(2023) 08 CAL CK 0023

In the Calcutta High Court

Case No : FA No. 109 Of 2003, IA NO: CAN 4 Of 2023

Dilip Kumar Sarkar APPELLANT

Vs

Kalpana Neogi (Since Deceased) Represented By Pradeep Neogi @ Khokan Neogi & Ors. RESPONDENT

Date of Decision : 07-08-2023

Acts Referred:

- Code Of Civil Procedure, 1908 — Order 41 Rule 33
- Evidence Act, 1872 — Section 77, 78, 78(6)
- Benamidar Transactions (Prohibition) Act, 1988 — Section 4
- Registration Act, 1908 — Section 33

Citation : (2023) 08 CAL CK 0023

Hon'ble Judges : Rajasekhar Mantha, J;Supratim Bhattacharya, J

Bench : Division Bench

Advocate : D. P. Adhikari, Goutam Thakur

Final Decision : Allowed

Judgement

1. The instant appeal arises out of a judgment and decree dated 22nd September 1993, passed by the Learned Assistant District Judge, Uttar Dinajpur at Raiganj in TS no. 5 of 1990.

2. The suit was filed by Kalpana Neogi, predecessor of the respondents, and her siblings, for declaration of title and recovery of khas possession of RS Plot No. 1044 correspondent to C.S. Plot 830 of RS Khatian No. 699 corresponding to C.S. Khatian No. 699 of J.L. No. 150 of Mouza Raiganj, District Uttar Dinajpur, West Bengal (suit property).

3. By the impugned decree such declaration and Khas possession of the property was granted in favour of the original plaintiffs Kalpana Neogi, Bharati Lala, Minati Das, Sunity Hore, Jayanti Hore, Tapati Bhowmick, Subhash Ch. Hore, and Sanjit Kr. Hore.

4. The brief facts of the case are that one Shobharani Hore, through her

husband, Ramesh Chandra Hore of Halpara, Thakurgaon District, East Pakistan, now Bangladesh, purchased the suit property by registered deed of conveyance dated 16.06.1960 from one Pora Mohammad.

5. Shobharani Hore was a citizen of East Pakistan and subsequently, after 1971, became a citizen of Bangladesh. She remained as such until her death on 27.5.1972. It was stated by plaintiff no. 1, daughter of Sobharani Hore that her mother purchased the property with the intention of settling in India.

6. At the time of death, Sobharani left behind six daughters, i.e plaintiff no. 1 to 6, and two sons, the plaintiff no. 7 and 8, and her husband/Defendent no. 2, namely Ramesh Chandra Hore, as her legal heirs.

7. The appellant/original Defendent no. 1, namely, Dilip Kumar Sarkar is the brother of Sobharani Hore. Sobharani and her maternal family owned several properties in Tangail in Mymensingh District of Bangladesh which was then East Pakistan. Defendant no. 1 was about 3 years old when the suit property was purchased. Substantial properties of Sobharani's maternal family, at Tangail in Mymensingh District in Bangladesh, devolved upon the Defendant no. 1 and he admittedly had shares in them. Tangail is presently an independent district carved from the Mymensingh district, in Bangladesh.

8. Shobharani came to India from time to time and finally returned to Bangladesh in 1971 after the country was liberated from West Pakistan. She had not renounced East Pakistani or Bangladeshi citizenship ever. Before leaving India she had entrusted the title deed of the suit property to Defendant no. 1.

9. The Plaintiff no. 1/Kalpana Neogi, daughter of Sobharani Hore, stated that one Naresh Datta, a neighbour to the suit property, was entrusted with the responsibility of looking after the property. She is the only resident and citizen of India from the family of Shobharani Hore, apart from the Defendant no. 1. Kalpana has resided in Jalpaiguri, District in West Bengal since after her marriage. The suit property is at a distance of about 400 kms from Jalpaiguri.

10. There is a boundary wall constructed in the suit property in 1988. There is a dispute between the plaintiff no. 1 and the defendant no. 1 as to who exactly constructed it. The defendant no. 1/appellant stated that he constructed it out of his own funds, while the original plaintiff no. 1 claims that she paid a sum of Rs. 2500/- for the construction of the boundary wall. In January 1989, the Defendent no. 1 constructed a Chapra or Tin shed on the suit land.

11. Admittedly, the Defendant no. 1 is the maternal uncle of the original plaintiff no. 1 i.e. Kalpana Neogi. The Defendant no. 1 filed a written statement in the suit, inter alia, contending that the suit property was purchased out of the funds from the sale of the properties in Tangail Bangladesh, for his benefit, by his brother-in-law, Ramesh Chandra Hore, husband of Shobharani Hore. The latter was a mere benamidar of the suit property.

12. The purchase of the suit property was actually funded by Shobharani's

husband Ramesh Chandra Hore, brother-in-law of the defendant no. 1, with the funds from the sale of the Tangail properties in Bangladesh, of the Defendant no. 1, and hence the suit property was for the benefit of the defendant no. 1. Shobharani Hore did not have any income of her own and no real interest in the suit property.

13. With the view to confirm the aforesaid, Ramesh Chandra Hore executed a deed of relinquishment on 22nd August, 1978 of the suit property in favour of the defendant no. 1. The said deed of relinquishment was registered with the Additional District Registrar of Assurances (ADSR) at Raiganj in Uttar Dijanpur District, West Bengal.

14. The Defendant no. 1 also averred in the written statement that he had been in continuous possession of the suit property since 1960, for over 40 years. He has also claimed a title by adverse possession of the property against Sova Rani Hore and any of her legal heirs.

ISSUES FRAMED IN THE COURT BELOW

1) Is the suit maintainable in its present form?

2) Is the suit barred by the law of limitation, waiver and acquiescence?

3) Is the suit properly valued and stamped?

4) Has the plaintiff No. 1 any locus standi to file the instant suit for and on behalf of the other plaintiffs?

5) Can the general Power of Attorney dt. 21.5.90 as alleged to have been executed by plaintiff No. 2 to 8 in favour of the plaintiff No. 1 be recognised as valid document empowering the plaintiff No. 1 to institute the instant suit?

6) Is the sale deed dated 16.6.60 executed by Pora Md. In favour of Shova rani Hore w/o. Ramesh Ch. Hore, in respect of the suit land a deed of benami transaction?

7) Is the suit property a Benami property?

8) Has the deed of relinquishment dt. 22.8.78 in respect of the suit land as alleged to have been executed by Ramesh Ch. Hore defendant No. 2 in favour of Shri Dilip Kr. Sarkar, conferred any right, title and interest to the defendant No. 1 in respect of the suit land?

9) Is the suit bad for defect of parties?

10) Can all the plaintiffs claim to have acquired right, title and interest over the suit land by inheritance after death of Shova Rani Hore?

11) Has the title of the Plaintiffs been ceased to exist on the suit land for their continuous absence of physical possession on the suit land for a period of more than 12 years.

12) Has the defendant No. 1 acquired any right, title and interest over the suit land by adverse possession?

13) Are the plaintiffs entitled to get a decree as prayed for?

14) To what other relief or reliefs are the plaintiffs entitled to?”

THE EVIDENCE IN THE COURT BELOW

15. On behalf of the plaintiff three witnesses are examined, Kalpana Neogi (PW1), her husband Harendra Kumar Neogi (PW2), neighbour to the suit property Naresh Dutta (PW3).

16. The Defendant no. 1 examined seven witnesses i.e Jitendra Nath Bose (DW1), an attesting witness to the deed of relinquishment; Indu Bhusan Das (DW2) scribe of the deed of relinquishment; Tapash Das (DW3) son of Abha Rani Das (sister of Sobharani Rani Hore); Satya Ranjan Das (DW4) another attesting witness, Dilip Kumar Sarkar (DW5) the defendant no. 1; Basudeb Datta (DW6) an employee of the ADSR, Raiganj; Mani Mandal (DW7) who sold a katha of land, adjacent to suit land, in November, 1988.

17. The defendants exhibited a citizenship certificate issued by the S.D.O., Raiganj, in favour of Jitendra Nath Bose; a registered deed of relinquishment dated 22.08.78; a postcard dated 10.10.81 written by Ramesh Ch. Hore to Dilip Kumar Sarkar expressing love and affection; a letter dated 06.08.80; tax paid receipts to the State by Dilip Kumar Sarkar as owner and occupier of the suit property etc.

THIS COURT’S ANALYSIS

18. The Court below failed to consider that the original plaint was filed and signed and verified only by the plaintiff no. 1. There is no signature or authority from the plaintiff no. 2 to 7 given to the plaintiff no. 1 to institute the suit. It is only later in the suit that a purported Power of Attorney executed in favour of the plaintiff no. 1, by the plaintiff nos. 2 to 7, was produced. The said Power of Attorney was stamped in India but executed in Bangladesh. It was not attested before the Indian High Commission in Bangladesh. The suit should not and could not have been entertained on behalf of the plaintiff Nos. 2-7.

19. Reference was made by the Counsel of the appellant to the case of Mussammat Khatoon Begum (since deceased) Muhammad Naseem Lodhi & Ors. v Raja Mohammad Amin and Ors. being FA 261 of 2010 judgment dated 16th December, 2022, where a coordinate Bench of this Court held as follows:-

“Section 77 deals with proof of documents by production of certified copies. The appellants/ defendants first has to prove the Exbt. B is a public document and entries therein are made by a public servant at Pakistan in discharge of his official duty. The document sought to be relied upon is a document purported to have been issued by a competent authority from Pakistan. It is in the category of “other official documents” within the mean of Section 78 of the Inddian Evidence

Act. Since it is a foreign document it has to be proved in accordance with Section 78(6) of the Indian Evidence At, 1872. The said Section reads:

“78(6). Public documents of any other class in a foreign court:_

By the original, or by a copy certified by the legal ekeper thereof, with a certificate under the seal of a Notary Public, or of (an Indian Consul) diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the country.”

The proof required under this clause is for the purpose of the Court being in a position to decide whether a document is a document which falls within the definition “public document” in Section 74 because, unless the character of the document is that it is an act of a public office, legislative, judicial or executive, it would not be public document. (See.East India Trading Co. V. Badat and Co., AIR 1959 Com 414: 61 BOm LR 333: ILR (1959) Bom 1004)

In the context of admissibility of birth record from Pakistan the Punjab High Court in Union of India v. Amrik Singh, AIR 1963 Pinj 104: ILR (1962) 2 Punj 597 has held that a copy of the birth entry from the birth record of the Town Committee of a town in Pakistan is not admissible in the absence of attestation by the High Commissioner for India in Pakistan under this Clause.

Sub-section (6) makes it clear that apart from the two certificates one by the legal keeper of the original documents, and the other by the Counsel General there shall also be proof of the character of the document according to the law of the foreign country before the document is admitted. It is a condition precedent, per Subho Rao J, in Badat and Co. v East India Trading Co., AIR 1964 SC 538)

The document namely Exbt. B produced does not fulfil any of the aforesaid requirements and accordingly could not have been marked at all, or taken on record. Only upon fulfilment of the conditions clearly mandated in the said Section the aid document could bemarked as an Exhibit.”

20. It is now well-settled that when a title deed to a property is proved through the attesting witnesses and has been registered in accordance with the Indian law the document is admissible in evidence. A registered document speaks for itself. The contents of the document ought to have been accepted by the Trial Court unless such contents are disproved. Reference in this regard is made to the decision of Prem Singh v. Birbal reported in (2006) 5 SCC 353, at paragraph 27:-

“27. There is a presumption that a registered document is validly executed. A registered document, therefore, prima facie would be valid in law. The onus of proof, thus, would be on a person who leads evidence to rebut the presumption. In the instant case, Respondent 1 has not been able to rebut the said presumption.”

21. At paragraph 27 of Ishwar Dass Jain v. Sohan lal reported in (2000) 1 SCC

434, it was held:-

“27. We shall next refer to the vital evidence or facts relating to the mortgage which have not been considered by the courts below. The defendant admitted in his evidence as DW 2 that the mortgage deed was executed by him. The endorsement of the Sub-Registrar shows that the amount of Rs 1000 was paid as mortgage money. There is a presumption of the correctness of the endorsement made by the Sub-Registrar under Section 58 of the Registration Act (vide Baij Nath Singh v. Jamal Bros. & Co. Ltd. [AIR 1924 PC 48 : 51 IA 18]); it can be rebutted only by strong evidence to the contrary.”

22. The Court below therefore committed serious error in not accepting the registered deed of relinquishment dated 22nd August 1978 and its contents. The contents of the document have not been disproved by the plaintiff.

23. It further appears that the deed of relinquishment dated 22nd August 1978 has been proved by the attesting witness, the scribe, and the employee of the ADSR, Raiganj. It is clearly mentioned in the deed of relinquishment that Ramesh Chandra Hore funded the entire purchase of the suit property from the sale of the properties of the Defendant no. 1 situated in Bangladesh. This clearly indicates that the funds for purchasing the suit property belong to the defendant no. 1 the defendant no. 1 has been enjoying and in possession of the property since it was purchased. the original sale deed of the suit property from 1960, in favour of Sova Rani Hore also indicates that the money was paid by Ramesh Chandra Hore. The relevant text of the deed of relinquishment is set out hereinbelow:-

“Executed by Sri Ramesh Chandra Hore son of late Tarak Chandra Hore. by faith Hindu occupation householder r/o Bimnagar, Raiganj. PS Raiganj, district Paschim Dinajpur.

This no claim deed is executed to the effect following. You are my brother in law and my wife was your own sister. While you were a minor I used to look after your property and your land described in the schedule below was purchased by me while you were a minor, by a registered sale deed no. 8299 dated 16.6 60 of Raiganj subregistry office, in the benami of my wife Smt. Shobharani Hore. But in actual fact the money was paid through me to the vendor and the money was not from my or my wife's fund. The said amount was your own money. Accordingly, neither I nor my wife ever were in enjoyment and possession of the said land. You are in enjoyment and possession ever since the purchase of the land and you have been bearing the revenue etc of the said land as assessed and the original title deed is in your possession as well. As thd sale deed us in my wife's name and as it is mentioned in the deed that the amount of consideration has been paid through me, therefore apprehending that there may be trouble in future in that regard, I am executing this no claim deed on this date and promise and declare that the land had been purchased out of your own money and in your interest. Abd it is you who has been in enjoyment and possession right from the beginning. We have never been in enjoyment and possession of the same. No claim by me or my heirs shall be admissible in the said land and we will not do so. If we do then it shall be inadmissible in every court. You shall get your name recorded in respect of the said land by virtue of this no claim deed and shall continue in enjoyment and possession with the right of all transfer and transformation down to your sons, grandsons, heirs in great happiness To this import out of my own accord, in sound health without anyone's request I do execute this no claim deed for property valued at Rs. 3000.00 three thousand rupees. FINIS 5th fifth Bhadra 1385 thirteen hundred and eighty five corresponding to 22.8.78.

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Sd/- Sri Ramesh Chandra Hore

Schedule of Property

In district Paschim Dinajpur, Collectorate touji no. 2, mahal no. 150, mpuja Raiganj under the landlord the government of West Bengal through the Collector of Paschim Dinajpur, in khatian no. 699, with annual jama of 1-4-10 pies, out of 10 decimals of land with korfa right applicable under section 48 C1(2)1, 09 decimals with annual proportionate jama of 1-2-9 pies is contained in this deed.

Khatian no. 699 six hundred and ninety nine.

Dag no. 830 eight hundred and thirty, bhita residential .09 nine decimals of land only.

24. PW 1/ Kalpana Neogi, in her evidence, has contradicted herself. On the one hand, she said that she is not aware of any of the properties the defendant no. 1/ appellant had in Bangladesh. On the other hand, during cross-examination, she accepted that the defendant has properties in Mymensigh District of Bangladesh.

25. The contents and statements made in the deed of relinquishment could not be disproved or shaken by PW 1. She has not been able to demonstrate any documents or proof or evidence suggesting that the Defendant no. 1/appellant was not in continuous possession of the property from the date of purchase i.e. in 1960. It had only come in evidence that plaintiff no. 1 visited the property a few times from as had the recorded owner i.e. Shobharani Hore.

26. The plaintiff nos. 2 to 7 are admittedly foreign nationals. The purported power of attorney, not having been affirmed before the Indian High Commission at Bangladesh, does not have any validity in the eye of law in India. They have not deposed in the suit. The suit ought to have been dismiised against them.

27. It further appears that the Court below wholly failed to appreciate that the Hindu Marriage Act, 1955 and Hindu Succession Act, 1956 would have no manner of application to the legal heirs of Sobharani Hore as they are all foreign nationals.

28. The appellants argued that, since Sobharani was a foreign national albeit a Hindu, it is the uncodified Hindu law that ought to have been applied to determine whether Sobharani had any income of her own for being able to purchase the suit property. Reliance in this regard has been placed on Clauses 124, 125, 126, and 154 of Mulla on Hindu law to demonstrate Hindu law and practice before the year 1955:-

"124. Peculiar features of stridhann-A Hindu female may acquire property from various sources. She may acquire it by gift, or by inheritance, or on partition. She may also acquire it by her own labour and skill. But all property acquired by her is not stridhana. Whether a particular kind of property is stridhana or not, depends on -

(1) the source from which the property was acquired.

(2) her status at the time of acquisition, that is whether she acquired it during maidenhood, coverture, or widowhood; and lastly,

(3) the school to which she belongs.

What is stridhana, and what is not, according to the different schools, we have already stated in section 123 and the earlier sections. We shall elucidate this subject still further by treating it from a practical point of view, that is, by enumerating all possible descriptions of property that may be lawfully acquired by a Hindu female, and dealing with each one of these descriptions separately in separate sections, and stating which of them are stridhana and which are not according to the different schools [§§ 125 to 135]. In the meantime it may be asked, what is the practical importance of the distinction between property which is stridhana and property which is not stridhana? The answer is that the distinction is important in two ways: first, as regards succession and, secondly, as regards the power of alienation.

Stridhana of every description belonging to a woman passes on her death to her heirs [§§ 145-157]. It is not so with regard to women's property which is not stridhana.

Stridhana belonging to a woman is property of which she is the absolute owner, and which she may dispose of at her pleasure, if not in all cases during coverture, in all cases during widowhood [§§ 141 to 144]. But a woman is not the absolute owner of property which is not her stridhana, nor can she dispose of it at her pleasure even during widowhood. She is merely a qualified owner of such property; in other words she takes only a limited interest in the property, the nature and extent of which depend on the character of the property.

125. Sources of woman's property.-A Hindu female may acquire property from diverse source. Several descriptions of property that may be lawfully acquired by a Hindu female are:

(1) Gifts and bequests from relations [§ 126].

(2) Gifts and bequests from strangers [s 127].

(3) Property obtained on partition [§ 128].

(4) Property given in lieu of maintenance [§ 129].

(5) Property acquired by inheritance [§ 130].

(6) Property acquired by mechanical arts [§ 131].

(7) Property obtained by compromise [§ 132].

(8) Property acquired by adverse possession [§ 133].

(9) Property purchased with stridhana or with savings of income of stridhana.

(10) Property acquired from sources other than those mentioned above.

Bequest stand on the same footing as gifts (w)

126. Gifts and bequests from relations.-Property given or be-queathed

(x) to a Hindu female, whether during maidenhood, coverture, or widowhood, by her parents and their relations, or by her husband and his relations (y), is stridhana according to all the schools, except that the Dayabhaga does not recognize immoveable property given or bequeathed by a husband to his wife as stridhana (2) [§ 120].

Gifts from relations-Gifts from relations constitute "technical" stridhana [§ 113]. These gifts bear various names according to the occasion on which theyare made. Those names are-

(1) adhyagni, that is, gifts made before the nuptial fire;

(2) adhyavahanika, that is, gifts made at the bridal procession;

(3) padavandanika, that is, a gift made to a woman when she at the feet of elders;

(4) anwadheyaka, that is, gift made after marriage;

(5) adhivedanika, that is, gifts made on supersession; makes obeisance

(6) sulka, that is, gratuity or marriage-fee;

(7) pritidatta, that is, gifts of affection made by the father-in-law or in-law;

(8) bhartridatta, that is, gifts from the husband.

The above terms are explained in § 113.

See § 401, "Gifts and bequests to widows, daughters, and other females."

154. Classification of stridhana.-Stridhana according to Dayabhaga school ($ 120) may be divided, for the purpose of succession, into four classes:

(1) shulka, ie, a present to induce the bride to go to her husband's house. Shulka devolves in the order mentioned in § 146, sub§ (2);

(2) yautaka, ie, gifts made at the time of marriage. This term has been interpreted by the High Court of Calcutta as including not only gifts made be- fore the nuptial fire (§ 113, sub-§ (1)), but gifts made during the continu- ance of the marriage ceremonies, ie, the ceremonies beginning with shraddha and ending with that of prostrating before the husband. It is conceived that it includes gifts from strangers made before the nuptial fire and at the bridal procession;

(3) gifts and bequests from the father made after marriage. (Gifts made by relations after marriage is called anwadheyaka. The present class relates to anwadheyaka from father);

(4) ayautaka, ie, gifts and bequests from relations made before or after marriage. This class includes gifts and bequests from the father made before marriage, but not those made after marriage. The later come under the third class. Gifts from the father at the time of marriage fall within the second class."

29. It is therefore clear and apparent from the principles applicable to the Dayabhaga school of Hindu Law, that the female married Hindu can have no other source of income than those enumerated herein above. The evidence of PW 1/ daughter of Sobharani Hore is in contradiction of the applicable Hindu Law. PW 1 was born in the year 1960 when the suit property was purchased. She therefore could not have any personal knowledge of the source of income of her mother. There is a contradiction in her evidence of the properties of her maternal uncle in Tangail, Bangladesh. The contents of the deed of relinquishment, where her father Ramesh Chandra Hore has stated that the suit property was purchased out of the funds of defendant No. 1 out of his properties in Bangladesh, paid through the father of PW 1 must therefore be accepted. It must also be accepted that the Sobharanu was the Benamidar of the property. The property was purchased for the Benefit of and intrust for the Defendant no. 1.

30. Since both Sobharani and her husband Ramesh were foreign nationals, the Benamidar Transactions (Prohibition) Act 1988 may not apply to them. However, even if the said Act of 1988 was to apply, since the property is in India, the exceptions to section 4 of the said Act of 1988 under subsection (3) (before the Amendment in 2016) would clearly come to the aid of the Defendant no. 1. The custody of the title deed to the property were with Defendant no. 1. He was paying tax in in respect of the property. He was in possession of the property.

31. Sobharani and Ramesh are deemed trustees of the suit property for the beneficiary Defendant no. 1. The contents of the deed of relinquishment confirms the same.Reliance in this regard has been placed on paragraphs 6 and 7 of Jaydayal Poddar (Dead) through LRs v. Mst BiBi Hazra and Ors. reported in (1974) 1 SCC 3:-

“6. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, it any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1 viz. the source, whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.”

24. Reference also made para 17 and 18 of the decision of the Supreme Court in case of Thakur Bhim Singh (Dead) by LRs & Anr. vs. Thakur Kan Singh, reported in (1980) 3 SCC 72.

“17. The principle enunciated by Lord Macmillan in the case of Manmohan Das [AIR 1931 PC 175 : 134 IC 669 : 1931 ALJ 550] has been followed by this Court in Jaydayal Poddar v. Bibi Hazra (Mst) [(1974) 1 SCC 3 : (1974) 2 SCR 90] where Sarkaria, J., observed thus: (SCC p. 6, para 6)

“It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances:(1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship if any, between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale."

18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) the burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) it is proved that the purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be decided on the basis of the surrounding circumstances, the relationship of the parties, the motives governing their action in bringing about the transaction and their subsequent conduct, etc."

25. On the principle of the adverse possession counsel for the appellant relied upon the decision of Supreme Court in case of Ravinder Kaur Grewal and Ors. vs. Manjeet Kaur and Ors. reported in (2019) 8 SCC 729, atparagraphs 60, 61, and 62, where it was held as follows:-

"60. The adverse possession requires all the three classic requirements to co-exist at the same time, namely, nec vi i.e. adequate in continuity, nec clam i.e. adequate in publicity and nec precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that but for due diligence he would have known it. Adverse possession cannot be decreed on a title which is not pleaded. Animus possidendi under hostile colour of title is required. Trespasser's long possession is not synonymous with adverse possession. Trespasser's possession is construed to be on behalf of the owner, the casual user does not constitute adverse possession. The owner can take possession from a trespasser at any point in time. Possessor looks after the property, protects it and in case of agricultural property by and large the concept is that actual tiller should own the land who works by dint of his hard labour and makes the land cultivable. The legislature in various States confers rights based on possession.

61. Adverse possession is heritable and there can be tacking of adverse possession by two or more persons as the right is transmissible one. In our opinion, it confers a perfected right which cannot be defeated on re-entry except as provided in Article 65 itself. Tacking is based on the fulfilment of certain conditions, tacking may be by possession by the purchaser, legatee or assignee, etc. so as to constitute continuity of possession, that person must be claiming through whom it is sought to be tacked, and would depend on the identity of the same property under the same right. Two distinct trespassers cannot tack their possession to constitute conferral of right by adverse possession for the prescribed period.

62. We hold that a person in possession cannot be ousted by another person except by due procedure of law and once 12 years' period of adverse possession is over, even owner's right to eject him is lost and the possessory owner acquires right, title and interest possessed by the outgoing person/owner as the case may be against whom he has prescribed. In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. In case of dispossession by another person by taking law in his hand a possessory suit can be maintained under Article 64, even before the ripening of title by way of adverse possession. By perfection of title on extinguishment of the owner's title, a person cannot be remediless. In case he has been dispossessed by the owner after having lost the right by adverse possession, he can be evicted by the plaintiff by taking the plea of adverse possession. Similarly, any other person who might have dispossessed the plaintiff having perfected title by way of adverse possession can also be evicted until and unless such other person has perfected title against such a plaintiff by adverse possession. Similarly, under other articles also in case of infringement of any of his rights, a plaintiff who has perfected the title by adverse possession, can sue and maintain a suit.”

26. The exhibits showing payment of the suit property tax being paid by the Defendant no. 1, and the continuous possession of the defendant no. 1 in respect of the suit property on record. PW 1 in her evidence has only stated that she visited the suit property a few times since 1974 travelling from her matrimonial home at Jalpaiguri. She claimed to have paid for the construction of the boundary wall in 1988 but there is no proof whatsoever of the same.

27. The facts proven above clearly demonstrate that the Defendant no. 1 has been able to set up an adverse title to the plaintiff no. 1 by adverse possession.

28. In the facts and circumstances of the case, this Court is the view that the Court below wholly failed to appreciate the scope of Section 33 of the Registration Act as regards the execution of Power of Attorney and Section 78(6) of the Indian Evidence Act. The Court below committed a serious error in law in recognising the Power of Attorney, purportedly executed by PWs 3 to 7 in favour of PW 1. The Court below also failed to appreciate that Section 4 of the Benami Transaction (Prohibition) Act, 1988 has no manner of application in the facts of the case.

29. Placing reliance on the decision of the Supreme Court in Somakka (Dead) By LRs. v. K. P. Basavaraj (Dead) by LRs. reported in (2022) 8 SCC 261, Counsel for the appellant has prayed that his title in respect of the suit land should be decided here instead of remanding it to the Court below. The dispute has been pending for more than 30 years between a niece and her maternal uncle. At paragraph 34 of the aforesaid case, the Supreme Court stated as follows:-

"34. The next question which arises is that where the judgment of the appellate court is being set aside on the ground of non-consideration of the evidence on record, the matter would normally be required to be remanded to the first appellate court, whether in the facts and circumstances this case requires a remand. In the facts and circumstances of the present case, we find that the suit was instituted in the year 1991, more than three decades ago; the evidence discussed by the trial court is neither disputed nor demolished by the learned counsel for the respondent. As such, we do not find any good reason to remand the matter to the High Court."

30. This Court would have been normally required to remand the matter back for consideration afresh, of the evidence-on-record, by the Court below. However, this court proceeds to pass a decree dismissing the suit and upholding the right, title and interest of the appellant/defendant no. 1 in respect of the suit property inter alia based on the deed of relinquishment.

31. The aforesaid declaration is made under powers exercised under Order 41 Rule 33 of the Code of Civil Procedure, 1908.

32. The appellant may obtain mutation of the suit property in his name and/or his legal heirs.

33. For the reasons stated hereunder the impugned judgment and decree is set aside. FA 109 of 2003 is allowed. All pending CAN applications shall stand disposed of.

34. Urgent photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

35. Judgment is delivered in open court. The decree may be drawn up expeditiously. The LCR shall be sent to the Court below urgently by special messenger. The costs of special messenger shall be put in by the appellant by day after tomorrow.

I agree.

