
(2011) 12 AHC CK 0145
In the Allahabad High Court
Case No : Second Appeal No. 476 of 1994

Fakhrey Aalam Khan and Others

APPELLANT

Vs

Smt. Salma Waheed and Others

RESPONDENT

Date of Decision : 19-12-2011

Acts Referred:

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

Citation : (2011) 12 AHC CK 0145

Hon'ble Judges : Dilip Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Dilip Gupta, J.—The defendants have filed this Second Appeal for setting aside the judgment and decree dated 12th January, 1987 passed by the learned IXth Additional Civil Judge by which the suit was decreed as also the judgment and decree dated 11th April, 1994 passed by the learned IInd Additional District Judge, Meerut by which the Civil Appeal filed by the defendants was dismissed.

2. Original Suit No. 369 of 1977 was filed on 9th July, 1977 by Abdul Wahid Khan (since deceased) in the Court of Munsif with Fakhrey Aalam Khan, Sultan Alam Khan and Gayas Alam Khan (Appellants in this appeal) as defendants for possession of the disputed house after vacation by the defendants and for damages for use and occupation at the rate of Rs. 20/-per month. It was alleged that the plaintiff was the owner of the house and the license given to the defendants in 1966 to reside in the first floor of the house had been terminated on 2nd May, 1977 for the reason that they had not only damaged the property but were also harassing the plaintiff.

3. To appreciate the controversy it will be useful to give the pedigree which is as follows:

4. It needs to be mentioned that the plaintiff Abdul Wahid Khan filed Original Suit No. 369 of 1997 in the Court of Munsif, but subsequently as the valuation was

raised, the plaint was directed to be returned for being presented before the appropriate Court by the order dated 6th February, 1979. However, Abdul Wahid Khan died on 31st August, 1978 during the pendency of the suit before the Munsif and he was substituted by his widow-Niaz Fatma (plaintiff No. 1), two daughters and one son (plaintiff Nos. 2 to 4). The plaint was then presented before the First Civil Judge and was registered as Original Suit No. 190 of 1979.

5. The plaint was filed with the allegations that the plaintiff-Abdul Wahid Khan was the owner of the house detailed in the plaint and the defendants were the licensees of the first floor of the house since 1966. As the defendants damaged the property and were harassing the plaintiff, the license of the defendants was terminated on 2nd May, 1977 and they were asked to vacate the premises, but as they did not vacate it, notice dated 12th May, 1977 was served upon them asking them to vacate the premises. Instead of vacating the premises, the defendants sent a reply claiming to be the owners of the property. Relief for possession of the house was, therefore, claimed.

6. The defendants filed a written statement contending that Abdul Latif Khan, grand-father of the defendants and plaintiff nos. 2 to 4 was the owner of the house in dispute and the defendants were not the licensees. It was also alleged that the defendants were residing in the house as owners for the last 30 years and that the brothers and sisters of the plaintiff Abdul Wahid Khan had migrated to Pakistan.

7. An Amendment Application was filed by the defendants on 14th April, 1982 for making amendments in the written statement filed by them which application was allowed on 27th May, 1982. The defendants added a paragraph in their written statement that the defendants were residing in the house as co-sharers and that the brothers and sisters of Abdul Wahid Khan were not impleaded as heirs.

8. Subsequently, another Amendment Application was filed by the defendants on 3rd May, 1983 to incorporate in the written statement that Majid-ul-Nisha was a benamidar and she or her heirs were not the exclusive owners of the house in dispute. This amendment application was also allowed.

9. The Trial Court framed the following issues:

1. Whether the plaintiffs are the owners of the house in dispute?
2. Whether the defendants are licensees of the plaintiffs of the house in dispute?
3. Whether the suit is undervalued and court fee paid is insufficient?
4. Whether the suit is bad for non-joinder of necessary parties?
5. Whether the suit is barred by limitation?
6. Reliefs?
7. Whether the plaintiff alone was entitled to file the suit?

8. Whether the defendants are entitled to the benefit of Section 14 of U.P. Act No. 13 of 1972?

9. Whether notice terminating the license is invalid as alleged in paragraph 23 of the W.S.?

10. Whether the defendants have acquired title over the house in dispute by adverse possession as alleged in paragraph no. 15 of the W.S.? If so, its effect?

10. The Trial Court came to the conclusion that the plaintiffs were the owners of the house in dispute; the defendants were the licensee of the plaintiffs; the suit was not bad for non joinder of all the heirs of Majin-ul-Nisha as plaintiffs; the suit was not barred by limitation; the defendants were not entitled to benefit of Section 14 of the U.P. Act No. 13 of 1972; the notice terminating the license was valid; the defendants had not perfected their title by adverse possession and that the plaintiffs were entitled to recover possession of the property in dispute. The suit was, accordingly, decreed.

11. Feeling aggrieved, the defendants filed Civil Appeal No. 100 of 1987. The First Appellate Court found that the plea taken by the defendants that the two sale deeds executed in favour of Majid-ul-Nisha were Benami transactions since the property was actually purchased by Abdul Latif Khan was not required to be examined since Benami Transaction (Prohibition) Act, 1988 had come into force and the Supreme Court in Mithilesh Kumar and Another Vs. Prem Behari Khare, held that the Act was retrospective. The Trial Court also repelled the contention of the appellants that the shares of brothers and sisters of Abdul Wahid Khan vested in the custodian of evacuate properties as they had settled in Pakistan. The First Appellate Court also confirmed the finding of the Trial Court that the defendants were licensees of the plaintiffs, which license had been validly terminated and that the benefit of Section 14 of U.P. Act No. 13 of 1972 was not available to the defendants. The First Appellate Court also confirmed the findings of the Trial Court that the suit was not barred by limitation and that the claim of adverse possession set up by the defendants could not be established. The appeal was, accordingly, dismissed.

12. At the time of admission of the appeal substantial questions of law were not framed. On 12th September, 2007 the following substantial questions of law as stated in the Memo of Appeal were framed as substantial questions of law:

(1) Whether the defense of the appellants was barred by Section 4(2) of the Benami Transaction (Prohibition) Act, 1988?

(2) Whether, in the absence of any pleading by the plaintiff to have acquired title through sale deeds of 1942 in the name of Majid-ul-Nisha, the Courts below were justified in law in upholding the plaintiff's title as owner or licensor on the basis of these two sale deeds?

(3) Whether the findings of the Courts on the point of adverse possession stands vitiated in law as public documents more than 30 years were ignored,

misconstrued and misread and also on account of non recording of a categorical finding as to when the defendants came in possession and when the suit was filed?

(4) Whether the suit was barred by time?

13. It needs to be noticed that the basic dispute between the parties is with regard to the two sale deeds executed by the Vendors on 23rd May, 1972 and 25th July, 1972 in favour of Majid-ul-Nisha. According to the plaintiffs, Majid-ul-Nisha was became the owner of the property by virtue of the two sale deeds and on her death, the property devolved upon her five sons and three daughters, but by an oral gift dated 15th June, 1954, the sons and daughters gifted their shares in the property to their brother Abdul Wahid Khan and as such Abdul Wahid Khan became the sole owner of the property.

14. According to the defendants, the two sale deeds dated 23rd May, 1942 and 25th July, 1942 were Benami transactions as Abdul Latif Khan, husband of Majid-ul-Nisha had actually purchased the property. Thus, on the death of Abdul Latif Khan on 4th June, 1944, the property devolved on his heirs and, therefore, Abdul Wahid Khan cannot claim to be the exclusive owner of the house in dispute after the death of his mother Majid-ul-Nisha on 2nd March, 1948 and the defendants are co-sharers of the property.

15. The Trial Court after considering the evidence available on record, did not accept the plea of Benami transaction set up by the defendants. The Appellate Court, however, observed that since the Benami Transaction (Prohibition) Act, 1988 was retrospective in nature in view of the decision of the Supreme Court in *Mithlesh Kumari (supra)*, the plea of benami transaction set up by the defendants could not be accepted.

16. During the course of hearing of the Second Appeal, it was submitted by the learned counsel for the appellant that the decision of the Supreme Court in *Mithlesh Kumari (supra)* had been overruled by the Supreme Court in its subsequent decision in *R. Rajagopal Reddy and Others (deceased by legal representatives) Vs. Padmini Chandrasekharan (deceased by legal representatives)*, and it was held that the Benami Transaction (Prohibition) Act, 1988 was not retrospective.

17. This Court, accordingly, by the order dated 18th September, 2007 directed the lower Appellate Court to submit a finding to this Court on the basis of the evidence already existing as to whether the two sale deeds dated 23rd May, 1942 and 25th July, 1942, which were executed in favour of Majid-ul-Nisha, were Benami transactions or not. The lower Appellate Court submitted its finding to the Court by its order dated 30th November, 2007 that both the aforesaid sale deeds were not Benami transactions.

18. Sri W.H. Khan, learned Senior Counsel appearing for the defendant-appellants submitted that the Courts below erred in law in holding that the two

sale deeds dated 23rd May, 1942 and 25th July, 1942 were not Benami in nature. It is his submission that in fact Abdul Latif Khan had purchased the property in the name of his wife Majid-ul-Nisha. In this connection, he has submitted that the actual consideration for the sale deeds had been given by Abdul Latif Khan, who had purchased the house in dispute in the name of his wife Majid-ul-Nisha and this is an important factor for holding that the transaction was benami in nature. It is his submission that Majid-ul-Nisha had no source of income and she was also not present at the time of registration of the sale deeds while Abdul Latif Khan, who was also a marginal witness of the sale deeds was present at the time of registration of sale deeds and he paid the sale consideration to the vendor. He has also pointed out that DW 2 Mohd. Yashin Khan, one of the vendor, had also stated in his examination that the house had been sold to Abdul Latif Khan who paid the consideration amount and that the defendants have also been residing in the house since more than 50 years. He, therefore, submits that the findings recorded by the Trial Court and the Appellate Court are perverse and deserve to be set aside. It is also his submission that the defendant-appellants and before them their parents lived in the house in dispute treating themselves to be the owners since the beginning of July, 1955 and, therefore, the possession since the beginning and atleast since 1955 was continuously and peacefully with them to the knowledge of Abdul Wahid Khan, who never objected till 1977, by which time the title of the defendant-appellants had matured by adverse possession but the Court below committed an illegality in rejecting this submission. It is also his submission that in the absence of any pleadings in the plaint that Majid-ul-Nisha had acquired title over the house in dispute through the two sale deeds dated 23rd May, 1942 and 25th July, 1942, the Court belows were not justified in upholding the claim of the plaintiffs as owners/licensors.

19. It is, therefore, the submission of learned Senior Counsel for the appellants that as Abdul Latif Khan was the owner of the disputed house, the property, on his death in 1944, devolved on his heirs and Majid-ul-Nisha could not claim to be the exclusive owner of the house by virtue of the two sale deeds dated 23rd May, 1942 and 25th July, 1942. In support of his contention he has placed reliance upon decisions of the Supreme Court in Union of India (UOI) Vs. Moksh Builders and Financiers Ltd. and Others, and Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh,

20. Sri Rakesh Bahadur, learned counsel appearing for the defendants has, however, submitted that the First Appellate Court, after remand by the Trial Court, has recorded a categorical finding of fact that the two sale deeds dated 23rd May, 1942 and 25th July, 1942 executed in favour of Majid-ul-Nisha were not Benami transactions and as the appellants have failed to substantiate that the said findings are perverse, no interference is called for in this Second Appeal. He has emphasized that the scope of interference in Second Appeal is very limited.

21. It is also his contention that the burden was on the defendants to prove that

the transactions were Benami but the defendants failed to substantiate this plea as they could not establish the source from where the purchase money came, the motive for giving the transaction Benami color and nor they could establish that the conduct of the party was such which could lead to such an inference. In support of his contention he has placed reliance upon the decisions of the Supreme Court in Gapadibai Vs. State of Madhya Pradesh, and in Vidhyadhar Krishnarao Mungi and Others Vs. Usman Gani Saheb Konkani and Others,

22. It is also his contention that the defendants have failed to substantiate the plea of adverse possession and nor could they substantiate that the suit was barred by limitation.

23. I have considered the submissions advanced by learned counsel for the parties.

24. The first and the foremost issue that arises for consideration is whether Majid-ul-Nisha had purchased the house through the two sale deeds dated 23rd May, 1942 and 25th July, 1942 or whether the house was actually purchased by Abdul Latif Khan in the name of his wife and the transactions were Benami in nature.

25. It needs to be noticed that the first wife of Abdul Latif Khan was Maqsoodan who died in 1910. It is after the death of Maqsoodan in 1910 that Abdul Latif Khan married Majid-ul-Nisha in 1912. The sale deeds in favour of Majid-ul-Nisha were executed by the Vendors on 23rd May, 1942 and 25th July, 1942 almost after thirty years of the marriage. There is no dispute that the two sale deeds mention that the property was sold to Majid-ul-Nisha by the vendors and Abdul Latif Khan, her husband, was a witness to the execution of the sale deed.

26. The First Appellate Court was required by the Court to give a finding as to whether the two sale deeds were benami in nature. The First Appellate Court gave its finding on 30th November, 2007 that the two sale deeds were not benami in nature and they are reproduced :

1. That defendants have utterly failed to produce any evidence that Abdul Latif Khan had purchased the house in dispute in the name of his wife without any intention to benefit his wife.

2. That it is not established that Abdul Latif Khan had any intention to purchase house as benami.

3. That at the time of alleged purchase sons Alam Gir Khan (from first wife), Abdul Waheed (from second wife) and daughter of Abdul Latif Khan are alive. In these circumstance, there was no reason to purchase the house in the name of Smt. Majid-ul-Nisha.

4. That at the time of purchase about 30 years has been elapsed from the marriage of Smt. Majid-Ul-Nisha and there appears no reason to presume that house wife was not able to arrange the small consideration amount as her own.

5. That it is un rebutted that Smt. Majid-ul-Nisha was the house wife and illiterate lady. In India especially in Mohammadan community, Parda system was there. In these circumstances, there was no occasion to go to registry office and pay the consideration amount to vendors at the time of registry.

6. The evidence led by P.W.2 Smt. Niyaz Fatima wife of plaintiff Abdul Waheed, is more reliable and acceptable than statement of D.W.1 Fakhrey Alam and D.W.2 Mohammad Yasin regarding the fact that Smt. Majid-ul-Nisha had purchased the house in dispute as her own.

7. That statement of D.W.2 Mohammad Yasin, who is one of the vendors is not liable to be accepted because he has stated against the admitted facts mentioned in the disputed sale deeds which were executed by him alongwith other vendors.

8. That defendants have not challenged the validity of sale deeds upto 1977 from 1944, when Abdul Latif Khan had died.

9. That plaintiffs and defendants are sons and grand sons of Abdul Latif Khan. In these circumstances, no inference can be drawn from the fact that defendants are residing in the disputed house.

10. Title deeds remained in possession of the plaintiffs.

11. That vendee remained in possession in the disputed house after purchase and subsequently house remained in possession of the plaintiffs.

12. That act i.e. consideration done only by the husband is not conclusive proof that purchase was made by husband Abdul Latif Khan.

In view of the aforesaid discussion, I come to the conclusion that both the sale deeds dated 23-5-1942 and 25-7-1942 executed in favour of Smt. Majid-ul-Nisha were not benami transactions.

27. In coming to the aforesaid conclusion, the First Appellate Court noticed that PW-2 Niaz Fatma wife of Abdul Waheed Khan original plaintiff and real sister of the wife of Alam Gir Khan had stated that the disputed house was purchased by her mother-in-law Majid-ul-Nisha; her husband was in service and after retirement, they started living in the house in dispute; Majid-ul-Nisha was also residing in the house in dispute upto her death and Abdul Latif Khan had spent his huge amount of his treatment and that the house in dispute was purchased by Majid-ul-Nisha with her own money. The First Appellate Court also considered the statement of DW-1 Fakharey Alam and DW-2 Mohd. Yasin. It did not believe the statement of DW-1 Fakharey Alam that the disputed house was purchased by Abdul Latif Khan and consideration of amount was also paid by Abdul Latif Khan who was present at the time of execution of the sale deed for the reason that Fakharey Alam had not explained as to how he came to know of this fact. The statement of DW-2 Mohd. Yasin, who was a co-vendor, that the house was sold to Abdul Latif Khan who had paid the amount was also not believed as in the cross-examination he stated that both the sale deeds were executed by Abdul

Waheed, Farid, Rashid, Yasin, Ismail and Ashiya Begum in the name of Majid-ul-Nisha and the sale deeds were read over and heard by them. The First Appellate Court, therefore, concluded that the statements made by the DW-2-Mohd. Yasin were against the statements made in the sale deeds. The First Appellate Court, therefore, from the evidence available on record, concluded that the defendants had failed to discharge the burden cast upon them to prove the facts regarding the benami transactions, apart from the fact that there was no direct evidence available on the record to establish that the consideration amount of the sale deed was not paid by Majid-ul-Nisha. It further observed that Majid-ul-Nisha was house wife and old illiterate lady and in India, especially in Mohammedan Community, parda system was not only popular but religiously essential and husbands often negotiated the disposal of properties and obtained receipts for their wives. Thus, merely because the husband handed over the sale consideration and was also present at the time of execution of the sale deed could not conclusively lead to the inference that the sale deeds were actually intended to be executed in the name of the husband and, therefore, benami in nature.

28. Learned Senior Counsel appearing for the appellants has raised the same submissions as were raised before the First Appellate Court regarding the sale deeds being benami in nature and has contended that the findings recorded by the First Appellate Court are perverse.

29. In order to appreciate the contentions of learned Senior Counsel for the appellants, it would be necessary to examine the scope of interference in Second Appeal.

30. In *Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others*, the Supreme Court made the following observations:-

It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences are possible, one drawn by the lower appellate court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The High Court cannot substitute its opinion for the opinion of the first appellate court unless it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.

(Emphasis supplied)

31. This judgment has been followed in a number of decisions including Thiagarajan and Others Vs. Sri Venugopalaswamy B. Koil and Others, and Govindaraju Vs. Mariamman reported in AIR 2005 SCW 916.

32. In Ram Prasad Rajak Vs. Nand Kumar and Bros. and another reported in Ram Prasad Rajak Vs. Nand Kumar and BOrs. and Another, the Supreme Court has also observed:-

... Unless there was a substantial question of law, the High Court had no jurisdiction to entertain the second appeal and consider the merits.

...The High Court made an attempt to re-appreciate the evidence and come to the conclusion that the appellant failed to prove his bona fide requirement. In fact after a scanty discussion of the evidence, the High Court observed: "in this view of the matter I find and hold that the plaintiff miserably failed on factual aspect also to prove his bona fide necessity. The High Court has acted beyond its jurisdiction in appreciating the evidence on record.

(Emphasis supplied)

33. The submission of learned Senior Counsel for the appellants has to be examined in the light of the aforesaid limitation but before doing that it will be useful to reproduce certain decisions of the Supreme Court as to when a transaction can be said to be benami in nature.

34. In Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, the Supreme Court observed:-

.... 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 color; (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.

(Emphasis supplied)

35. The Supreme Court in Valliammal (D) by Lrs. Vs. Subramaniam and Others, held:

13. This Court in a number of judgments has held that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, 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. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M.P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:

- (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 color;
- (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. (Jaydayal Poddar v. Bibi Hazra, SCC p. 7, para 6)

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

18. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case.

(Emphasis supplied)

36. In *Binapani Paul Vs. Pratima Ghosh and Others*, , the Supreme Court held :

12. A question as to whether a transaction evidences a benami nature thereof is always difficult to answer. It is a case where despite some evidence brought on records by the plaintiffs that Suprovabala paid the consideration amount or at least a part of it, we may proceed to determine the issues between the parties on the premise that the amount of consideration was provided by Dr. Ghosh. A person may for various reasons intend to purchase a property in the name of his wife. It may be for one reason or the other....

13.... He, therefore, might have been of the opinion that in case of his early death, which appears to have been his premonition, something should be kept apart for his wife and daughters. When a person develops such an intention, it would be opposed to the essential characteristics of a benami transaction. He furthermore was not a debtor. He was not required to avoid any liability. He had no apparent motive for entering into a benami transaction. The plaintiffs' case that he had done so for the benefit of his wife, therefore, must be considered from that angle.

16. In *Tara Sundari Sen v. Pasupati Kumar Banerjee and Ors.* 1974 CLJ 370, it was observed:

...The only purpose of Nagendra Nath Ganguly having been a signatory to the said document must have been to represent to the world at large that the property was being acquired by Sm. Shantabala as her absolute property and that her husband had no right, title or interest in the same....

17. It was further observed therein :

The significance and value of these indisputable facts have to be carefully assessed. It is common case that the ultimate source of the money was the income and savings of Nagendra Nath Ganguly. The plaintiff contends that Nagendra Nath made a gift of the money of his wife Shantabala to enable her to acquire the properties. If that be so, the properties were Shantabala's Ajoutuka Stridhana. That Nagendra made gift out of his funds does not in any way prejudice the plaintiff's case. Once the gift was made, if it was made at all, the money belonged absolutely to Shantabala and the properties she purchased were hers and hers alone. That Nagendra engaged a contractor or a supervisor for construction of a structure on the land purchased by Shantabala or that he made payments to the contractor or the supervisor will not by itself be any evidence of his ownership. The husband of a Hindu lady living in a common matrimonial home usually manages and maintains her properties. The Court can and ought to take judicial notice of the fact that ordinarily in a Hindu household the husband deals with strangers and tradesmen. Therefore, the fact that payments were made by Nagendra Nath Ganguly is not inconsistent with the case that the premises belonged to Shantabala absolutely.

...

21. Dr. Ghosh indisputably was a person having a superior knowledge and understanding. He was holding a responsible position in the society. He was in a noble profession. When he made attestation of the deed of the power of attorney keeping in view the fact that he was the husband there cannot be any doubt that he fully understood in regard to the nature of the transaction as also the contents and merits thereof.

...

25. To decipher the intention of the parties, this Court must go back to the societal situation as was prevailing in 1935. Dr. Ghosh as a man of ordinary prudence wanted to make provision to protect and insure the welfare of his seven daughters and wife. In a case of this nature, the answer to such a question has to be in the affirmative. Question of intention is always relatable and peculiar to the facts of each case. [See AIR 1932 13 (Privy Council)]

26. In Chittaluri Sitamma and Anr. v. Saphar sitapatirao and Ors. AIR 1938 Madras 8, it was held:

...The mere suspicion that the purchases might not have wholly been made with the lady's money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao whether in a smaller measure or a larger measure, must have also contributed to these purchases. Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction though it is an important character...

27. The learned Counsel for both the parties have relied on a decision of this Court in Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, wherein it has been held that the true character of a transaction is governed by the intention of the person who contributed the purchase money and the question as to what his intention was, has to be decided by:

- (a) Surrounding circumstances
- (b) Relationship of the parties
- (c) Motives governing their action in bringing about the transaction and
- (d) Their subsequent conduct.

28. All the four factors stated may have to be considered cumulatively. The relationship between the parties was husband and wife. Primary motive of the transaction was security for the wife and seven minor daughters as they were not protected by the law as then prevailing. The legal position obtaining at the relevant time may be considered to be a relevant factor for proving peculiar circumstances existing and the conduct of Dr. Ghosh which is demonstrated by

his having signed the registered power of attorney.

...

30. Source of money had never been the sole consideration. It is merely one of the relevant considerations but not determinative in character. [See Thulasi Ammal v. Official Receiver, Coimbatore AIR 1934 Mad 671]

(Emphasis supplied)

37. The aforesaid decisions of the Supreme Court in Binapani Paul (supra) and Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, were again considered by the Supreme Court in V. Shankaranarayana Rao (D) by Lrs. and Others Vs. Leelavathy (Dead) by Lrs. and Others, and it was observed -

In the aforementioned judgments, this Court has inter alia emphasized on the fact that the role and/or the motive on the part of the person who had advanced the amount of consideration plays an important role in determination of the nature of transaction. The High Court unfortunately had not considered the question from the said angle. The High Court while pronouncing the impugned judgment had also not considered the effect and purport of the requisite ingredients for arriving at a decision as to whether the transaction in question is benami or not.

38. It is, therefore, clear from the aforesaid decisions of the Supreme Court that whether a particular sale is benami or not is largely one of fact and for determining this question, no absolute formula or acid test, uniformly applicable in all situations, can be laid down but in weighing the probabilities, the Courts are usually guided by the following 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 color;
- (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.

39. The Supreme Court has also emphasized that to decipher the intention of the parties, the Court has to go back to the societal situation as was prevailing at the time of execution of the sale deed and the source of money can never be the sole consideration though it may be one of the relevant considerations. The Supreme Court has also emphasized that the motive of the person, who had advanced the amount, plays an important role in determining the nature of transaction for a person may have various reasons to purchase a property in the

name of his wife as he may proceed to keep something apart from his wife and his daughter after his death and when a person develops such a feeling it will be opposed to the essential characteristics of a benami transaction. It has also to be seen whether a person, who may have been a debtor, avoided the sale deed in his name to avoid any liability. The relationship between the parties has also to be seen, particularly when the relationship is that of husband and his wife. In Binapani Paul, the Supreme Court rejected the transaction being benami in nature as the husband, who had good understanding, had also signed power of attorney for the reason that the primary motive of the transaction was the security of his wife and in such circumstances the source of money was held not to be the sole consideration.

40. The appellants have not stated what was the motive for execution of the two sale deeds in the name of the wife of Lateef Khan to establish that the sale deeds were benami.

41. What is noticed in this case is that the First Appellate Court has considered all the aspects of the matter and arrived at a conclusion that the transactions were not benami in nature. Keeping in mind the scope of interference in Second Appeal, as emphasized by the Supreme Court in the decisions referred to above, it is not possible to accept the contention of learned Senior Counsel for the appellants that the finding arrived at by the First Appellate Court that the transactions were not benami in nature is perverse and needs to be set aside.

42. The contention of learned Senior Counsel for the appellants that the defendants had perfected their title by adverse possession cannot also be accepted in view of the decision of the Supreme Court in T. Anjanappa and Others Vs. Somalingappa and Another, in which the concept of adverse possession was explained:

12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.

43. There is nothing on the record to indicate that the possession, if any, of the defendants was hostile.

44. It is also not possible to accept the contention of learned Senior Counsel for the appellants that since the plaintiffs had not stated in the plaint that they

acquired title through two sale deeds executed in 1942 the suit should have been dismissed. It was the case of the plaintiffs that they were the owners of the house in dispute and that the defendants were the licensors since 1966. Evidence had been led by them and the two sale deeds had been filed to establish that Majid-ul-Nisha was the owners of the house in dispute.

45. The last contention of learned Senior Counsel for the appellants is that the suit was barred by limitation. The Trial Court and the First Appellate Court have rejected this plea. It has been found as a fact that the suit was filed in 1977 after the license was terminated by the notice dated 2nd May, 1977. It cannot, therefore, be said that the suit was barred by limitation.

46. There is, therefore, no merit in this Second Appeal. It is, accordingly, dismissed.