration Act, 1908 — Section 17(2)

Citation : (2010) 4 PLR 43 : (2010) 3 RCR(Civil) 508

Hon'ble Judges : Vinod K.Sharma, J

Judgement

Vinod K.Sharma, J.

1 This is plaintiffs second appeal against the judgments and decrees dated 23.4.2005, passed by the learned Courts below vide which suit filed by the plaintiff/appellant for declaration to the effect, that the plaintiffs and the defendants are owners in possession in equal shares of the property bearing No. 504, Ward No. 16, Gurgaon, as fully detailed and described in para 1 of the plaint; and further that they are entitled to be recorded as such in the ownership column in the Municipal record of the Municipal Committee, Gurgaon, and further claiming a decree for possession by way of partition by metes and bounds of the share of the plaintiffs in respect of the suit property along with actual possession.

2 The plaintiffs filed the suit, referred to above, on the pleadings that Sh. Rao Gajraj Singh, Advocate, Member of Parliament (Lok Sabha) and father of the plaintiffs and defendants, was the owner in possession of the property in dispute.

3 Sh. Rao Gajraj Singh expired on 29.3.1981 intestate, leaving behind the parties to suit and Smt. Sumitra Devi, widow of late Sh. Rao Gajraj Singh and mother of the parties. Smt. Sumitra Devi also died on 6.6.1989, leaving behind the plaintiffs and the defendants as the only legal heirs.

4 It was the pleaded case of the plaintiffs, that house in dispute stands in the

name of Sh. Rao Gajraj Singh, in the records of Municipal Committee, Gurgaon for which house tax upto date i.e. 199091 stood paid on 9.7.1990 to the tune of Rs. 3290/ (Rupees three thousand two hundred and ninety only) vide receipt No. 13, book No. 46, dated 19.7.1990. The electric connection was also in the name of late Sh. Rao Gajraj Singh and upto date bills for electricity consumption also stood paid.

5 It was also pleaded by the plaintiffs, that plaintiff No. 3, applied to the Administrator, Municipal Committee, Gurgaon on 8.4.1991, with the consent of other plaintiffs, for transfer of the house in the names of the surviving plaintiffs and defendants being the heirs of late Sh. Rao Gajraj Singh, but the Administrator, Municipal Committee, Gurgaon vide letter dated 15.6.1991 advised them to get Court order with regard to change of ownership. Thus, the suit.

6 It was also the case of the plaintiff/appellant, that relationship between the parties was strained and no longer amicable. So, they did not want to keep the property joint. The partition by metes and bounds was prayed.

7 The suit was contested by defendant No. 1, whereas defendant No. 2 was proceeded ex parte on 20.5.1992, and defendants No. 3 & 4 were proceeded ex parte on 5.2.1992.

8 In the written statement, a plea was taken that the boundaries of the suit property were not correctly stated. It was denied that late Sh. Rao Gajraj Singh, father of the parties, was absolute owner in possession of the suit property. The stand of defendant No. 1 was, that the suit property was owned and possessed by Sh. Rao Gajraj Singh, to the extent of half share and Smt. Sumitra Devi, mother of the parties, to the extent of remaining half share. This was said to be the position, even during the life time of Sh. Rao Gajraj Singh, as he had himself executed a writing in his own hand, which was attested by Rao Devender Singh, real sister's son, in token of its correctness.

9 The said writing was said to have been handed over to Smt. Sumitra Devi for assertion and protection of her rights in the said property and also to get necessary entries, in the Municipal record changed. The copy of, that writing was kept by Sh. Rao Gajraj Singh with him. The writing was said to be a memorandum of acknowledgment of settlement of the suit property made by him, prior to its recording. In the writing the ownership and possession of Smt. Sumitra Devi, to the extent of half share, was acknowledged. Sh. Rao Gajraj Singh assigned the remaining half share belonging to him in favour of Smt. Sumitra Devi and viceversa.

10 Since Rao Gajraj Singh died during the life time of Smt. Sumitra Devi, therefore, she became absolute owner in possession of the entire property by operation of law. Nothing was, therefore, left to be inherited or shared by any other person, including any of other heirs, as Smt. Sumitra Devi had become absolute owner in possession of the suit property on the death of Rao Gajraj

Singh, with no restriction on the right of alienation.

11 It was denied, that Sh. Rao Gajraj Singh died without leaving any will or assignment. It was, however, admitted that Smt. Sumitra Devi, mother of the parties expired on 6.6.1989, at Ranchi while she was staying with defendant No. 1. Smt. Sumitra Devi executed a Will bequeathing the suit property in favour of defendant No. 1. The Will was executed on 1.6.1989, after understanding the contents of the Will in a sound disposing mind.

12 Defendant No. 1 claimed absolute ownership of the suit property. It was also the case of defendant No. 1, that he had served Rao Gajraj Singh and Smt. Sumitra Devi, to the best of his capacity, therefore, his parents had great love and affection for him. Smt. Sumitra Devi being pleased with the services of the defendant and his family members, who was neglected by the plaintiffs during her life time, and specially in her old age, when she executed the Will in favour of defendant No. 1.

13 It was further the stand of defendant No. 1, that the house tax and electricity bills were paid from the amount collected by way of rent of the tenanted portion of the suit property. It was further asserted by defendant No. 1, that existence of name of Sh. Rao Gajraj Singh in the Municipal record and in the record of the Haryana State Electricity Board in respect of the electricity connection, did not make any difference to the right, title and interest of Smt. Sumitra Devi, and after her death to that of the answering defendant. The plea of partition was denied. In view of the facts stated above, it was asserted, that the plaintiffs had no share in the suit property. Other preliminary objections were also taken.

14 Replication was filed, wherein the pleas raised in the plaint were reiterated and those of written statement were denied.

15 In addition thereto, in the replication, it was asserted that the property was owned by Sh. Rao Gajraj Singh, as absolute owner and not to the extent of half share. It was denied, that Sh. Rao Gajraj Singh had ever admitted ownership and possession of Smt. Sumitra Devi in respect of the suit property, as alleged. The stand taken in the replication was, that Smt. Sumitra Devi had succeeded to the extent of 1/9th share, after the death of late Sh. Rao Gajraj Singh along with their sons and daughters. It was denied, that Sh. Rao Gajraj Singh ever executed any writing in his own hand, during his life time, admitting the ownership of Smt. Sumitra Devi, in the house in question.

16 It was denied, that the writing was executed and signed by Sh. Rao Gajraj Singh and handed over to Smt. Sumitra Devi, as pleaded by defendant No. 1. It was pleaded that Rao Gajraj Singh had written a letter in the year 1970, in response to the letter from the office of Income Tax Office, Gurgaon dated 11.12.1970, seeking clarification of ownership of the house in question, which was occupied by Rao Gajraj Singh and his family members, wherein he has written, that it was a joint property, along with his wife, and his five sons. The writing said to have been written was claimed to be having no evidentiary value

being not admissible in evidence, because rights in immovable property worth of more than Rs. 100/, could only be created by registered deed, duly stamped. It was also pleaded, that after the death of Sh. Rao Gajraj Singh, Smt. Sumitra Devi being widow of Sh. Rao Gajraj Singh filed an application for grant of succession certificate in respect of the amount, which was lying deposited with the State Bank of India and the Bank of Baroda under Section 372 of the Indian Succession Act. The said application was tried and decided by the Court of Senior Sub Judge, Gurgaon on 12.6.1981. In those proceedings, a specific stand was taken by Smt. Sumitra Devi that Rao Gajraj Singh did not leave any Will. This averment was supported by her while deposing in the Court. All the sons and daughters of Sh. Rao Gajraj Singh including defendant No. 1, admitted that Rao Gajraj Singh died without leaving any Will.

17 The writing by Sh. Rao Gajraj Singh was said to be outcome of fraud and manipulation of the fertile brain of defendant No. 1. It was asserted, that writing could not be termed, as memorandum of acknowledgment of settlement of the suit property. It was pleaded that settlement required involvement of more than two persons. It was pleaded, that Sh. Rao Gajraj Singh was residing in his own house i.e. the disputed house and was being looked after by Sh. Rao Surender Singh, plaintiff No. 2, who was practicing as an advocate at Gurgaon, and was staying with him along with his family.

18 It was pleaded in the replication, that Sh. Rao Gajraj Singh suffered an acute attack of left vertical failure, which resulted in infection on 10.1.1981, and he was admitted in Dr. Ram Manohar Lohia Hospital, New Delhi, from where he was discharged on 4.3.1981. Defendant No. 1 took him to Karnal, where his condition became bad to worse, and on 28.3.1981 he became unconscious, and ultimately died at 11 P.M. on 29.3.1981, in the presence of all the family members.

19 It was denied, that Sh. Rao Gajraj Singh was being served and looked after by defendant No. 1. The allegations were also levelled, that defendant No. 1 tried to forge a Will of Sh. Rao Gajraj Singh while he was staying at Karnal and was not keeping good health but he could not succeed, as the CMO posted there, did not connive with him.

20 It was also alleged, that the writing had never seen the light of the day during the life time of Sh. Rao Gajraj Singh and Smt. Sumitra Devi. The execution of Will by Smt. Sumitra Devi on 1.6.1989 was also denied, by pleading that Smt. Sumitra Devi was ill and suffering from paralysis before her death. She was stated to have lost her memory and was not having the sound disposing mind, as she had become completely wreck physically and mentally. She was not in a position to take independent cogent decision, therefore, she was said to be not in sound disposing mind to execute any Will.

21 The Will also did not see the light of the day till the filing of the written statement. The Will was said to be unnatural and surrounded by suspicious circumstances. She was said to be seriously ill since 1986 and her condition

became very serious, as she had fallen down on the night of 27.5.1989 and became unconscious.

22 It was the case of the plaintiff/appellant, that defendant No. 1 informed, that Smt. Sumitra Devi had been admitted in hospital in Ranchi and gone in COMA and later on died in hospital at about 3:45/4 A.M. on 6.6.1989 without regaining consciousness. The Will was, said to be a manipulated, fraudulent, fake, and false document.

23 It was the case of the plaintiffs, that vide letter dated 4.7.1989, defendant No. 1 was informed about the suspicious circumstances in the alleged Will, and the strange circumstances under which Smt. Sumitra Devi died.

24 It was also the case of the plaintiff/appellant, that they were kept away from Smt. Sumitra Devi, so that they don't come to know about the real condition, and cause of death of Smt. Sumitra Devi.

25 It was the case of the plaintiffs/appellant, that defendant No. 1 had not replied to their letter or controverted the averments made therein, pointing out the suspicious circumstances. It was the case of the plaintiff/appellant, that defendant No. 1 was posted as Judge of the High Court Bench at Ranchi at relevant time, therefore, he played a great fraud and coerced in preparing the alleged Will of Smt. Sumitra Devi.

26 It was pleaded, that defendant No. 1 might have got the thumb impression of Smt. Sumitra Devi on blank papers, either when she was unconscious or after her death, and subsequently used it to prepare the false Will. It was the case of the plaintiffs, that Smt. Sumitra Devi was forced to go to Ranchi against her Will, and further forced to take all the fixed deposit receipts lying in the name of the deceased, which were maturing on 6.7.1989, 8.7.1989, 23.11.1989 and 18.12.1989, bank books, huge cash approximately amounting to Rs. 206456/ (Rupees two lac six thousand four hundred and fifty six only), as also the deceased's gold bangles, gold chain, pair of ear rings and gold rings besides other valuables, which was not accounted for by defendant No. 1.

27 It was the case of the plaintiffs, that Smt. Sumitra Devi was taken to Ranchi with mala fide intention, to grab her valuables, which were deposited in the bank at Gurgaon, which defendant No. 1 got transferred for misusing and usurping.

28 It was also alleged, that defendant No. 1 being Judge of the High Court, colluded with the Administrator, Municipal Committee, posted at that time. On the allegations referred to above, the Will was claimed to be fake and forged, and not executed by Smt. Sumitra Devi of her free will.

29 Defendant No. 1 filed rejoinder to the replication on 31.8.1988, and reasserted the facts already set out in the written statement and also controverted the pleas taken by the plaintiffs in their replication.

30 From the pleadings of the parties, the learned trial Court framed the following

issues :

1. Whether the plaintiff and defendants are cosharers in the property in dispute to the extent of 1/8th share each ? OPP
2. Whether the late Sh. Rao Gajraj Singh was sole owner in possession of the disputed house at the time of his death as alleged ? OPP
3. Whether the plaintiffs are entitled to partition of the suit property by metes and bounds?OPD
4. Whether the alleged writing/memorandum of acknowledgment of settlement of the suit property was executed by Rao Gajraj Singh in favour of late Smt. Sumitra Devi as alleged ? OPD
- 4A. Whether late Smt. Sumitra Devi was owner in possession of 1/2 share of the suit property during the life time of Rao Gajraj Singh and after his death she became absolute owner in possession of the same by virtue of writing/memorandum of acknowledgment of the settlement as alleged ? If so to what effect ? OPD
5. Whether deceased Smt. Sumitra Devi had duly executed a valid Will in favour of defendant No. 1 on 1.6.1989. If so, its effect ?OPD
6. Whether the plaintiffs have got no locus standi or cause of action to file and maintain the present suit ? OPD
7. Whether the plaintiffs are estopped by their own act and conduct from filing the present suit ? OPD
8. Whether the present suit is time barred ? OPD
9. Whether the suit has not been properly valued for the purpose of court fees and jurisdiction? OPD
10. Whether the suit is bad for want of complete description of the land and site plan of the suit property ? OPD
11. Whether the suit is not maintainable in the present form ? OPD
12. Whether the plaintiffs have suppressed material facts? If so, its effect ? OPD
13. Relief."

Both the parties, were called upon to lead evidence, in support of their respective claims. The plaintiffs in support of their case examined Ram Kumar House Tax Clerk, MC, Gurgaon as PW1, Dharam Parkash Jain, Record Keeper, Sessions Court, Gurgaon as PW2, Mahender Singh plaintiff No. 1 himself appeared as PW3 and also produced Jagdish Chander as PW4.

31 Defendant No. 1, on the other hand, himself stepped into the witness box as DW1 and produced Chhote Lal, DRK of the D.C. Office as DW2, Sh. Rakesh

Kataria, Clerk, Bank of Baroda, Gurgaon as DW3, Sh. Banshi Parshad Advocate as DW4, Dr. B.N. Yadav as DW5, Sh. Sanjay Kumar Banerjee as DW6, Sh. Sher Singh as DW7, Laxmi Chand Jain as DW8 and Sh. Som Nath Aggarwal, Hand Writing and Fingerprints Expert as DW9. In rebuttal to the evidence led by defendant No.1, the plaintiff examined Smt. Savita Rai Singh as PW5, Sh. Veer K. Sakhuja, Handwriting and Fingerprints Expert as PW6 and Jai Gopal Accountant, Bank of Badoda, Gurgaon as PW7, besides tendering documents. The learned trial Court, took up issues No. 4 & 4A together, as the findings on issues No. 1 & 2 were dependent upon the findings on issues No. 4 & 4A.

32 The learned trial Court on appreciation of evidence, came to the conclusion, that the stand taken by the plaintiff/appellant, was contradictory for the reason, that in the plaint the plaintiffs had claimed Rao Gajraj Singh to be the absolute owner of the property in dispute, as per assessment register of property tax Ex. P1 to Ex. P4, but in the replication, it was stated, that in reply to the letter of income tax authority Rao Gajraj Singh had shown himself to be the joint owner of the property in dispute. The learned trial Court held, that except for the copy of assessment register Ex. P1 to Ex. P4, there was no document of title of the property brought on record, thus held, that the plaintiffs/appellant had failed to prove the fact, that Sh. Rao Gajraj Singh was the absolute owner of the property in dispute.

33 The learned trial Court also held, that the document Ex. D1 was duly proved on file, for the reason that in letter Ex. PW3/3 dated 4.7.1989, it was stated that their father Rao Ji left a Will about the Gurgaon house, which was solely owned by him, wherein restrictions were imposed on Bibi Ji from alienating the house, and that the house will go to the heirs of Rao Ji.

34 The learned trial Court held, that in the plaint, the case pleaded was, that Sh. Rao Gajraj Singh did not leave any Will, the learned trial Court drew a presumption, that the plaintiffs were aware of the document Ex. D1. The learned trial Court, therefore held, that the admission made in Ex. PW3/3, was sufficient to prove the document Ex. D1.

35 The learned trial Court, further relied upon the evidence of Smt. Savita Rai Singh, defendant, who had admitted the writings of Ex. D1 and identified the signature of Rao Gajraj Singh on Ex. D1. Besides this, the writing was also identified by Sh. Sher Singh DW7, who was Clerk of Rao Gajraj Singh.

36 Besides the evidence, referred to above, Sh. Som Nath Aggarwal, Handwriting and Finger Print Expert was also examined as DW9, to prove the handwriting on Ex. D1. Defendant No. 1, the other son of Rao Gajraj Singh, while appearing as DW1, also proved the writing of Rao Gajraj Singh on document Ex. D1.

37 The learned trial Court thereafter considered the question, whether the document Ex. D1, which stood duly proved, required registration under Section 17 of the Indian Registration Act, and came to the conclusion, that it did not require any registration. The reason for coming to this conclusion was, that under the

said document, no new rights were created, in favour of Smt. Sumitra Devi, as it was a mere declaration, of her rights which she already possessed. The learned trial Court held, that it did not require registration, as there was no transfer of property. The learned trial court also held, that there was no date mentioned on the document Ex. D1, therefore, it could not be presumed, that it was executed after expiry of six months after the date of purchase of the stamp paper for the said purpose.

38 The learned trial Court also did not find any substance in the contention of the learned counsel for the plaintiffs, that Ex. D1 did not bear the signatures of Smt. Sumitra Devi. Interestingly, the learned trial Court thereafter went on to hold, that in view of admission of the plaintiffs, that Sh. Rao Gajraj Singh was the absolute owner of the property in dispute, and being the sole owner, the presence of his sons and daughters was not necessary, while making settlement of the property in dispute.

39 The learned trial Court relied upon the judgment of this Court in the case of *Premlata v. Bhupender Singh* 2001(1) SLJ 59 to hold that the house tax assessment registers Ex. P1 to Ex. P4 were not the documents of title to prove the ownership. The reliance in support of this was also placed on the judgment of the Hon'ble High Court of Madras in the case of *Arulmigu Viswesharaswami v. R.V.E. Venkatachata Goundar* 1997(1) Civil Court Cases 574 (Madras).

40 The learned trial Court also rejected the contention of the plaintiffs/appellant, that document Ex. D1 was never acted upon, and the ownership of Smt. Sumitra Devi was not got recorded in the revenue record, on the ground, that the matter was between husband and wife, who were residing together, and enjoying the property in dispute, therefore by merely not getting the document entered in the Municipal record, it did not mean, that Smt. Sumitra Devi ceased to be the owner of 1/2 share, or that the document was not acted upon.

41 The learned trial Court also held, that it was proved on record, that after the death of Sh. Rao Gajraj Singh, Smt. Sumitra Devi alone was residing in the property in dispute. The learned trial Court held, that there was no reason forthcoming, as to why the proceedings of partition were not initiated by the plaintiffs during the life time of Smt. Sumitra Devi. On the basis of this conclusion, it was held, that the plaintiffs admitted Smt. Sumitra Devi as absolute owner of the property in dispute, after the death of their father Sh. Rao Gajraj Singh.

42 The learned trial Court, also did not agree with the contention, that adverse inference was required to be drawn, for nonexamining Sh. Devender Singh, the witness to Ex. D1, for the reason, that the document stood proved beyond doubt, as it was admitted by the plaintiffs and defendant Savita Rai Singh, PW5.

43 The learned trial Court also did not accept the contention of the learned counsel for the plaintiffs/appellant, that Ex. D1 declared the share of the properties different from the one recorded in the Municipal record, therefore, it

required registration under Section 17(1)(b) of the Registration Act, for the reason, that the record of house tax assessment register was not record of title, therefore, if Sh. Rao Gajraj Singh was recorded as absolute owner, it was of no consequence.

44 The learned trial Court also did not accept the contention of the plaintiffs/appellant, that vide Ex. DI, only the life interests were created in Smt. Sumitra Devi for her protection, for the reason in the document, it was mentioned that,

"In case of demise of any one of us, the house in question shall be the sole owner's property of the other.....nobody can and has any rights about what is described as above."

45 The learned trial Court, came to the conclusion, that under the document Ex. DI, on death of Rao Gajraj Singh, Smt. Sumitra Devi became absolute owner of the property in dispute, and in coming to this conclusion, the learned trial Court placed reliance on the following judgments :

"Vijay Pal Singh and another v. Dy. Director of Consolidation and others 1995 (4) S.L.J. 3001, Smt Vidhya v. Nand Ram @ Asoop Ram (Dead) by LR's. 2001SLJ 98, Namburi Basava Subrahmanyam v. Alapati Hymavathi and Others 1996(2) R.R.R. 588 : AIR 1996 Supreme Court 2220, Smt Ram Kali v. Choudhri Ajit Shankar and Others 1997, SAR 333, Nazar Singh and Others v. Jagjit Kaur and Others 1996(1) R.R.R. 379:1996(1) LJR 141, Yadala Venkata Subbamma v. Yadalla Chinna Subbaih (Dead) by LR's. 2001(1) R.C.R.(Civil) 528 : 2001(1) SLJ 592 and Smt Beni Bai v. Raghubir Prasad 1999(2) R.C.R.(Civil) 210:1999 (Suppl.) Civil Court Cases 635."

wherein, it has been laid down, that the female acquiring right in lieu of maintenance under Will, becomes absolute owner and could Will away her property to anyone.

46 The learned trial Court held, that provisions of Section 14(2) of the Hindu Succession Act, will not be applicable. On issues No. 4 & 4A, the learned trial Court was pleased to hold, that the memorandum of acknowledgment of settlement of the property in dispute was executed, by Sh. Rao Gajraj Singh in favour of Smt. Sumitra Devi, and that Smt. Sumitra Devi was owner in possession of 1/2 share of the suit property during the life time of Rao Gajraj Singh, and after his death, she became absolute owner in possession of the same by virtue of memorandum of acknowledgment of settlement. Both the issues were decided in favour of defendant No, 1.

47 On issue No. 5, the learned trial Court, on appreciation of evidence, recorded a finding, that defendant No. 1 proved the execution of the Will. The Will was drafted by Sh. Banshi Parshad, Advocate, who was also attesting witness of the Will, who stepped into the witness box as DW4, and deposed, that the contents of the Will were read over to the testatrix Smt. Sumitra Devi, and she after understanding the same put her left thumb impression on Will Ex. DW4/1. The

learned trial Court held, that there was no haste in execution of the Will Ex. DW4/1.

48 It was deposed by Sh. Banshi Parshad, Advocate, DW4 that he was called on 30.5.1989 for drafting the Will, when he received instructions from Smt. Sumitra Devi and thereafter, he went again to Smt. Sumitra Devi on 31.5.1989 with the draft of the Will, which was read over to Smt. Sumitra Devi. Thereafter by taking further instructions for correction, he prepared the Will Ex. DW4/1, and he further attested it as witness. The testimony of DW4 was corroborated by Dr. B.N. Yadav, DW5, who was also attesting witness of Will Ex. DW4/1.

49 The learned trial Court held, that Dr. B.N. Yadav was acquainted with Smt. Sumitra Devi, being a friend of defendant No. 1, as revealed from the evidence. Both the witnesses were held to be trustworthy.

50 The learned trial Court also held, that evidence on record proved the fact, that Smt. Sumitra Devi was in touch with Dr. B.N. Yadav, therefore, he was the right person, who could have been asked for getting the Will drafted.

51 The learned trial Court, did not accept the statement of PW5, Savita Rai Singh, wherein she had deposed, that Smt. Sumitra Devi was not of sound disposing mind on 2.6.1989. The learned trial Court did not agree with the contention that DW4, Sh. Banshi Parshad, who was a practising Advocate at District Courts at Ranchi, was under the influence of defendant No. 1.

52 The learned trial Court did not pay importance to the minor contradictions for the reason, that these witnesses were examined after a lapse of 13 years of attesting the Will. The learned trial Court also did not believe the evidence of Savita Rai Singh PW5, as it did not inspire confidence. This was for the reason, that in the plaint allegations were made against defendant No. 3 by the plaintiffs also, but were got omitted in the replication.

53 The learned trial Court also recorded a finding on the basis of evidence, that Smt. Sumitra Devi was of sound disposing mind and was in good health. The learned trial Court also did not find any substance in the contentions raised by the learned counsel for the plaintiffs, that there were suspicious circumstances, like spacing of the typing, cutting and corrections made in the Will. The learned trial Court did not find any substance in the allegation, that the Will was forged.

54 The learned trial Court also held, that the scribe of the Will was not asked to explain the over writing in the Will, when he appeared in the witness box. The learned trial Court did not accept the contention that putting up of left thumb impression on the Will would be a suspicious circumstance, for the reason, that it was proved,, that in Bihar there was practice to put left thumb impression by the ladies also.

55 The learned trial Court also did not find any substance in the contention of the learned counsel for the plaintiffs/appellant that the Will was suspicious document due to participation of defendant No. 1 in the Will, as there was no evidence

which could show, that defendant No. 1 took active part in execution of the Will. His mere presence, therefore, could not be a suspicious circumstance.

56 The learned trial Court also held, that there was evidence to show, that Smt. Sumitra Devi had great love and affection for defendant No.1, for the reason, that she was taken care of, by him and his wife.

57 The learned trial Court did not find any substance in the allegations made by the plaintiffs, that DW6 & DW7 had acted in collusion with defendant No. 1. The learned trial Court did not believe the assertion of the plaintiffs/appellant that the thumb impression of the testatrix was taken after her death or during the unconscious state of mind.

58 The learned trial Court did not accept the contention of the learned counsel for the plaintiffs/appellant, that the Will was surrounded by the suspicious circumstances, as it had not seen the light of day, till it was placed on record by defendant No. 1, with the written statement, for the reason, that there was mention about the Will, in the letter Ex. PW3/3 dated 4.7.1989.

59 The learned trial Court held, that mere nonregistration of the Will, was not a suspicious circumstance, as it does not require compulsory registration.

60 The learned trial Court also did not find any force, in the contention of the learned counsel for the plaintiffs/appellant, that Smt. Sumitra Devi died after 5 days of execution of the Will to hold, that it was a suspicious circumstance. The learned trial Court held, that letter Ex. D2 proved, that Smt. Sumitra Devi was looked after by defendant No. 1.

61 The learned trial Court further did not find any substance in the contention of the learned counsel for the plaintiffs/appellant, that no reasons were given for excluding the other legal heirs, therefore, the Will was surrounded by suspicious circumstance. The learned trial Court came to the conclusion, that the execution of the Will was duly proved.

62 In view of the finding on issues No. 4,4A and 5, the learned trial Court on issues No. 1 to 3 held, that Smt. Sumitra Devi was absolute owner of the property in dispute after the death of Sh. Rao Gajraj Singh, and that she validly executed the Will Ex. DW4/1 in favour of defendant No. 1, thereby defendant No. 1 became absolute owner of the property in dispute. The plaintiffs were, held not to be cosharers in the property. Accordingly, all these issues were decided against the plaintiffs/appellant.

63 In view of the findings on issue No. Scolding defendant No. 1 to be the absolute owner of the property, on issues No. 6 & 11, it was held, that plaintiffs had no locus standi or cause of action to file the suit. The suit was held to be not maintainable. Issue No. 7, was decided against defendant No.1 having been not pressed. On issue No. 8, the suit was held to be within limitation. On issue No. 9, the learned trial Court held, that the suit was not properly valued for the purposes of Court fee and jurisdiction, as ad valorem court fee was to be paid, as

defendant No.1 was absolute owner of the property. Issue No.9 was, therefore, decided in favour of defendant No. 1. Issue No. 10 was decided against defendant No. 1. Similarly, issue No. 12 was decided against defendant No. 1 being not pressed. In view of the findings, referred to above, the suit filed by the plaintiffs/appellant was ordered to be dismissed. The plaintiff/appellant, along with others preferred an appeal against the judgment and decree passed by the learned trial Court.

64 The plaintiff/appellant challenged the finding on issue No. 9, recorded by the learned trial Court holding, that the ad valorem Court fee was payable, by contending, that for determining the court fee payable, the averments made in the plaint were to be seen, and if the averments made in the plaint are read, then it would show, that the suit was properly valued for the purposes of court fee and jurisdiction. This contention was accepted.

65 The learned lower appellate Court further held, that the matter of court fee was between the litigant and the State, therefore, held that the learned trial Court committed an error in deciding issue No. 9 against the plaintiffs/appellant.

66 One of the reasons for coming to this conclusion was, that possession of one coowner was on behalf of all the other coowners. The learned lower appellate Court also held, that the learned trial Court wrongly, ignored the law on court fee by ignoring, that appeal being in continuation of suit, the authorities pertaining to court fee in appeal, were applicable to suit for partition.

67 The learned lower appellate Court, there after proceeded to consider the question whether Sh. Rao Gajraj Singh was the sole owner in possession of the suit property, during his life time or whether Smt. Sumitra Devi, his wife was owner in possession of 1/2 share of the suit property during his life time, whether after the death of Sh. Rao Gajraj Singh, Smt. Sumitra Devi, widow of Sh. Rao Gajraj Singh had become absolute owner in possession of the entire suit property or not. The learned lower appellate Court in answer to these questions held, that the plaintiffs/appellant, did not produce any sale deed, or document of title to prove, that Sh. Rao Gajraj Singh was the sole owner in possession of the suit property. The learned lower appellate Court also held, that plaintiffs/appellant had based their claim, on the house tax assessment entries Ex. P2, Ex. P3 & Ex.P4, but these were not documents of title to hold, that Sh. Rao Gajraj Singh was absolute owner of the property.

68 The learned lower appellate Court rejected the contention, that these documents were relevant to prove the ownership. The learned lower appellate Court, thereafter proceeded to hold, that there was evidence adduced to show, that father of Smt. Sumitra Devi, had contributed a lot, in acquisition of this property in the name of his soninlaw. Therefore, mere fact, that Sh. Rao Gajraj Singh was shown as owner in the Municipal records, he alone could not be held, to be owner in possession of the suit property. In view of admission made by Rao Gajraj Singh in document Ex. DI, title of Smt. Sumitra Devi to the extent of 1/2

share was recognised by him.

69 The learned lower appellate Court also held, that the execution of the document Ex. D1, was duly proved from the statement of Smt. Savita Rao Singh PW5, who was the witness of the plaintiffs as also the daughter of Rao Gajraj Singh. The learned lower appellate Court also accepted the evidence of DW7 Sher Singh, who was Clerk of Rao Gajraj Singh, besides these having been proved by the handwriting expert.

70 The contention raised by the learned counsel for the plaintiffs/appellant that Ex. D1, was not admissible in evidence being unregistered document, and that it could not be treated to be a Will having not been attested by two attesting witnesses, was rejected. The plea of the defendant/respondent No. 1 was accepted by recording a finding, that the plaintiffs were to stand on their own legs and could not take benefit of the weaknesses in the case of the defendant.

71 The learned lower appellate Court held, that the plaintiffs failed to prove, that Rao Gajraj Singh was the sole owner, of the property in dispute, as assessment register, could not be treated to be the document of title.

72 The learned lower appellate Court, also took note of the contradictions, in the stands taken in the plaint and in the replication, wherein it was mentioned, that Sh. Rao Gajraj Singh has shown the property to be joint between his wife and sons, whereas in the plaint the property, was claimed to be under absolute ownership of Sh. Rao Gajraj Singh. The learned lower appellate Court also accepted the statement of DW1, wherein he deposed, that major contribution in purchasing the land, on which the house was constructed, was paid by his grand maternal father as told to him by his mother.

73 The learned lower appellate Court held, that the substantial amount, was contributed by the father of Smt. Sumitra Devi. The learned lower appellate Court held, that the evidence showed, that the financial condition of Sh. Rao Gajraj Singh, was not sound at the relevant time, when the suit property was acquired.

74 The learned lower appellate Court held, that Benami transactions were not prohibited prior to 1988, and if in the Municipal record name of Sh. Rao Gajraj Singh alone was existing, that does not prove him as owner of the suit property.

75 The learned lower appellate Court also held, that title of Smt. Sumitra Devi, over the suit property was recognised in the settlement/arrangement, Ex. DI in the year 1973, and it transpired from the evidence adduced, that Smt. Sumitra Devi, mother of the parties to the suit or appeal got constructed shops on the front side portion of the house, therefore, Ex.DI was only an arrangement between husband and wife. Rather it was an arrangement between two coowners, who were having 1/2 share each in the suit property.

76 The learned lower appellate Court further held, that the word "is or has" as mentioned in Ex. DI, did not matter much, as Sh. Rao Gajraj Singh was only

referring to the Municipal entries, in his name regarding the suit property. Through document Ex. DI, he recognised, the title of his wife Smt. Sumitra Devi to the extent of 1/2 share.

77 The learned lower appellate Court further held, that under Ex. DI it was settled, that in case of death of either party i.e. Sh. Rao Gajraj Singh or his wife Smt. Sumitra Devi, the other surviving coowner or partner, will become owner of the suit property, therefore, this document could not be treated to be a transfer deed, or a document transferring the right, title or interest in the suit property in favour of Smt. Sumitra Devi, therefore, did not require registration, being an arrangement between the parties.

78 The learned lower appellate Court also held, that Rao Gajraj Singh was not holding the suit property as Karta of joint family, so the plaintiffs/appellant did not have any preexisting right in the property. Furthermore, the plaintiffs did not challenge the title of Smt. Sumitra Devi in the suit property, during her life time after the death of Sh. Rao Gajraj Singh, therefore, in case Sh. Rao Gajraj Singh would have been exclusive owner in possession of the suit property, then on his death, all sons and daughters of Sh. Rao Gajraj Singh, would have asserted their claim over the suit property equally, but as no application for change of the name in the Municipal record was moved, therefore, in view of the law laid down in the case of Jagdish and others v. Ram Karan and others 2003(1) R.C.R.(Civil) 657 : 2003(1) PLR 182, the antecedent title in the matter of family arrangement was to be presumed. The plaintiffs were treating Smt. Sumitra Devi, as absolute owner in possession of the suit property. This finding was based on the statement of Sh. N.S. Rao, DW1, wherein he asserted, that his mother became absolute owner in possession of the house, in pursuance to the settlement, and all the brothers and sisters used to treat her as owner in possession of the suit property. This deposition was not questioned in the cross-examination.

79 The learned lower appellate Court because of the fact, that Smt. Sumitra Devi also filed ejectment petition against the tenants, held that Sh. Rao Gajraj Singh was not exclusive owner in possession of the suit property. Rather Sh. Rao Gajraj Singh and his wife were coowner in possession of the suit property and after the death of Rao Gajraj Singh, Smt. Sumitra Devi became absolute owner in possession of the suit property by virtue of Section 14 of the Hindu Succession Act. The question of obtaining consent of other sons and daughters in the matter of arrangement Ex. DI, did not arise because, that arrangement was between two coowners or partners, who were husband and wife.

80 The learned lower appellate Court then proceeded to hold, that placing of restrictions in the matter of alienation were relevant, during the life time of Sh. Rao Gajraj Singh and his wife Smt. Sumitra Devi, but after their death, by virtue of Will made by Smt. Sumitra Devi, defendant No. 1 became the owner in possession of the suit property. The learned lower appellate Court did not accept the contentions raised by the plaintiffs/appellant, and affirmed the findings recorded by the learned trial Court on issues No. 1 to 4A.

81 The learned lower appellate Court, after affirming the findings on issues No. 1 to 4A, considered the contentions, of the learned counsel for the plaintiff/appellant to challenge the Will.

82 The Will was challenged by the plaintiffs/appellant on the plea, that the evidence showed, that Savita daughter of the testatrix was to go to Ranchi on 2.6.1989, therefore, the execution of the Will could have been waited for her arrival. That no documents were produced regarding the health of the testatrix to show, as to whether she was of sound disposing mind at the time of execution of the Will. That the Will was surrounded by suspicious circumstances, as the testatrix put her left thumb impression instead of right thumb impression. That the attesting witnesses Sh. Banshi Parshad Advocate DW4 and Dr. B.N. Yadav, DW5 were interested witnesses. That they had drafted the forged and fabricated Will in collusion with Sh. N.S. Rao, defendant No. 1. That once it was proved, that Smt. Sumitra Devi, was a religious minded lady, then in the natural course of human conduct she would have not ignored her other sons and daughters from inheritance without any rhyme and reason. That the Will was surrounded by suspicious circumstance, as no reasons were mentioned to disinherit the natural heirs. That the Will was kept guarded secret till the filing of the suit which showed the suspicious circumstance. That the executant of the Will was not in good health, as she had suffered the attack of paralysis in June 1986 on the right side of the body, therefore, confined to bed, and further that she had died after four or five days of the execution of the Will. That Smt. Sumitra Devi was 8283 years of age, and it was not certified by the Doctor, that She was having sound disposing mind. The allegations of mala fide against defendant No. 1, were also alleged qua transfer of accounts of Smt. Sumitra Devi to Ranchi. That Smt. Sumitra Devi was kept in solitude and was under the domain and control of defendant No. 1, therefore, the Will was not executed by her of free disposing mind.

83 The learned lower appellate Court did not accept any of these contentions, for the reasons given by the learned trial Court. The learned lower appellate held, that there was evidence to show, that the plaintiffs were aware of the Will, as proved from the letter written by the plaintiff and duly exhibited. It was further held by the learned lower appellate Court, that there was evidence to prove, that it was practice in Bihar, of obtaining left thumb impression of the male and female on the document, therefore, mere fact that Smt. Sumitra Devi had put her left thumb impression on the Will Ex. DW4/1, it could not be held to be a suspicious circumstance. The learned lower appellate Court further went on to hold, that once it was proved, that once Smt. Sumitra Devi was having attack of paralysis on the right portion of her body, then in that case her putting right thumb impression on the Will in question, would have resulted in hue and cry by the plaintiffs/appellant to claim, that the Will was fabricated. The learned lower appellate Court also held, that there was nothing on record to prove, that the Will was fabricated in connivance with defendant No. 1. The learned lower appellate Court also held, that merely because no reasons were given for

ignoring the other sons and daughters was of no consequence. The learned lower appellate Court also held that the person who typed the Will was not alive, therefore, could not be produced. The learned lower appellate Court also rejected the contention, that the attesting witnesses were under the influence of defendant No. 1/respondent, specially in view of the evidence showing, that there was admission by the plaintiffs/appellant that defendant No. 1 and his wife Smt. Kamla used to render services to Smt. Sumitra Devi, in her old age, and also when she was ill. Statement of Savita PW5 was discarded regarding the state of health, of Smt. Sumitra Devi. The learned lower appellate Court also held, that mere old age of the testatrix could not be a ground to reject the Will. The plea, that defendant No. 1 had participated in execution of the Will was not accepted, as there was no evidence to prove his participation. The learned lower appellate Court further held, that mere presence of the beneficiary at the time of execution of the Will, was not sufficient to hold, that the Will was surrounded by the suspicious circumstances. The learned lower appellate Court also held that the executrix of the Will died after four or five days of execution of the Will, is no ground to reject the Will, which was duly proved, by examining the attesting witnesses and the independent witnesses to prove the health of Smt. Sumitra Devi. The learned lower appellate Court rejected the contentions raised, and by considering the authorities relied upon by the plaintiffs/appellant, affirmed the findings of the learned trial court on issue No. 5 to hold, that deceased Smt. Sumitra Devi had executed the Will, in favour of defendant No. 1 on 1.6.1989.

84 The findings on issues No. 6,7,8,10,11 & 12 were also affirmed. The learned lower appellate Court by recording the following paragraph dismissed the appeal.

"45. Before parting with this judgment, I can not help mentioning this fact that argument advanced in this case were lengthy one, evidence adduced on the file was lengthy one, written arguments submitted were lengthy one. Authorities cited by both the sides were numerous. Thus possibility of some omission while discussing the evidence and legal proposition or possibility of not citing any authority cannot be ruled out but however every endeavor has been made by me to consider all the relevant and material points involved in the effectual disposing of the matter in controversy of this appeal. In my considered opinion I have considered all the relevant points involved in the matter in controversy. It may also be mentioned that mere fact that as per averments made in the plaint plaintiffs are proved in constructive possession of the suit land as they have alleged themselves as coheirs, their possession of the suit land can not be held and it is defendant No. 1 who is proved owner in possession of the suit property."

85 Mr. Ashok Aggarwal, learned senior counsel appearing with Mr. Lokesh Sinhal, Advocate for the appellant, contended that the following substantial questions of law arise, in this appeal for consideration :

1. Whether the judgment and decree passed by the learned Courts below is outcome of misinterpretation of document Ex. DI, therefore, perverse ?

2. Whether the findings of the learned Courts below in recording a finding that vide Ex. DI Smt. Sumitra Devi had become absolute owner of the property after the death of Sh. Rao Gajraj Singh, is perverse ?

3. Whether the learned Courts below wrongly ignored the suspicious circumstances to uphold the Will?

86 Before appreciating respective contentions raised by the learned counsel for the parties, it would be desirable to reproduce Ex. DI, as the whole case revolves around this document. The Ex. DI reads as under :

"I, Rao Gajraj Singh s/o Rao Hira Singh is & has been described as owner of House situated in Gurgaon Town Baraf Khanna Mohalla. The House in fact is property joint of myself & my wife Sumitra Devi as equal partners. In case of demise of any one of us, the House in Question shall be the sole owned property of the other. The boundaries periphery of the House is as follows :

East West North South Lane Kacha Road & house of Shri S.N. Mathur Kacha Road & Houses of L. Mohan Lal & Moot Chand Pacca Road Delhi Rewari Houses Badri Parshad & others There would be complete rights on the House in Question of us both & in case of demise of any one the rights of complete ownership till life shall be in the other. Nobody can & has any rights above what is described as above. This writing is being given to Sumitra Devi for assertion & protection of her rights in the House in Question. Of course there would be no rights of transfer to Rao Gajraj Singh or Sumitra Devi unless both agree. This writing is being given to Sumitra Devi & a copy shall be kept by me personally. If & when necessary entries in Municipal record would be changed accordingly. The house. is free from any encumbrance & owned & possessed by us both as owners. This writing is given to Sumitra Devi for use of it as & when necessary & copy is kept by me. Witness Rao Gajraj Singh Ex. M.P Sd/ in Hindi (Lok Sabha) Advocate Gurgaon."

87 Mr. Ashok Aggarwal, learned Senior counsel appearing on behalf of the appellant, at the very outset, challenged the findings of the learned Courts below on issues No. 1,2,3 & 4A, by contending, that the findings on these issues are outcome of misinterpretation of document Ex. DI. The findings being perverse were liable to be reversed. The learned senior counsel for the appellant contended, that the findings are against the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as "the Act"), as it was not permissible for the defendant/respondent No. 1 to take a defence, as raised, in view of Section 4 of the Act.

88 In order to appreciate the arguments, raised by the learned senior counsel for the appellant, it would be necessary to reproduce Section 4 of the Act, which reads as under :

"4. Prohibition of the right to recover property held benami. (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie

or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply, (a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

The provisions of Section 4 of the Act were considered by the Hon"ble Supreme Court in the case of *Mithilesh Kumari v. Prem Behari Khare* 1989(1) R.R.R. 255 : 1989(2) S.C.C. 95, wherein it was held, that Section 4 takes into sweep all past Benami transactions irrespective of the fact when those were created, and that the provisions of Section 4 of the Act also apply to the pending suits and appeals.

89 The operation of Section 4 of the Act was again considered by the HonWe Supreme Court in the case of *if. Rajagopal Reddy (dead) by L.Rs. and others v. Padmini Chandrasekharan (dead) by L.Rs.* 1995(2) S.C.C. 630, wherein the Hon"ble Supreme Court was pleased to lay down, that Sections 4(1) & (2) are not retrospective, therefore, the suit on behalf of person, claiming to be real owner of property to enforce his right in the property held benami filed prior to coming into force will be competent, and provisions of Section 4(1) of the Act will not apply. The Hon"ble Supreme Court reiterated the basic law, that when statutory provision creates new liability and new offence, it would have prospective operation. The relevant portion of the judgment of the Hon"ble Supreme Court, necessary for decision of this case, reads as under :

".....The real problem centres round the effect of Section 4(1) on pending proceedings wherein claim to any property on account of it being held benami by other side is on the anvil and such proceeding had not been finally disposed of by the time Section 4(1) came into operation, namely, on 19th May, 1988. SaikiaJ. speaking for the Division Bench in the case of *Mithilesh Kumari (supra)*, gave the following reasons for taking the view that though Section 3 is prospective and though Section 4(1) is also not expressly made retrospective, by the legislature, by necessary implication, it appears to be retrospective and would apply to all pending proceedings wherein right to property allegedly held benami is in dispute between parties and that Section 4(1) will apply at whatever stage the litigation might be pending in the hierarchy of the proceedings :

(1) Section 4 clearly provides that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the

property is held or against any other person shall lie by or on behalf of a person claiming to be real owner of such property. This naturally relates to past transaction as well. The expression "any property held benami" is not limited to any particular time, date or duration. Once the property is found to have been held benami, no suit, claim, or action to enforce any right in respect thereof shall lie.

(2) Similarly subsection (2) of Section 4 nullifies the defences based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property. It means that once a property is found to have been held benami the real owner is deprived of such a defence against the person in whose name the property is held or any other person. In other words, in its sweep Section 4(2) engulfs past benami transactions also.

(3) When an Act is declaratory in nature, the presumption against retrospectivity is not applicable. A statute declaring the benami transactions to be unenforceable belongs to this type. The presumption against taking away vested right will not apply in this case inasmuch as under law it is the benamidar in whose name the property stands, and law only enabled the real owner to recover the property from him which right has now been ceased by the Act. In one sense there was a right to recover on the part of the real owner against the benamidar. *Ubi Jus ibi remedium*. Where the remedy is barred, the right is rendered unenforceable.

(4) When the law nullifies the defences available to the real owner in recovering the benami property from the benamidar, the law must apply irrespective of the time of the benami transactions. The expression "shall lie" under Section 4(1) and "shall be allowed" in Section 4(2) are prospective and shall apply to present (future stages) and future suits, claims or action only.

(5) The word "suits" would include appeals and further appeals as appeals are in continuation of the suits. This is an aspect of procedural law and, therefore, when procedure is changed for deciding any such proceedings between the parties the provisions of such procedural law can be applied to such pending proceedings by necessary implication.

(6) Repelling the contention that right of the parties to a suit would be determined on the basis of rights available to them on the date of filing of the suit and distinguishing the judgment of this Court in *Nand Kishore Marwah v. Samundri Devi* 1987(2) R.C.R.(Rent) 412: (1987)4 SCC 382, it was observed that the aforesaid case was for eviction where the rights of the parties on the date of suit were material unlike in this case where subsequent legislation has nullified the defences of benami holders.

12. Before we deal, with these six considerations which weighed with the Division Bench for taking the view that Section 4 will apply retrospectively in the sense that it will get telescoped into all pending proceedings, howsoever earlier they

might have been filed, if they were pending at different stages in the hierarchy of the proceedings even upto this Court, when Section 4 came into operation, it would be apposite to recapitulate the salient feature of the Act. As seen earlier, the preamble of the Act itself states that it is an act to prohibit benami transactions and the right to recover property held benami, for matters connected therewith or incidental thereto. Thus it was enacted to efface the then existing rights of the real owners of properties held by others benami. Such an act was not given any retrospective effect by the legislature. Even when we come to Section 4, it is easy to visualise that subsection (1) of Section 4 states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other shall lie by or on behalf of a person claiming to be the real owner of such property. As per Section 4(1) no such suit shall thenceforth lie to recover the possession of the property held benami by the defendant. Plaintiff's right to that effect is sought to be taken away and any suit to enforce such a right after coming into operation of Section 4(1) that is 19th May, 1988, shall not lie. The legislature in its wisdom has nowhere provided in Section 4(1) that no such suit, claim or action pending on the date when Section 4 came into force shall not be proceeded with and shall stand abated. On the contrary, clear legislative intention is seen from the words "no such claim, suit or action shall lie", meaning thereby no such suit, claim or action shall be permitted to be filed or entertained or admitted to the portals of any Court for seeking such a relief after coming into force of Section 4(1). In Collins English Dictionary, 1979 Edition as reprinted subsequently, the word "lie" has been defined in connection with suits and proceedings. At page 848 of the Dictionary while dealing with topic No. 9 under the definition of term "lie" it is stated as under :

"For an action, claim appeal etc. to subsist; be maintainable or admissible".

The word "lie" in connection with the suit, claim or action is not defined by the Act. If we go by the aforesaid dictionary meaning it would mean that such suit, claim or action to get any property declared benami will not be admitted on behalf of such plaintiff or applicant against the concerned defendant in whose name the property is held on and from the date on which this prohibition against entertaining of such suits comes into force. With respect, the view taken by that Section 4(1) would apply even to such pending suits which were already filed and entertained prior to the date when the Section came into force and which has the effect of destroying the then existing right of plaintiff in connection with the suit property cannot be sustained in the face of the clear language of Section 4(1). It has to be visualised that the legislature in its wisdom has not expressly made Section 4 retrospective. Then to imply by necessary implication that Section 4 would have retrospective effect and would cover pending litigations filed prior to coming into force of the Section would amount to taking a view which would run counter to the legislative scheme and intent projected by various provisions of the Act to which we have referred earlier. It is, however, true as held by the Division Bench that on the express language of Section 4(1)

any right inhering in the real owner in respect of any property held benami would get effaced once Section 4(1) operated, even if such transaction had been entered into prior to the coming into operation of Section 4(1), and hence after Section 4(1) applied no suit can lie in respect to such a past benami transaction. To that extent the Section may be retroactive. To highlight this aspect we may take an illustration. If a benami transaction has taken place in 1980 and a suit is filed in June 1988 by the plaintiff claiming that he is the real owner of the property and defendant is merely a benamidar and the consideration has flown from him then such a suit would not lie on account of the provisions of Section 4(1). Bar against filing, entertaining and admission of such suits would have become operative by June, 1988 and to that extent Section 4(1) would take in its sweep even past benami transactions which are sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1); but that is the only effect of the retroactivity of Section 4(1) and nothing more than that. From the conclusion that Section 4(1) shall apply even to past benami transactions to the aforesaid extent, the next step taken by the Division Bench that therefore, the then existing rights got destroyed and even though suits by real owners were filed prior to coming into operation of Section 4(1) they would not survive, does not logically follow.

13. So far as Section 4(2) is concerned, all that is provided is that if a suit is filed by a plaintiff who claims to be the owner of the property under the document in his favour and holds the property in his name, once Section 4(2) applies, no defence will be permitted or allowed in any such suit, claim or action by or on behalf of a person claiming to be the real owner of such property held benami. The disallowing of such a defence which earlier was available, itself suggests that a new liability or restriction is imposed by Section 4(2) on a preexisting right of the defendant. Such a provision also cannot be said to be retroactive or retrospective by necessary implication. It is also pertinent, to note that Section 4(2) does not expressly seek to apply retrospectively. So far as such a suit which is covered by the sweep of Section 4(2) is concerned, the prohibition of Section 4(1) cannot apply to it as it is not a claim or action filed by the plaintiff to enforce right in respect of any property held benami. On the contrary, it is a suit, claim or action flowing from the sale deed or title deed in the name of the plaintiff. Even though such a suit might have been filed prior to 1951988, if before the stage of filing of defence by the real owner is reached. Section 4(2) becomes operative from 19th May,1988, then such a defence, as laid down by Section 4(2) will not be allowed to such a defendant. However, that would not mean that Section 4(1) and 4(2) only on that score can be treated to be impliedly retrospective so as to cover all the pending litigations in connection with enforcement of such rights of real owners who are parties to benami transactions entered into prior to the coming into operation of the Act and specially Section 4 thereof. It is also pertinent to note that Section 4(2) enjoins that no such defence "shall be allowed" in any claim, suit or action by or on behalf of a person claiming to be the real owner of such property. That is to say

no such defence shall be allowed for the first time after coming into operation of Section 4(2). If such a defence is already allowed in a pending suit prior to the coming into operation of Section 4(2), enabling an issue to be raised on such a defence, then the Court is bound to decide the issue arising from such an already allowed defence as at the relevant time when such defence was allowed, Section 4(2) was out of picture. Section 4(2) nowhere uses the words "No defence based on any right in respect of any property held benami whether against the person in whose name the property is held or against any other person, shall be allowed to be raised or continued to be raised in any suit." With respect, it was wrongly assumed by the Division Bench that such an already allowed defence in a pending suit would also get destroyed after coming into operation of Section 4(2). We may at this stage refer to one difficulty projected by learned advocate for the respondents in his written submissions, on the applicability of Section 4(2). These submissions read as under :

"Section 4(1) places a bar on a plaintiff pleading "benami", while Section 4(2) places a bar on a defendant pleading "benami" after the coming into force of the Act. In this context, it would be anomalous if the bar in Section 4 is not applicable if a suit pleading benami" is already filed prior to the prescribed date, and it is treated as applicable only to suit which he filed there after. It would have the effect of classifying the so-called "real" owners into two classes those who stand in the position of plaintiffs and those who stand in the position of defendants. This may be clarified by means of an illustration. A and B are "real" owners who have both purchased properties in say 1970, in the names of C and D respectively who are ostensible owners viz. Benamidars. A files a suit in February 1988 i.e. before the coming into force of the Act against C, for a declaration of his title saying that C is actually holding it as his benamidar. According to the petitioner's argument, such a plea would be open to A even after coming into force of the Act, since the suit has already been laid. On the other hand, if D files a suit against B at the same for declaration and injunction, claiming himself to be the owner but B's opportunity to file a written statement comes in say November 1988 when the Act has already come into force, he in his written statement cannot plead that D is a benamidar and that he, B is the real owner. Thus A and B, both "real" owners, would stand on a different footing, depending upon whether they would stand in the position of plaintiff or defendant. It is respectfully submitted that such a differential treatment would not be rational or logical."

14. According to us this difficulty is built in Section 4(2) and does not provide the rationale to hold that this Section applies retrospectively. The legislature itself thought it fit to do so and there is no challenge to the vires on the ground of violation of Article 14 of the Constitution. It is not open to us to rewrite the section also. Even otherwise, in the operation of Section 4(1) and (2), no discrimination can be said to have been made amongst different real owners of the property, as tried to be pointed out in the written objections. In fact, those cases in which suits are filed by real owners or defences are allowed prior to

coming into operation of Section 4(2), would form a separate class as compared to those cases where a stage for filing such suits or defences has still not reached by the time Section 4(1) and (2) starts operating. Consequently, latter type of cases would form a distinct category of cases. There is no question of discrimination being meted out while dealing with these two classes of cases differently. A real owner who has already been allowed defence on that ground prior to coming into operation of Section 4(2) cannot be said to have been given a better treatment as compared to the real owner who has still to take up such a defence and in the meantime he is hit by the prohibition of Section 4(2). Equally there cannot be any comparison between a real owner who has filed such suit earlier and one who does not file such suit till Section 4(1) comes into operation. All real owners who stake their claims regarding benami transactions after Section 4(1) and (2) came into operation are given uniform treatment by these provisions, whether they come as plaintiffs or as defendants. Consequently, the grievances raised in this connection can not be sustained."

In view of the law laid down by the Hon"ble Supreme Court, the observations of the learned lower appellate Court, that Benami transactions were not prohibited prior to 1988, and if in the Municipal record name of Sh. Rao Gajraj Singh alone was existing, did not go to prove, that he was owner of the suit property, cannot be approved.

90 It was contended by the learned Senior counsel appearing on behalf of the appellant, that the learned Courts below wrongly read into evidence Ex. D1, though, it was not admissible in evidence for want of registration. The contention of the learned senior counsel for the appellant was, that the document Ex. D1 showed, that by way of this document the property was transferred in the name of Smt. Sumitra Devi, therefore, it required registration. In support of this contention, the learned senior counsel referred to Section 17 of the Registration Act, which reads as under :

"17. Documents of which registration is compulsory. (1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864 of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely :

- (a) instruments of gift of immovable property;
- (b) other nontestamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;
- (c) nontestamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) nontestamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property : Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this subsection any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53 A of the Transfer of Property Act, 1882(4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.

(2) Nothing in clauses (b) and (c) of subsection (1) applies to (i) any composition deed; or

(ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subjectmatter of the suit or proceeding]; or

(vii) any grant of immovable property by the Government; or

- (viii) any instrument of partition made by a Revenue officer; or
 - (ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871 (26 of 1871), or the Land Improvement Loans Act, 1883 (19 of 1883); or
 - (x) any order granting a loan under the Agriculturists Loans Act, 1884 (12 of 1884), or instrument for securing the repayment of a loan made under that Act; or
 - (xa) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property ; or
 - (xi) any endorsement on a mortgaged deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
 - (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer. Explanation. A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.
- (3) Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered."

The contention raised was, that under Ex. D1 a right was declared in present, as also in future, and the value of the property declared was more than Rs. 100/, therefore, Ex. D1 was compulsorily registrable under Section 17(2) of the Registration Act, reproduced above.

91 To support this contention, the reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Kale and Others v. Deputy Director of Consolidation and others AIR 1976 SC 807, wherein the Hon'ble Supreme Court while considering the provisions of the Registration Act vizaviz a family settlement was pleased to lay down as under :

"(4) Registration would be necessary only if the terms of family arrangement are reduced to writing Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of Court for making necessary mutation In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore, does not fall within the mischief of Section 17(2) (sic) (Section 17(1)(b) ? of the Registration Act and is, therefore, not compulsorily registrable."

The contention of the learned Senior counsel for the appellant, therefore, was that, as the document Ex. DI read with Section 17(b) of the Act, even if taken to be family settlement, was compulsorily registrable.

92 Reliance was also placed on the judgment of this Court in the case of Hans Raj and others v. Mukhtiar Singh 1996(3) R.C.R. (Civil) 740, wherein this Court was pleased to lay down as under :

"Applying the above well settled principle of law that if a document does not confirm or accepts preexisting rights, it cannot be said to be a memorandum or settlement which does not require registration. In the present case language of Ex.P.2 does not indicate confirmation of any preexisting rights. In fact it only creates rights in praesenti. This fact is further established from the evidence led by the defendants in the suit that the revenue entries continued to be in the name of the defendants and their predecessor in interest as owners for all this time. If the matter had already been settled there was no question of not acting upon it and why would the dispute arise between the parties. On the one hand plaintiff himself admits that he wanted to challenge the will of 1976 but did not challenge the same for all this period. He chose not to give any dates and any explanation in his evidence as to why he waited for such a long period i.e. from August, 1976 till the institution of the suit in the year 1987. Once it is held that Ex.P.2 is a partition document which has created title and interest of the parties in the property in dispute for the first time, then such writing/settlement would require registration under the provisions of Section 17(2). Nonregistration of this document would be hit by bar of Section 17 and would be inadmissible in evidence. The document which is inadmissible in evidence cannot be relied upon or looked into by the Court. I have no hesitation in holding that Ex.P.2 is an inadmissible document and the finding of the trial court to that extent was correct. The learned counsel for the respondent has relied upon the judgment of his court in the case of Moot Chand v. Udho Ram, 1994(3) Recent Revenue Reports 127 to argue that such a document like Ex.P.2 does not require registration. The facts of that case were entirely different and secondly the court as a matter of fact had found that narration of document clearly shows that there was oral settlement/writing between the parties which was acted upon and the document was only the memorandum to confirm such terms. This judgment is certainly of no help to the respondent in the present case. 9. The oral evidence led on behalf of the appellants read with the revenue record which has the rebuttable presumption in their favour in contrast to the weak evidence led by the plaintiff and specifically the fact that the whole case of the plaintiff was admittedly based on Ex.P.2 which is an inadmissible document. The irresistible conclusion is that the suit of the plaintiff must fail. Document Ex.P.2 being an unregistered document and consequently inadmissible does not create any right in law in favour of the plaintiff. It appears from the record that the plaintiff had never prayed for decree for injunction against the defendants. Consequently the relief which is not prayed in the plaint cannot be decreed by a court. It is settled law that in a suit of the present kind, the court can not grant a relief which is not

specifically prayed for in the plaint and the opposite party has not been given an appropriate opportunity to meet such a claim."

Reliance thereafter was placed on the judgment of this Court in the case of Harpal Singh v. Mohinder Singh 2003(2) R.C.R. (Civil) 756, wherein it was held, that when a document creates right for the first time, then it requires registration, under Section 17 of the Registration Act.

93 The contention of the learned senior counsel for the appellant, therefore, was that document Ex.D1 has been misinterpreted to hold, that it was merely a declaration of ownership of Smt. Sumitra Devi, that she was owner of the half share, whereas other half share was to be transferred to her on the death of Sh. Rao Gajraj Singh.

94 The contention was, that the second part of the document holding, that the property was transferred to Smt. Sumitra Devi under the arrangement, also cannot be sustained for want of registration of the document, as it was attested by one of the witnesses, therefore, could not be said to be a Will.

95 It was also the contention, that the finding of the learned lower appellate Court holding, that Smt. Sumitra Devi being in possession as owner, in pursuance to Ex. D1, by virtue of Section 14 of the Hindu Succession Act, became absolute owner of the suit property is perverse. The contention was, that if provisions of Section 14 of the Hindu Succession Act were to be invoked in that event Ex. D1 could not be read into evidence, thus it was to be held a document conferring title in favour of Smt. Sumitra Devi, which required registration, and in absence thereof, it could not be read in evidence.

96 The learned senior counsel for the appellant challenged the findings of the learned Courts below on issue No. 5, for the reason, that the Will dated 1.6.1989, set up by defendant No. 1 was forged and fabricated Will, which was not validly proved, for the reason, that it was proved on record, that testatrix had died few days after the execution of the Will, who admittedly was staying with defendant No. 1, therefore, she was under the complete control of the appellant.

97 It was also the contention, that it was proved on record, that she was suffering from prolonged illness and had paralytic attack, therefore, she was extremely weak, both physically and mentally. This according to the learned senior counsel, itself was a suspicious circumstance, to reject the Will. In support of this contention, reliance was placed on the judgment of the Hon'ble Orissa High Court in the case of Gopal Charan Mohanty and Another v. Smt Adarmani Mohanty and Others 1988 Civ.CC. 317.

98 It was thereafter contended, that the Will of Smt. Sumitra Devi shows, that no reference was made as to why the other natural heirs were excluded from inheritance. This was a strong suspicious circumstance, which was required to be explained by the propounder of the Will, which defendant No. 1/respondent failed

to do. In support of the contention, that absence of reference, as to why the natural heirs are being excluded from inheritance, is a suspicious circumstance, reliance was placed on the judgment of this Court in the case of Kewal Krishan and others v. Gurdev Chand 1988 Civ.CC. 411.

99 It was further the contention, that this Court, had gone to the extent of holding, that even where widow is staying with collateral of the second husband it would not lead to a conclusion, that the widow could have disinherited the natural heirs, and in case, it is so, it would certainly be mentioned in the Will. The contention, therefore, was that as nonmention about other legal heirs and reason for their exclusion in the Will was a suspicious circumstance, and the learned Courts below, therefore, committed an error in accepting the said Will.

100 It was also the contention, that the finding of the learned Courts below is perverse being outcome of misreading of evidence in upholding the Will, as no evidence was led to prove, that the executant was of the sound disposing mind, whereas it was proved beyond doubt, that the executant was ailing, infirm and had no understanding power at the time of execution of the Will. In support of this contention reliance was placed on the Division Bench Judgment of this Court in the case of Mohinder and Ors. v. Bugli Devi widow of Nagina and Ors. 1992(1) HLR 188.

101 The learned senior counsel appearing on behalf of the appellant thereafter contended, that in this case it was proved, that the testatrix had put her left thumb impression, even though under the normal circumstances right thumb impression should have been put, this was suspicious circumstance, which rendered the Will invalid. In support of this contention, reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Smt. Guro v. Shri Atma Singh and others 1992(1) SLJ 864, wherein thumb impression by literate person was held to be a suspicious circumstance.

102 It was contended, that in order to prove the Will, the propounder was not only to prove its due execution, but also dispel the surrounding suspicious circumstances. The contention was, that the suspicious circumstances pointed out in the Will were not satisfactorily explained, and the finding on issue No. 5 upholding the Will, therefore, was perverse and outcome of misreading of evidence.

103 In support of the finding of the learned lower appellate Court, on issue No. 9, which was challenged by way of the crossobjection No. 9C of 2006 filed by defendant No. 1/respondent, the learned senior counsel placed reliance on the judgment of this Court in the case of Vijay Kumar v. Harish Chand Alias Hari Chand 1991(2) R.R.R. 494 : (19912) The Punjab Law Reporter 78, to contend that according to Schedule II, Article 17 Clause (vi) and Haryana amendment Article 12(vi), in case of a suit for possession by partition a fixed Court fee is required to be affixed and not ad valorem court fee.

104 It was contended, that in view of the judgment of this Court in the case of

Teja Singh and others v. Mst. Bishan Kaur and others, 1961 P.L.R. 875, the Crossobjections are liable to be dismissed for want of ad valorem court fee. In view of the contentions referred to above, the learned senior counsel appearing on behalf of the appellant contended, that the substantial questions of law, raised in this appeal be answered in favour of the plaintiff/appellant and against defendant No. 1/respondent.

105 Mr. Arun Palli, learned senior counsel appearing on behalf of the respondent No. 1, on the other hand, supported the judgment and decree passed by the learned Courts below by contending, that the learned Courts below rightly held, that Ex. DI was a document showing the arrangement between husband and wife, therefore, was not required to be registered.

106 It was also the contention of the learned senior counsel, that reading of Ex. DI, would show, that it was merely a declaration of title of Smt. Sumitra Devi, and was not a document wherein any share was transferred to Smt. Sumitra Devi.

107 The contention of the learned senior counsel was, that the word "declaration" under Section 17 of the Registration Act implies a definition of legal change to the property by an expression embodied in the document, referred to, and does not admit a mere statement of fact.

108 Contention of the learned senior counsel for the respondent No. 1 was, that reading of Ex. DI, would show, that by way of Ex. DI Sh. Rao Gajraj Singh had merely stated a fact that the property, though in the name of Sh. Rao Gajraj Singh, was in fact owned by them jointly, therefore, there was no question of Section 17 of the Registration Act being applicable, as the declaration only amounted to acknowledgment of the fact. In support of this contention, reliance was placed by the learned senior counsel, on the judgment of the Hon'ble Privy Council in the case of (Thakur) Baceshwari Charan Singh v. Thakurain Jagarnath Kauri and another, A.I.R. 1932 Privy Council 55. The operative part of the judgment reads as under :

"Now it is quite clear in comparing these two cases that they took diametrically opposite views as to the proper meaning of the word "declare" in the 17th section, and it is upon that point that the whole question turns. Subsequent decisions have given full effect to the view of West, J., in the Krishnaji's case.

In the case of Jiwan Ali Beg v. Basa Mal the headnote accurately sets forth one of the points in the case :

"An instrument to come within S. 17(b), Registration Act (3 of 1877), must in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property."

Then in the case of Ranganayaki Ammal v. Virupakshee Rao Naidu at p. 102 (of 45 M.L.J.), the learned Judge in the High Court, expressly cites the words of West J., in Krishnaji's case, and in the case of Baldeo Singh v. Udal Singh at p. 4

(of 43 All.) precisely the same thing is done. Their Lordships have no doubt that this track of decision is right. Though the word " "declare" might be given a wider meaning, they are satisfied that the view originally taken by West.J., is right. The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mortgages by deposit of documents of title. A comparison of the case of Mohommed Ismail Ariff v. Dawood, with that of Subramanian v. Lutchman will show that, according to this distinction, a document requires registration or not. In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his. There was therefore no necessity for registration. It is not out of place to remark that this exactly fits in with Expl. 1. If you take the case of an acknowledgment contained in a communication addressed to a third party registration is not practicable; it is scarcely conceivable that it could be required."

109 The learned senior counsel thereafter referred to the judgment of the Hon"ble Supreme Court in the case of Capt. (Now major) Ashok Kshyap v. Mrs. Sudha Vasisht and another AIR 1987 Supreme Court 841, to contend, that in order to attract the provisions of Section 17(I)(b) of the Registration Act, the question to be seen is "Whether the document itself extinguishes or purports to create, declare any right in immovable property.

110 The contention of the learned senior counsel was, that if this principle is applied in the present case, it would clearly show, that no right was being created, as it was merely acknowledgment of the title preexisting in favour of Smt. Sumitra Devi, therefore, the provisions of Section 17(I)(b) of the Registration Act could not be invoked, to hold that the document Ex. DI needed registration, as contended by the learned senior counsel for the appellant.

111 The learned senior counsel also placed reliance on the judgment of the Hon"ble Madras High Court in the case of Ranganayaki Ammal v. Virupakshee Rao Naidu and another A.I.R. 1923 Madras 621, to contend, that a mere statement of fact, as in Ex. DI is admissible in evidence, either as a contract to acknowledge of an existing title or an evidence of an admission. The finding of the Hon"ble Madras High Court, on which reliance was placed, reads as under :

"It is said on the other side that this is not a document which purports to create or modify in any way anybody"s title to immovable property. It is simply a statement of fact, as I said in the course of the argument, that Johnson"s house is Johnson"s house. To my mind this matter cannot be put better than in the words of West, J, in the case of Sakharam Krishnaji v. Madan Krishnaji, where the learned Judge says thus :

"Here, however, the document is not itself one which declares a right in immoveable property, in the sense probably intended by S 17. There "declare" is placed along with "create", "assign", "limit", or "extinguish a right, title or interest" and these words imply a definite change or legal relation to the

property by an expression of will embodied in the document referred to. I think this is equally the case with the word "declared". It implies a declaration of will not a mere statement of fact, and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense; but a letter containing an admission, direct or inferential, that a partition once took place, does not "declare" a right within the meaning of the section. It does in once sense "declare" a right that is the existence of the right is directly or indirectly stated by the writing, but it is not the expression or declaration of will by which the right is constituted."

112 The reliance was also placed by the learned senior counsel on the judgment of the Allahabad High Court in the case of Shyam Sunder and others v. Siya Ram and another AIR 1973 Allahabad 382, to contend, that a document merely recognizing title or defining a share on the basis of such recognition does not create, declare, etc. any right, title or interest in immovable property and requires no registration.

113 The reliance was also placed on the judgment of the Hon"ble Supreme Court in the case of Maturi Pullaiah and another v. Maturi Narasimham and others AIR 1966 Supreme Court 1836, wherein the Hon"ble Supreme Court was pleased to lay down, that where the document does not create any interest in immoveable property, it does not require registration, and furthermore the family arrangement will need registration, only if it creates any interest in immovable property in praesenti, in favour of the parties mentioned therein, but where no such interest is created, the document would be valid despite its nonregistration.

114 The learned senior counsel also placed reliance on the judgment of the Hon"ble Supreme Court in the case of Kale and Others v. Deputy Director of Consolidation and others (supra) to contend, that distinction should be made between the document containing the terms and recitals of a family arrangement made under the document and mere a memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable property, and therefore does not fall within the mischief of Section 17(2) of the Registration Act.

115 The learned senior counsel thereafter placed reliance on the judgment of the Hon"ble Supreme Court in the case of R. Rajagopal Reddy (dead) by L.Rs. and others v. Padmini Chandrasekharan (dead) by L.Rs. (supra) to contend, that the provisions of the Act take care of future benami transactions and protects the transactions, which have already been undertaken. Therefore, the contention of the learned senior counsel for the respondent was, that in the case in hand there was no plea raised of benami title, nor the defendant/respondent No. 1 sought to enforce any right of benami ownership of Smt. Sumitra Devi.

116 The defendant/respondent merely asserted, that under Ex. DI there was

acknowledgment of ownership of Smt. Sumitra Devi by Sh. Rao Gajraj Singh, and it was not a case of benami transaction, so as to hold, that the defendant/respondent No. 1 could not raise this defence. Sum and substance of the argument of learned senior counsel, therefore, was that the learned Courts below rightly interpreted document Ex. D1, to hold, that under the said document, in view of the acknowledgment and declaration by way of family settlement, the whole of the property vested in the surviving spouse which resulted in passing on the title in favour of Smt. Sumitra Devi, and by virtue of Will executed in favour of defendant/respondent No. 1, he became absolute owner.

117 To rebut the contentions, on the validity of the Will, raised by the learned senior counsel for the appellant, Mr. Arun Palli, learned senior counsel appearing on behalf of the respondent No. 1, placed reliance on the judgment of the Hon''ble Delhi High Court in the case of Ramesh Kumar v. Kaushalya Devi 2002(1) R.C.R.(Civil) 480:2002(1) Civil Court Cases 598 (Delhi) to contend, that authenticity of the Will cannot be doubted because the estate is bequeathed contrary to the normal line of succession or inheritance, as this is the very object of the Will.

118 He also by referring to the judgment of the Hon''ble Delhi High Court contended, that an old lady desiring to execute her Will is not expected to go for looking a lawyer of her own, it would be natural for her to depend on a person with whom she is living. The Hon''ble Delhi High Court in the referred case was pleased to hold, that where the testator was an old lady, and required treatment then it was well advised, if the doctor examined her also witnessed the Will, as it gives credit to its execution and cannot be taken as a suspicious circumstance.

119 Mr. Aran Palli, learned senior counsel, thereafter placed reliance on the judgment of the Hon''ble Supreme Court in the case of Sadasivam v. K. Doraisamy 1996(1) R.R.R. 735 : 1996 Supreme Appeals Reporter 408 (SC), wherein the Hon''ble Supreme Court was pleased to lay down, that Will being not registered, is not a suspicious circumstance, and furthermore absence of witness from the locality is also not a suspicious circumstance, for the reason, that the executor of the Will, can call any such person to attest, it in whom he has the confidence. In that case, the delay in disclosure of the Will was also held to be not a suspicious circumstance.

120 The learned senior counsel also placed reliance on the judgment of this Court in the case of Mangatxc Ram & Ors. v. Dina Nath 1997(3) R.C.R.(Civil) 70 :1997(1) Civil Court Cases 570 (P&H), wherein it was held, that a validly executed Will which is proved by proper evi dence before the Court cannot be ignored merely on the ground, that some Class I heirs were excluded.

121 The learned senior counsel thereafter placed reliance on the judgment of the Hon''ble Supreme Court in the case of Ramabai Padmakar Patil (D) through Lrs. and Ors. v. Rukminibai Vishnu Vekhande and Ors. 2003(4) R.C.R.(Civil) 92 : 2003 SAR (Civil) 685, to contend, that if a Will is duly executed, and held to be

genuine, and good reasons exist why other legal heirs were not given anything, Will can not be said to be surrounded by suspicious circumstance.

122 The learned senior counsel thereafter placed reliance on the judgment of this Court in the case of Gurbaksh Singh v. Jagat Singh 1994(1) R.R.R. 672 (P&H), to contend, that finding regarding genuineness of the Will is a finding of fact, which cannot be interfered with in the regular second appeal. The Hon''ble High Court in the case of Gurbaksh Singh v. Jagat Singh (supra) was pleased to lay down as under :

"14. All these circumstances go a long way to establish that the testator had love and affection for his grandsons who were living with him as proved from domicile certificate Ex.D2/I.

15. The reasoning of the trial Court in holding the Will Ex. DI to be a genuine document has been accepted and affirmed by the first Appellate Court. These findings of the Courts below are based on evidence and good reasoning and there is material pointed out by the learned counsel for the appellant which may persuade me to take a view contrary to those adopted by the Courts below. There is even not a whisper from the side of the defendants that the Will was the result of fraud much less executed under the influence exercised by the defendants. It may be mentioned here that although the Will has not been scribed by a regular deed writer and is not a registered document, yet the evidence led by the defendants goes a long way to establish that it was a genuine document and was last Will of the testator. The scribe of the Will namely Dr. Charan Singh DW4 and attesting witnesses Lt. Col. Bikram Singh (Retd.) DW1 and Pargan Singh DW2 were put to lengthy cross examination by the plaintiff but no dent is found to have been created in their testimony, to hold that they are not truthful witnesses or had any motive to depose in favour of other defendants or against the plaintiff.

16.The conclusions arrived at by the Courts below that the Will Ex. DI is genuine and is a true document are findings of fact and cannot be interfered with in this Regular Second Appeal, more so when the learned counsel for the appellant could not point out any infirmity in the approach of the Courts below, who have based their conclusions on evidence on record."

Reliance was also placed on the judgment of Hon''ble Orissa High Court in the case of N.D. Samant v. Kumari Jayashree Roy & Others 1989 Civil Court Cases 277 (Orissa), in support of the finding, that the witnesses deposing after long lapse of time, then overlapping of facts and discrepancies are to be overlooked.

123 Reliance thereafter was placed on the judgment of this Court in the case of Dalip Singh & Others v. Pritam Kaur 1990(1) R.R.R. 276 : 1989 Civil Court Cases 333 (P&H)), to contend, that when a testator is living with nephew and a Will was executed in his favour, it could not lead to a conclusion, that the Will was obtained by undue influence.

124 The support thereafter was also sought from the judgment of this Court in the case of Punjab Kaur v. Mohinder Singh 1999(4) R.C.R.(Civil) 457:1999(3) Civil Court Cases 604 (P&H) to contend, that the Will being registered or unregistered does not make any difference.

125 In support of the contention, that merely because testatrix was staying with defendant No. 1 or that he made arrangement for her to execute the Will, cannot be a suspicious circumstance, reliance was placed on the judgment of this Court in the case of Harnek Singh v. Sukhdev Singh 2001(4) R.C.R.(Civil) 411 : 2002(1) Civil Court Cases 59 (P&H), wherein it was laid down, that absence of proof of beneficiary participating actively to such an extent, that he diverts the mind of the testator in such a manner, that testator is not in a position to form a rational view with regard to the disposition of the property, can not lead to a suspicious circumstance.

126 Reliance was thereafter placed on the judgment of this Court in the case of Bhim Sain v. Kaushalya Devi alias Prem Lata & Ors. 2009(4) R.C.R.(Civil) 48 : 2009(4) Civil Court Cases 460 (P&H) to contend, that widow is competent to bequeath the property, even if bequeathed to her as a limited estate in lieu of maintenance.

127 Reliance was also placed on the judgment of this Court in the case of Smt Bhagya Wati Jain v. General Public 1995(1) R.R.R. 145 : 1994(3) R.R.R. 494 : 1994(2) R.R.R. 276 : 1994 Civil Court Cases 135 (P&H), in support of the contention, that there was no specific form or language required to execute a Will, nor mere nonregistration of the Will is a ground to ignore the Will or to hold it to be not properly executed. In this very judgment, it was also held, that Advocate can be an attesting witness, which is not in itself ground to create doubt or suspicion qua the proper execution. The Division Bench of this Court, in the case also held, that merely because testator is suffering from illness or in a state of agony can not be stretched to hold, that he had no disposing mind at the time of execution of the Will.

128 Reliance was also placed on the judgment of this Court in the case of Yash Pal Singh v. Raj Pal Singh and others 2004(1) RCR(Civil) 255, in support of the contention, that participation by beneficiary at the time of execution, and exclusion of some natural heirs, cannot itself, in absence of any evidence, constitute a suspicious circumstance.

129 Thereafter reliance was placed on the judgments of this Court in the case of Salinder Kaur and others v. Kundan Singh and others 2004(4) RCR(Civil) 483, and Jaswinder Singh and others v. Kartar Singh and others 2004(3) RCR(Civil) 426, to contend, that mere old age or the executant suffering from illness, cannot be a ground to reject the Will, if it is proved, that the Will was duly executed in accordance with law, and it depicted the genuine desire of the testator then the same must be implemented.

130 Finally, reliance was placed on the judgment of the Hon"ble Supreme Court

in the case of Madhukar D. Shende v. Tarabai Aba Shedage 2002(1) R. C.R. (Civil) 724:2002 Supreme Appeals Reporter (Civil) 140, wherein the Hon"ble Supreme Court was pleased to lay down, that merely because executant died on third day of the execution of the Will, and plea, that she was physically and mentally fit to execute the Will, in absence of proof and also for want of certificate of the Doctor, that the executant of the Will was physically and mentally fit to make the Will, or that the Will was surrounded by suspicious circumstance, though the will was duly executed, cannot be a ground to reject the Will.

131 In support of the crossobjection, the learned Senior counsel appearing on behalf of the respondent placed reliance on the judgment of this Court in the case of Bijender Singh v. Chand Singh and others 2009(1) R.C.R. (Civil) 270, wherein this Court was pleased to lay down as under :

"11. It is a case where the plaint has been drafted to look as if the relief is of declaration whereas in fact the relief claimed is for the cancellation of decree and sale deeds. The learned trial court has rightly observed that in the absence of cancellation of decree and the sale deed the relief claimed by the petitioner for possession by way of partition cannot be granted."

In view of the contentions, referred to above, the learned senior counsel appearing on behalf of the respondent No. 1 contended, that the substantial questions of law be answered against the plaintiff/appellant and appeal be dismissed.

132 Before considering the arguments of respective parties, it would be relevant to note, that even if the stand raised by respondent/defendant No. 1 was to be accepted, still the judgment and decree passed by the learned courts below cannot be sustained. Admittedly, document Ex.D. 1 can not be said to be a Will, therefore, the half share of Sh. Rao Gajraj Singh, in any case, was to be inherited by all the legal heirs, therefore, the court could not have dismissed the suit for partition, because in that eventuality defendant No. 1 could only claim half share of his mother and additional 1/9th share, which she would have inherited as legal heir of Sh. Rao Gajraj Singh. However, this situation does not arise for the reasons herein after stated.

133 On consideration of respective contentions of the parties, this Court has come to the conclusion, that the appeal filed by the appellant deserves to be accepted, though the Will executed by Smt.Sumitra Devi deserves to be upheld.

134 One of the reasons, for nonsuiting the plaintiff/appellant was, that the plaintiff had failed to prove, that the property was owned by Sh. Rao Gajraj Singh, as only document in proof of ownership produced was the house tax registers Ex. Pl to P4, which were not the document to prove the title, in view of the law laid down by this Court in the case of Premlata v. Bhupender Singh (supra), and the judgment of the Hon"ble High Court of Madras in the case of Arulmigu Viswesharaswami v. R. V.E. Venkatachata Goumder (supra).

135 This finding of the learned Courts below, on the face of it is perverse. The fact that Sh. Rao Gajraj Singh, father of the parties, was owner of the property, was not in dispute. The defence raised was, that late Sh. Rao Gajraj Singh was not absolute owner in possession of the suit property, as alleged. The contention raised was, that the property in suit was owned and possessed by late Sh. Rao Gajraj Singh to the extent of half share and Smt. Sumitra Devi, the mother of the parties, to the extent of half share. This plea was based on Ex. DI, reproduced above. Therefore, it could not be said, that late Sh. Rao Gajraj Singh had no interest in the property. Even as per the admission, in case it is held, that Ex. DI, did not amount to acknowledgment of ownership to the extent of half share of Smt. Sumitra Devi, then the ownership of late Sh. Rao Gajraj Singh is not even in dispute, therefore, the finding of the learned Courts below nonsuiting the plaintiff/appellant for want of proof of title of late Sh. Rao Gajraj Singh, on the face of it, is perverse, therefore, cannot be sustained.

136 The question to be decided in the case is interpretation of Ex. DI. This Court agrees with the contention raised by the learned senior counsel for the respondent, that Ex. DI was merely a declaration/acknowledgment of ownership of Smt. Sumitra Devi, therefore, did not create any right for the first time to attract the provisions of Section 17(I)(b) of the Registration Act.

137 However, at the same time, it is held, that though the ownership of Smt. Sumitra Devi as equal partner in the property was declared, but this declaration could not be enforced to hold, that as per the document Ex. DI Smt. Sumitra Devi was owner of half of the property, as held by the learned Courts below. The operating part of the document Ex. DI, reads as under :

"I, Rao Gajraj Singh s/o Rao Hira Singh is & has been described as owner of House situated in Gurgaon Town Baraf Khanna Mohalla. The House in fact is property joint of myself & my wife Sumitra Devi as equal partners."

The declaration by late Sh. Rao Gajraj Singh, in the document Ex. DI, therefore, was an acknowledgment of title in the property of Smt. Sumitra Devi, which was recorded in his name to the extent of half share as Benami, and other half as absolute owner. This right of ownership could only be enforced on the basis of declaration/acknowledgment before coming into force of the Act, but not thereafter. In view of the judgment of the Hon'ble Supreme Court in the case of R. Rajagopal Reddy (dead) by L.Rs. and others v. Padmini Chandrasekharan (dead) by L.Rs. (supra) this plea was not available to defendant No. 1, to claim, that half of the property vested in Smt. Sumitra Devi during the life time of Sh. Rao Gajraj Singh, being hit by the provisions of Section 4 of the Act.

138 The learned Courts below were not right in coming to the conclusion, that under the document Smt. Sumitra Devi was declared to be owner of the half share during the life of Sh. Rao Gajraj Singh. It is held, that on the date of filing of the suit late Sh. Rao Gajraj Singh was to be held as owner of the property, and the declaration/acknowledgment made could not be enforced merely because

Smt. Sumitra Devi, continued to be in possession of the property or had constructed certain shops or had filed petitions of eviction against the tenants. The possession of Smt. Sumitra Devi after the death of Sh. Rao Gajraj Singh, would be on behalf of the legal heirs, and not as an exclusive owner of the property.

139 The second part of the document Ex. D1, also could not be held to be transfer of right of ownership on death, as document cannot be treated to be Will, as it was signed by only one of the witnesses and not two witnesses. This document also cannot be treated to be a document transferring title in favour of Smt. Sumitra Devi to give her absolute right of transfer by invoking the provisions of Section 14 of the Hindu Succession Act, as in case under the document any right was transferred, then the second part of the document, would be the document creating right, which would need registration. Therefore, on true interpretation of the document, as referred to above, when read with the authoritative pronouncement of the Hon"ble Supreme Court in the case of R. Rajagopal Reddy (dead) by L.Rs. and others v. Padmini Chandrasekharan (dead) by L.Rs. (supra), it is to be held, that vide document Ex. D1, no title was passed on Smt. Sumitra Devi, and the property, on the death of Sh. Rao Gajraj Singh, was to be inherited by all the legal heirs in equal share i.e. 1/9th share each.

140 However, the finding, of the learned Courts below, that the document Ex. D1 was not required to be registered cannot be faulted with, as the learned senior counsel appearing on behalf of the respondent was right in contending, that no right was created for the first time merely by declaration/acknowledgment, of the share. As already observed above, this declaration/acknowledgment of benami title could not be enforced after coming into force of the Act.

141 The person recorded as owner, as admitted by the parties, was to be treated as absolute owner of the property. The fact, that the claim of Smt. Sumitra Devi was benami, stood fortified from the fact, that the evidence led showed, that father of Smt. Sumitra Devi had contributed towards the purchase of the house as held by the learned lower appellate Court..

142 The substantial questions of law No. 1 & 2 raised, therefore, are answered in favour of the plaintiff/appellant, and it is held, that the judgment and decree passed by the learned Courts below is outcome of misinterpretation of document Ex. D1.

143 The findings recorded by the learned Courts below on issues No. 1,2,3 & 4A, being outcome of misinterpretation of document, deserve to be reversed and decided in favour of the plaintiff/appellant.

"Ordered accordingly."

144 However, the third substantial question of law, deserves to be decided against the appellant, as the learned Courts below on appreciation of evidence have rightly come to the conclusion, that Smt. Sumitra Devi executed a valid Will

bequeathing the property in favour of defendant No. 1, however, she could not bequeath more than what she inherited, therefore, under the Will it is only 1/9th share in the property, which stood transferred in favour of defendant No. 1, therefore, respondent No. 1 would be entitled to the share of Smt. Sumitra Devi also in the property left by late Sh. Rao Gajraj Singh.

145 The suspicious circumstances pointed out by the learned counsel for the appellant, by placing reliance on the judgment of the Hon'ble Orissa High Court in the case of Gopal Charan Mohanty and Another v. Smt Adarmani Mohanty and Others (supra), judgments of this Court in the case of Kewal Krishan and others v. Gurdev Chand (supra) and Jaswinder Singh and others v. Kartar Singh and others (supra), Division Bench judgment of this Court in the case of Mohinder and Ors. v. Bugli Devi widow of Nagina and Ors. (supra), judgment of the Hon'ble Supreme Court in the case of Smt Guro v. Shri Atma Singh and others (supra), and Gurdial kaur and others v. kartar Kaur and others 1998(2) R. C.R. (Civil) 390:1998(1) PLJ 685, cannot be used to the advantage of the plaintiff/appellant.

146 Though, in a given case, the suspicious circumstances pointed out by the plaintiff/appellant, can be treated to be suspicious circumstances, but in the facts and circumstances of the case, it is cumulative effect, which is required to be seen. An isolated suspicious circumstance cannot be a ground to reject the Will, specially when both the learned Courts below by concurrent finding of fact have upheld the Will.

147 In view of the judgments, on which reliance was placed by the learned Senior counsel appearing on behalf of the respondent No. 1, when read with the judgments relied upon by the learned senior counsel appearing on behalf of the appellant, the only conclusion which can be arrived at is the one arrived at by this Court in the case of Jaswinder Singh and others v. Kartar Singh and others (supra), that is to say, that when due execution of the Will is proved, and the suspicious circumstances are explained by the propounder of the Will, the Will deserves to be accepted.

148 It may be noticed, that in the case in hand, the Will was duly proved by the attesting witness, and all the suspicious circumstances were duly explained, as to how the Will was executed on the instructions of the testatrix. The suspicious circumstance, that why LTI was used instead of RTI, was also duly explained, for the reason, that in Bihar even the ladies use LTI and furthermore the testatrix was suffering from paralytic attack on the right side, therefore, putting of right thumb impression, could , not be said to be a suspicious circumstance.

149 Similarly, minor contradictions, in the statements of the witnesses examined after lapse of so many years, could not be a ground to hold, that the Will was surrounded by suspicious circumstances, nor nonmentioning of other legal heirs, and the reason for disinheritance could be a ground to hold the Will to be surrounded by suspicious circumstances, in the facts and circumstances of the

present case, when it was proved beyond doubt, and was even admitted by the plaintiff, that it was defendant No. 1 and his wife, who were looking after her when she was in need of medical aid and even otherwise, they were the one, who were looking after her in the old age.

150 The allegation, that the Will was executed at the instance of defendant/respondent No. 1 was not proved, as admittedly he had not participated in drafting of the Will, and merely because the testatrix was living with him, could not be a ground to hold, that the Will was surrounded by suspicious circumstances. The finding, therefore, on issue No. 5 cannot be said to be perverse or capable of being not arrived at on appreciation of evidence. The finding recorded by the learned Courts below holding the Will to be validly executed, is a finding of fact, which cannot be reopened in the regular second appeal. Consequently, finding on issue No. 5 is affirmed.

151 The Crossobjections filed by defendant/respondent No. 1, on the question of court fee, also deserves to be rejected. It cannot be disputed, that it is the real intention, which is to be seen for determining the court fee payable, but at the same time in view of the law laid down by this Court in the case of Vijay Kumar v. Harish Chand Alias Hari Chand(supra), it has to be held, that in a suit for possession by partition a fixed court fee was required to be paid. Furthermore, the learned lower appellate Court rightly held, that the possession of one of the cosharers was on behalf of the others. Even otherwise, the question of court fee is a matter between Court and the litigant, and the defendant/respondent can not be said to have any grievance, specially, when even in the crossobjections, the ad valorem court fee has not been affixed. The finding of the learned lower appellate Court on issue No. 9 is affirmed, as I find no force in the crossobjections.

152 Finding on issue No. 3 is also reversed, and it is held that the plaintiffs are entitled to partition of the suit property by metes and bounds, whereas on issue No. 4, it is held, that document Ex. DI was executed by Sh. Rao Gajraj Singh in favour of late Smt. Sumitra Devi, but the title acknowledged, in favour of Smt. Sumitra Devi, could not be enforced by the defendant/respondent No. 1 after coming into force of the Act. In view of the findings, referred to above, the findings of the learned Courts below on issues No. 6 & II are also reversed, and decided against the defendants, whereas finding on issues No. 7,8,10 & 12 by the learned Courts below is affirmed, while CrossObjection No. 9 C of 2006 are dismissed, and the suit filed by the plaintiff/appellant is ordered to be partly decreed by setting aside the judgment and decree passed by the learned Courts below. The legal heirs of Sh. Rao Gajraj Singh are held to be entitled to 1/9th share each. However, defendant No. 1 would be entitled to 1/9th share of Smt. Sumitra Devi, in addition to his 1/9th share in the Will. A preliminary decree for partition be accordingly drawn. Appeal partly allowed and CrossObjection No. 9C of 2006 are dismissed. No costs.