

(2014) 05 SHI CK 0182
In the High Court Of Himachal Pradesh
Case No : O.S.A. No. 4 of 2006

Sushima Kishandev Kaushal

APPELLANT

Vs

The Council for Tibetan Education

RESPONDENT

Date of Decision : 27-05-2014

Acts Referred:

Evidence Act, 1872 — Section 114, 114(e), 145
Foreign Exchange Regulation Act, 1973 — Section 31, 31 (1), 31(1)
Registration Act, 1908 — Section 17(b)
Transfer of Property Act, 1882 — Section 41, 53, 54
Trusts Act, 1882 — Section 82

Citation : (2014) 05 SHI CK 0182

Hon'ble Judges : Rajiv Sharma, J; Dharam Chand Chaudhary, J

Bench : Division Bench

Advocate : Vinay Kuthiala, Senior Advocate and Diwan Chand Negi, Advocates for the Appellant; Harish Bahl, Advocates for the Respondent

Judgement

Dharam Chand Chaudhary, J.—Challenge herein is to the judgment and decree dated 10.5.2006 passed by learned Single Judge of this Court, in Civil Suit No. 242 of 1995, whereby the suit of the appellant filed for declaration and the decree of possession of the suit land has been dismissed while arriving at a conclusion that the defendant (hereinafter to be referred as "the defendant"), the bona fide purchaser has acquired the same by way of registered sale deed Ext. PW-2/6 on payment of sale consideration to Smt. Raj Kumari Bhardwaj, the owner thereof.

2. The case of the plaintiff that neither Smt. Raj Kumari Bhardwaj was owner of the suit land nor the defendant, a foreign national competent to purchase the same, as acquisition of land by a foreign national/outsider is barred by Foreign Exchange Regulation Act, 1973 and also the HP Tenancy and Land Reforms Act, was discarded. The appellant is the plaintiff who instituted the suit in this Court for the grant of following reliefs:

"A" declaring that:--

- i) the mutation dated 15.3.69 of Mauza Dharamshala Khas, Cha Rehlu, Tehsil and District Kangra sanctioned in favour of Smt. Raj Kumari Bhardwaj;
- ii) the sale deed dated 7.7.1979 executed by Smt. R.K. Bhardwaj in favour of the defendant and registered at Sr. No. 216 in Book No. 1 Vol. 95 on page 205 in the office of Sub Registrar at Dharamshala, Tehsil and District Kangra;
- iii) the further mutation in favour of the defendant dated 26.2.1988 sanctioned on the basis of sale Deed dated 7.7.79 of Mauza Dharamshala Khas, Chak Rehlu, Tehsil and District Kangra;

are all null & void, inoperative and not binding on the rights of the plaintiff.

"B" A decree of declaration to the effect that the plaintiff is the sole & exclusive owner of the land measuring 14 kanals 11 marla, khatauni No. 392, Khara No. 218 and khasra Nos. 1208/1153 measuring 8 kanals 11 marlas, 1089 measuring 2 kanals 10 marlas, 1061 measuring 2 kanals 10 marlas, 1152/1990 measuring 1 kanal, alongwith all the super structure, standing on the same, situated in Tika and Mauza Dharamshala, Tehsil and District Kangra, as per the Jamabandi for the year 1966-67; and bearing Khasra Nos. 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 607, total 17 kita measuring 5337-25 as per the latest jamabandi for the year 1990-91.

"C" and decree of possession directing the defendant to hand over the vacant possession of the original suit property mentioned above to the plaintiff by demolition of all the structures raised by the defendant on the same" and further for the recovery of the amount of damages/mesne profits on account of the illegal use and occupation of the suit property by the defendant on the basis of the amounts of the same to be furnished by the defendant; and

"D" a preliminary decree be passed for the rendition of the accounts in respect of the illegal use and occupation of suit property since 1979 by the defendant;

and further a final decree be passed for the amount as found finally due to the plaintiff from the defendant on the basis of the settlement of accounts between the parties: and

"E" such other or further relief to which the plaintiff may be found entitled in the facts and circumstances of the case may also be granted to her while decreeing her suit against the defendant and justice be done to the parties."

3. Facts giving rise to file this appeal in nutshell are that the plaintiff allegedly acquired the suit land in the year 1962 out of her own funds and the money partly contributed by her father-in-law late Paras Ram Kaushal. Mutations were also entered and attested in her name. Late Smt. Raj Kumari Bhardwaj, the mother of the plaintiff, started looking after and maintaining the affairs of the suit land. The plaintiff never visited Dharamshala from 1969 to 1992 being ordinarily residing in Bombay and abroad, i.e., in London during this period. Her mother Smt. Raj Kumari Bhardwaj died on 2.7.1991 in the house of her sister.

After her death, in February, 1992, the plaintiff accompanied by her husband came to Dharamshala to take charge of the suit property, but it was found that the defendant had built some structures thereon after demolition of old structures which were known as "Retreat". On enquiries she made with the defendant and also on going through the revenue record, she came to know that on basis of her affidavit, mutation of the suit land was attested in favour of said Smt. Raj Kumari Bhardwaj, on 15.3.1969 and it is she who was recorded as owner of the suit land.

4. The plaintiff allegedly never sworn-in any affidavit in favour of her mother nor did she ever give any authority or right to her mother to deal with the suit property, therefore, the order of mutation was assailed being void ab initio, besides being bad in law because no notice was ever given to the plaintiff before passing of order of mutation in favour of her mother Smt. Raj Kumari Bhardwaj. The order of mutation allegedly was procured by the mother of the plaintiff in connivance with the revenue officials. On the basis of order of mutation dated 15.3.1969, entries came to be recorded in the Jamabandi showing the mother of the plaintiff as owner in possession of the suit property.

5. On 7.7.1979, the mother of the plaintiff, sold the suit property to defendant for a sum of Rs. 64,000/-. The mother of the plaintiff, allegedly being not owner of the suit property, had no authority to sell the same, therefore, the sale of the suit property she made in favour of the defendant is also illegal, void and of no consequence on the right of the plaintiff therein. It was also claimed that the defendant being a foreign national could not have purchased the suit land unless and until the permission under Section 31(1) of the Foreign Exchange Regulation Act, 1973, required to be obtained as per the procedure prescribed by the Reserve Bank of India and the Central Government, not obtained. With these facts placed on record the plaintiff has sought a decree declaring mutation dated 15.3.1969 of Mauza Dharamshal Khas, Chak Rehlu, Tehsil and District Kangra, sanctioned in favour of Smt. Raj Kumari Bhardwaj, sale deed dated 7.7.1979, executed by Smt. Raj Kumari Bhardwaj in favour of the defendant and registered at Sr. No. 216 in Book No. 1, Vol. 95 on page 205 in the office of Sub Registrar at Dharamshala, Tehsil and District Kangra, further mutation sanctioned in favour of the defendant on 26.2.1988 on the basis of sale deed dated 7.7.1979 of Mauza Dharamshala Khas, Chak Rehlu, Tehsil and District Kangra, are null and void, inoperative and not binding on the rights of the plaintiff being sole and exclusive owner of the suit land. By way of further relief, the plaintiff has prayed a decree for possession of the suit property and also recovery of damages/mesne profits including the decree for rendition of accounts with respect to use and occupation of the suit property by the defendant right from 1979 onwards.

6. The defendant, when put to notice, has contested the suit. In preliminary objections, it is submitted that the suit is barred by time, the plaintiff has no cause of action to file the suit against the defendant, the suit is not properly valued for the purpose of court fee and jurisdiction, the defendant is a bona fide

purchaser for consideration, the plaintiff is estopped to sue by her acts and conduct, acquiescence, improvements having been made by the defendant on the suit land and that the suit has been filed with mala fide intention to harass and humiliate the defendant.

7. On merits, it has been claimed that the plaintiff has negotiated the sale of the suit land with Smt. Raj Kumari Bhardwaj in the presence of the plaintiff and her husband Capt. K.D. Kaushal. It is thereafter the suit land was sold to the defendant on payment of consideration. The sale deed was presented before the Sub Registrar for the purposes of registration. The husband of the plaintiff was present even before the Sub Registrar also. It has, therefore, been denied that the plaintiff is the owner of the suit property. According to the defendant, it is rather Smt. Raj Kumari Bhardwaj, the mother of the plaintiff, was recorded owner in possession of the suit land and the defendant after due verification of the revenue record and satisfying itself about the title of Smt. Raj Kumar Bhardwaj in the suit land, purchased the same. It has been denied that the sale consideration was inadequate and on account of non-fulfillment of requirement of Section 31 (1) of the Foreign Exchange Regulation Act, 1973, is not legal and valid. It is also denied that the plaintiff did not visit Dharamshala between 1969 and 1992 and to the contrary it is submitted that she had been visiting Dharamshala during this period and she herself saw the old structures being demolished and new one being built on the suit property by the defendant.

8. In replication, the plaintiff has denied the contents of preliminary objections and also the contentions to the contrary in the written statement and reiterated the case as set out in the plaint.

9. On the pleadings of the parties and hearing learned Counsel on both sides, learned Single Judge has framed the following issues on 9.7.1996:

- "1. Whether the suit of the plaintiff is barred by limitation? OPD.
2. Whether the defendants have become owner of the disputed property by way of adverse possession? OPD.
3. Whether the defendant, who is a foreign national, is a bona fide purchase for consideration of the disputed property? OPD.
4. Whether the plaintiff is estopped from filing the present suit on account of her acts and conduct? OPD.
5. Whether the suit is properly valued for the purposes of Court fee and jurisdiction? OPP.
6. Whether the plaintiff has no cause of action to file the suit? OPD.
7. Whether the plaintiff is entitled to a decree for possession and mandatory injunction by demolition of the structures as prayed for? OPP.
8. Whether the plaintiff is entitled to mesne profits? If so, how much? OPP.

9. Relief(s)."

10. Issue No. 3 at the time of dictating the judgment was, however, divided into two parts by learned Single Judge which now reads as follows:

"3-A. Whether the defendant, being a citizen of India, was required to obtain permission of the Reserve Bank of India to purchase the suit land and if so, whether it (the defendant) did not obtain the requisite permission? OPP.

3-B. Whether the defendant is a bona fide purchaser for consideration? OPD.

11. Anyhow the parties were put to trial on all the issues framed. Plaintiff in turn has herself stepped into the witness box as PW-2 and produced sale deeds, Exts. PW-2/1 and PW-2/2, whereby the suit land was acquired by her. The mutations, Exts. PW-2/3 and PW-2/4 attested in her favour were also produced by her in her statement. She has also produced the Jamabandi for the year 1966-67 in which she was recorded as owner in possession of the suit land and also the sale deed Ext. PW-2/6 whereby her mother sold the suit property to the defendant. The copy of the order passed by the District Judge, Dharamshala qua the amendment in the plaint has also been proved by her as Ext. PW-2/7. Her husband and General Power of Attorney, Capt. K.D. Kaushal has also stepped into witness box as PW-3. He has produced copy of notice Ext. PW-3/1, reply received thereto Ext. PW-3/2, rejoinder Ext. PW-3/3 and sketch of suit property Ext. PW-3/4.

12. PW-1 Shri A.K. Sood was appointed as Commissioner in this case, who has proved his report Ext. PW-1/A and PW-4 Shri Banwari Lal is Patwari, Patwar Halqua Dharamshala-I and proved the documents Exts. PW-4/1 to PW-4/7.

13. In rebuttal, plaintiff has examined two more witnesses, namely Shri Deep Raj (PW-5), who has produced the record pertaining to attestation of mutation of the suit land in favour of Smt. Raj Kumari Bhardwaj, the mother of the plaintiff and PW-6 S.P. Sharma, Marketing Officer, Sharma Enterprises, in order to prove the certificate issued by Capt. V. Asthana of Shipping Corporation of India in favour of Shri K.D. Kaushal, however, the certificate was not allowed to be proved at a belated stage.

14. On the other hand, Shri Kalsang Dorjee (DW-1), the authorized representative of the defendant, has stepped in the witness box and has proved the letter of authorization Ext. D.W.-1/A. D.W.-2 Shri Ngodup Tsering has also proved letter of authorization Ext. D.W.-1/A and identified the writings of Lobsang T. Rikha, Secretary of the defendant encircled red on Ext. PW-2/6. D.W.-3 Rakesh Narain Sharma is scribe of sale deed Ext. PW-2/6, whereas, D.W.-4 Shiv Shankar Sharma, one of the marginal witnesses thereto and D.W.-6 Madan Pal Singh, the second marginal witness thereto. D.W.-5 Tilak Raj Dhingra is a Chemist and has been examined to prove that Mr. K.D. Kaushal, the husband of the plaintiff, started business under the name and style of S.K. Woolen Mills at Kangra with Prem Sagar and obtained loan. D.W.-7 R.C. Sood, is the Manager, State Bank of India, Dharamshala, D.W.-8 Rajinder Singh, an Officer of Punjab

National Bank, Dharamshala, D.W.-9 Keshav Dutt Sharma, Clerk, High Court of Himachal Pradesh, D.W.-10 H.V. Gupta, Assistant Manager, Punjab National Bank, Dharamshala, D.W.-11 and D.W.-13 again R.C. Sood, Manager, State Bank of India, Dharamshala and D.W.-14 Naresh Kumar Sharma, Senior Manager, Punjab National Bank, Palampur. All of them are the witnesses qua obtaining of loan by the husband of the plaintiff. D.W.-12 Tenzin Wangyal is also a witness to the execution of sale deed Ext. PW-2/6. D.W.-15 Varinder K. Sood, Advocate, has been examined to prove the proceedings under the HP Public Premises Eviction of Unauthorized Occupants Act, initiated by Shri K.D. Kaushal, the husband of the plaintiff against the defendant. D.W.-16 Manohar Lal is the Junior Assistant in the office of Deputy Commissioner, Kangra at Dharamshala, but however, failed to produce the record of Case No. 2/74, State v. K.D. Kaushal, being destroyed and D.W.-17 Chandu Lal, is Ahlmad in the office of S.D.O.(C), Kangra, who has produced the record pertaining to recovery of rent of the demised premises.

15. Learned Single Judge on appreciation of the oral as well as documentary evidence available on record while answering issues No. 1 and 2 against the defendant, has concluded that the suit is well within the period of limitation and that the defendant has not become owner of the suit land by way of adverse possession, issue No. 3-A was answered against the plaintiff as the plaintiff failed to produce evidence that the buildings are being used for non-residential purpose or that no permission had been obtained for raising such buildings, whereas issue No. 3-B was answered in favour of the defendant holding that the defendant is a bona fide purchase for consideration. Similarly, issues No. 4 and 7 were answered against the plaintiff holding that the plaintiff through her affidavit acknowledged that she was a Benamidar and the real owner was her mother and she, therefore, has not been held entitled to the decree of possession as well as mandatory injunction. Issues No. 6 and 8 were also answered in favour of the defendant and issue No. 5 in favour of the plaintiff. The suit has, however, been dismissed.

16. Aggrieved by the impugned judgment and decree, legality and validity thereof has been questioned in this appeal on the grounds, inter alia, that the pleadings and evidence qua non-compliance of provisions contained in Section 31(1) of the Foreign Exchange Regulation Act, 1973 have been ignored and contrary the defendant being not competent to purchase the property in India without complying with such requirements prescribed by the Reserve Bank of India, has erroneously dismissed the suit. Such permission though was obtained by the defendant, however, vide letter dated 7.10.1987 that is after acquiring the suit property. The conditions mentioned therein are that (a) the property acquired would be used solely for bona fide residential purposes for self and family; (b) the property would not be sold or transferred or disposed of by way of sale, lease, gift etc. without prior permission of the Reserve Bank of India; (c) no new construction would be carried out; and (d) precedents to such permission granted have been violated. The defendant allegedly violated all such conditions and the trial Court has simply ignored this aspect of the matter. Learned Single

Judge did not advert to the report of the Local Commissioner, which is a fact accepted by both the parties. The factum of requirement of permission under Foreign Exchange Regulation Act to be obtained prior to/or simultaneously on completion of the transaction and not after a period of 8-9 years has also not been appreciated in its right perspective. The plaintiff, therefore, claims that the sale transactions cannot be held to be legal and valid and rather was void ab initio. Learned Single Judge has erred in holding that the plaintiff was the Benamidar of late Smt. Raj Kumari Bhardwaj and there was no power of attorney authorizing Smt. Raj Kumari Bhardwaj to act on behalf of the plaintiff.

17. It is further contended that learned Single Judge did not consider the legal position that the revenue records are not the documents of title and that mutation neither creates nor extinguishes any title and there was no evidence on record that any subsequent transfer had been made by a registered instrument, that is, in accordance with the provisions of Transfer of Property Act and the Indian Registration Act. There was no evidence on record to point out the fact that the plaintiff or her husband late Capt. K.D. Kaushal knew that the mother of the plaintiff was owner of the suit property. Learned Single Judge further erred in inferring that the plaintiff had been visiting Dharamshala between 1969 to 1978 because the evidence on record shows that the husband of the plaintiff was away at sea during the period when the sale deed was executed and there was no evidence worth the name that Benami transaction had been entered into and mutation against law and without notice to the plaintiff had been entered, which could not be supposed to be foundation of title of Smt. Raj Kumari Bhardwaj and also could not be construed as the foundation of title. As such, the plaintiff prays for setting aside the judgment and decree under challenge.

18. Shri Vinay Kuthiala, learned Senior Advocate has emphasized that the plaintiff has acquired the suit land by way of registered sale deeds Ext. PW2/1 and PW2/2. Also that Mutations Ext. PW2/3 and PW2/4 have been attested and sanctioned in her favour and even she is recorded owner in possession thereof in the revenue record. The acquiring of suit land by her is not a Benami transaction because she had purchased the suit land from her own funds and partly from the money given to her by her father-in-law. The attestation of mutation of the suit land in the name of Smt. Raj Kumari Bhardwaj, her mother, on the basis of so called affidavit of the plaintiff is, therefore, stated to be illegal, null and void, as according to Mr. Kuthiala, the plaintiff never sworn in any affidavit, allowing thereby the attestation of mutations Ext. PW2/3 and PW2/4 of the suit land in the name of her mother Smt. Raj Kumari Bhardwaj, aforesaid. It has been pointed out that the attestation of mutations Ext. PW2/3 and Ext. PW2/4, behind the back of the plaintiff is non est and illegal. It has also been contended that the transfer of the land vide sale deeds Ext. PW2/6 by Smt. Raj Kumari Bhardwaj in favour of the defendant is not only violative of Section 118 of H.P. Tenancy and Land Reforms Act but also under Section 31 of the Foreign Exchange Regulation Act, 1973, (FERA) as well as Section 17-B of the Indian Registration Act. Learned Senior Advocate has also pointed out from the record that the defendant is not a

bona fide purchaser, hence the sale deed Ext. PW2/6 and mutations Exts. PW4/1 and PW4/2, attested on the basis thereof, are illegal, null and void and should have been declared so by learned Single Judge.

19. On the other hand, Shri Harish Bahl, learned counsel representing the respondent while repelling the contentions raised on behalf of the appellant-plaintiff has very ably argued that in view of the evidence available on record, Smt. Raj Kumari Bhardwaj, the transferor either was owner or ostensible owner within the meaning of Section 53 of the Transfer of Property Act so far as the land in dispute is concerned. Mr. Bahl has drawn the attention of this Court to the mutation order Ext. PW2/3 to show that the same was executed by the plaintiff admitting therein that the sale consideration was paid by her mother and the suit property was purchased in the name of the plaintiff. Also that the plaintiff further admitted that it is her mother who being in possession of the suit land was managing its affairs throughout. Attention of this Court has also been invited to the statement of the plaintiff to the effect that during the period from 1969 to 1992 she never visited Dharamshala. It has further been pointed out that the plaintiff in the plaint never assailed the transaction of sale in favour of defendant being violative of Section 118 of the H.P. Tenancy and Land Reforms Act and Section 31 of FERA. The averments to this effect in replication, according to Mr. Behl, have rightly been ignored as according to him, within the meaning of Order 6(1) CPC, pleadings means only the plaint and written statement. On the other hand, the attestation of mutation is stated to be an official act as envisaged under Section 114 of the Evidence Act, which according to Mr. Bahl, has been duly performed by the revenue staff. It is vehemently disputed that the defendant did not make any inquiry before acquiring the suit land by way of sale, as according to learned counsel, in view of the clear cut entries in the revenue record, showing said Smt. Raj Kumari Bhardwaj as owner in possession of the suit land, no other and further inquiry was required to be conducted. The defendant, therefore, is stated to be a bona fide purchaser on payment of consideration.

20. On analyzing the submissions made on both sides and also the record, the following points emerge for determination in the present appeal:

- "1) Whether the status of the plaintiff qua the suit land is that of Benamidar?
- 2) Whether mutations Ext. PW2/3 and PW2/4 attested in the name of Smt. Raj Kumari Bhardwaj, the mother of the plaintiff are illegal, null and void.
- 3) Whether the defendant is a bona fide purchaser on payment of sale consideration?
- 4) Whether the transaction of sale in issue is violative of the provisions contained under Section 31 of FERA and Section 118 of H.P. Tenancy and Land Reforms Act?"

Point No. 1

Whether the status of the plaintiff qua the suit land is that of Benamidar?

21. The case of the plaintiff is that she has acquired the suit land by way of sale deed dated 6.8.1962 Ext. PW2/1 and dated 15.2.1962 Ext. PW2/2 at her own and never authorized her mother to purchase any property in her name nor even appointed the mother as her Power of Attorney. The sale deeds supra, however, belie the case so set out in the plaint as the contents thereof reveal that the mother finds mention as her General Power of Attorney.

22. The plaintiff though claims that the sale consideration was paid by her from her own funds and the money given to her by her father-in-law, however, has denied the suit land having been purchased in her favour by her mother from her own funds. The stand so raised is absolutely false for the reason that not only the plaintiff while in the witness box as PW-2, but her husband PW-3 has also not stated anywhere that the land in question was purchased by her partly from own funds and partly from the funds provided by her father-in-law. Bald statement of the plaintiff in her cross-examination to this effect is neither sufficient nor does discharge the onus on her. She could have proved easily by producing the statements of account etc. or by way of stating on oath that the required funds were available in cash with her and her father-in-law and duly accounted for towards income-tax etc. On the other hand, as per mutation order Ext. PW2/3, one affidavit sworn in by the plaintiff was produced before the revenue authorities and as per the same the plaintiff herself has admitted that the funds to purchase the suit land in her name were arranged by her mother.

23. Admittedly, she never visited Dharamshala where the suit land is situated from 1969 to 1992. It is also the admitted case of the parties that the suit land was being looked after and managed by Smt. Raj Kumari Bhardwaj till its disposal in the year 1979 by her in favour of the defendant on receipt of consideration vide sale deed Ext. PW2/6. Therefore, it is satisfactorily established on record that the possession of suit land from the year 1962 i.e. execution of sale deeds in favour of the plaintiff remained throughout with the mother. The entries in record-of-rights from 1969 onward also show that it is said Smt. Raj Kumari Bhardwaj who was owner in possession of the suit land. Mother, therefore, was the true owner of the property in dispute and the onus to prove otherwise was upon the plaintiff which she failed to discharge.

24. Plaintiff and her husband both have stated in one voice that Smt. Raj Kumari Bhardwaj shifted to Bombay somewhere in 1979 and started living there and thereafter never came back to Dharamshala during her life time. In case the plaintiff and for that matter her husband PW-3 were not aware about the transfer of the suit land in favour of the defendant, what arrangement they made to look after and manage the same, nothing has come on record in this behalf. It has come in the evidence that the mother of the plaintiff was not seen in Dharamshala after two weeks of the sale of the suit land in favour of the defendant. It is significant to note that as per plaintiff's version after 1962 she never visited Dharamshala. Her husband PW-3, however, has come forward with

the version that during the period from 1969 to 1976 his family some time resided at Bombay and some time at Dharamshala.

25. Plaintiff was the only issue of Smt. Raj Kumari Bhardwaj. Nothing has come on record that relations of said Smt. Bhardwaj with the plaintiff were not cordial. On the other hand, it is the plaintiff who looked after her mother at Bombay. Their relations, therefore, were not strained. In such circumstances, it cannot be said by any stretch of imagination that the sale of the suit land at the instance of her mother was not genuine and rather result of fraud and misrepresentation. Plaintiff being the only child of her parents, it can reasonably be believed that the mother has not sold the land to the detrimental of daughter's (plaintiff's) interest.

26. There is Rapat in the Rojnamcha that the plaintiff was a Benamidar and real owner was her mother Smt. Raj Kumari Bhardwaj. On the basis of the Rapat, mutation Ext. PW4/4 was attested in favour of the mother of the plaintiff on 15.3.1969 by the Assistant Collector 1st Grade. As a matter of fact entries in the revenue record were required to be corrected which in fact were corrected by way of this mutation. There was no question of transfer of the suit land in favour of the mother as it was already with her. As noticed supra, the Rapat Rojnamcha further reveals that the status of the plaintiff was only that of a Benamidar qua the suit land. Therefore, it is crystal clear that the transaction of the suit land in favour of the plaintiff was in the capacity of a Benamidar. On behalf of the plaintiff, reliance has been placed on the judgment of the Apex Court in Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, and in Valliammal (D) by Lrs. Vs. Subramaniam and Others, also. In these judgments the Hon'ble Apex Court has laid down the following 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 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."

27. It is seen from the given facts and circumstances and the evidence discussed supra that the principles settled in the above judgments do not support the case of the plaintiff and rather lead to the only conclusion that she was only a Benamidar so far as the land in dispute is concerned.

28. On the other hand, the law laid down by the Apex Court in Syed Abdul Khader Vs. Rami Reddy and Others, clinches the point in issue in the present lis. The

same reads as under:

"19. In this case the father of the plaintiff throughout acted in relation to others as the owner of the property though the plaintiff was the real owner of the property. The father of the plaintiff executed agreement D-18 to sell the land to defendant 1. The transaction was completed in the presence of the plaintiff and the consideration was put in the hands of the plaintiff. Plaintiff would certainly be estopped from contesting the validity of the sale on the ground that the father had no authority to sell the land or on the ground that though his father entered into the agreement Ext. D-18, his constituted attorney defendant 34 acted as a mere rubber stamp.....

24. Undoubtedly, Kazim Yar Jung was holding a high office in Nizam's Government. It is rational to believe that he may have influenced the decision of the Nizam to grant the land and that he may not have taken the patta in his own name. The patta may, therefore, have been granted in favour of his minor son, the plaintiff. Does that make the plaintiff a Benamidar? Section 82 of the Indian Trusts Act, 1882, provides that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. Now, there is no evidence to show that the patta was for consideration. It is said that there was a grant of land and it is not clear that it was meant to be a gift of land. Even if the Nizam in appreciation of the services rendered by the plaintiff's father granted the land to the plaintiff, it could not be said that any consideration flowed from the father of the plaintiff so as to make the plaintiff a Benamidar. The genesis of the concept of benami is that consideration for a transfer must flow from one person and the transfer is taken in the name of the other person and the consideration so flowing for the transfer was not intended to be a gift in favour of the person in whose name the transfer is taken. All these ingredients of benami are absent in this case and, therefore, the contention that the plaintiff was a Benamidar cannot be accepted."

29. Learned Single Judge has, therefore, committed no illegality or irregularity while arriving at a conclusion that transaction of the suit land in favour of the plaintiff was Benami.

Point No. 2

Whether mutations Ext. PW2/3 and PW2/4 attested in the name of Smt. Raj Kumari Bhardwaj, the mother of the plaintiff are illegal, null and void.

30. Much has been said qua the legality and validity of Mutation Ext. PW4/4 attested in the name of Smt. Raj Kumari Bhardwaj, mother of the plaintiff. Our attention has been drawn to item No. 8.1(1) to 8.1 (4), 8.15 and 8.25 of Chapter 8 of Land Record Manual. Chapter 8 provides the procedure to be followed at the time of alteration of the status of an owner. Items No. 8.15 and 8.25 of Chapter 8 relevant in this matter read as follows:

"8.15 The status of a landowner or tenant cannot be altered except

a) by agreement of all the parties interested, or

b) in consequence of a decree or order which is binding upon them, or

(c) in accordance with facts proved or admitted to have occurred. (Section 38 of the Himachal Pradesh Land Revenue Act, 1954).

8.25 Any transfer of land in contravention of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 is void. The Revenue Officer shall refuse mutation of such void transfer."

31. Reliance on behalf of the plaintiff has also been placed on the judgment of this Court in *Smt. Mili Saint David v. Shri Dulo*, 1986 Sim. L.C. 120, para 3 whereof reads as follows:

"3..... In other words, mutations are to be attested on the spot by the Tehsildar. Further according to para 383 of the Manual, "every mutation order must clearly state the place where it was passed, the date on which it was passed and also whether the parties interested were present or, if any one was absent, the way in which his evidence was obtained or, if it was not obtained, what opportunity was given to him to be present." From the guidelines contained in the Manual, it is apparent that the interested parties have to be given an opportunity of being present and statement of parties and witnesses have to be very briefly recorded in the mutation order....."

32. The judgment again that of our own High Court in *Besru v. Shibu*, 1999(1) Sim. L.C. 343, lays down the principle that mutation should be attested after holding due inquiry.

33. Learned counsel has further placed reliance on the judgment of this Court in *Bhagat Ram v. Atma Ram*, 2000(1) Sim. L.C. 185, on the issue, which reads as follows:

"12.A bare reading of the above provisions shows that mutation is to be entered in respect of acquisitions through release, settlement, mortgage, exchange, sale and creation of tenancy rights. In the present case the report entered by the Patwari does not relate to acquisition of rights in the land in dispute in any of the above said mode. The defendant No. 2 had just asked that his name be entered as owner of the land in dispute along with the plaintiff. There is nothing in Ext. P-3 to suggest as to how the defendant had acquired any interest in the land in dispute."

34. We have carefully considered the above provisions of land Record Manual and also the law laid down by this Court in the judgments supra. Admittedly, the plaintiff was recorded owner in possession of the suit land in the revenue record. There is no denying to the settled legal principles that entries in the revenue record cannot be altered without associating owner thereof by issuance of notice. The present, however, is an exceptional case for the reason that mutation dated

15.3.1969 produced by the plaintiff and admitted by the defendant has to be seen in the given facts and circumstances of this case. A reading of the mutation order shows that there was a report in the Rojnamcha that the plaintiff was only a Benamidar and real owner was her mother Smt. Raj Kumari Bhardwaj. Therefore, entries in the revenue record were required to be corrected, which in fact, were corrected and no transfer of property had taken place. Hence, any inquiry by the Assistant Collector would not have led to anything for the reason that no change in the ownership had taken place by a registered document after the purchase of the property in the name of plaintiff in the year 1962 and only revenue entries were got corrected vide mutation dated 15.3.1969 Ext. PW2/4. True it is that the documents on the basis whereof a mutation is entered and attested are not retained and the same rather are seen and returned.

35. It has been claimed that Smt. Raj Kumari Bhardwaj, the mother of the plaintiff has managed the attestation of mutation in her name in connivance with the revenue authorities. PW-3 while in the witness box has stated that the entries in the revenue record qua the suit land in the name of her mother-in-law were changed by the revenue authorities fraudulently. Interestingly enough, the ingredient of fraud have neither been pleaded nor proved. Therefore, the order of mutation having been passed by the competent authority in normal course of business can be presumed to be correct, unless contrary is proved. Support in this behalf can be drawn from Section 114(e) and (f) of the Evidence Act. It is seen from the written statement that the defendant has set out a plea that the mutation of the suit land was attested in the name of Smt. Raj Kumari Bhardwaj with the consent of the plaintiff. Meaning thereby that said Smt. Raj Kumari Bhardwaj was the real owner, because it is only on account of this fact, the entries were required to be corrected. The Rapat entered in Rojnamcha Vakyati, to the effect that the plaintiff was a Benamidar so far as the suit land is concerned, as it was purchased by her mother from her own funds. The plaintiff herself has admitted her mother in possession of the suit land and also that she was managing the same throughout from the day it was purchased. An admission being a statement of fact is a best proof. In case admission is clear-cut, accurate, ex-facie, unequivocal and categorical, it can always be relied upon. A vague statement, however, cannot be construed as an admission. What an admission constitutes, has been defined by the Apex Court in *Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead)* by Lrs. and Another, , which reads as follows:

"If admission is proved and if it is thereafter to be used against the party who has made it the question comes within the provisions of Section 145 of the Evidence Act. The provisions in the Evidence Act that "admission is not conclusive proof" are to be considered in regard to two features of evidence. First, what weight is to be attached to an admission? In order to attach weight it has to be found out whether the admission is clear, unambiguous and is a relevant piece of evidence. Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it, it is sound that if a witness is under cross-examination on oath,

he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule. Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence will be of no avail and cannot be utilized against him."

36. The plaintiff, therefore, cannot wriggle out herself from the admission made by her. As such, mutations Ext. PW2/3 and PW2/4 were legally and validly attested in favour of her mother said Smt. Raj Kumari Bhardwaj.

Point No. 3

Whether the defendant is a bona fide purchaser on payment of sale consideration?

37. It is seen from the revenue record, i.e. Jamabandi for the year 1966-67 that Smt. Raj Kumari Bhardwaj, the transferor, was recorded owner in possession of the suit land. Mutation thereof was attested in her favour on the basis of Rapat on 15.3.1969. Rapat Rojnamcha on the basis whereof mutation has been attested that shows the plaintiff was only a Benamidar and it is her mother, who was owner in possession of the suit land. Not only this, plaintiff has further admitted that suit land remained throughout in possession of her mother. It cannot be said that the plaintiff or her husband had no knowledge about the sale transaction in favour of the defendant for the reason that as per own admission of her husband PW-3 he had installed a woolen spinning unit at Dharamshala in the year 1969-70, which remained in operation till 1976. He used to visit Dharamshala and stay in the house of his mother-in-law. As his mother-in-law had no other property at Dharamshala, therefore, it is the suit property which was of her only property there. PW-3 has not said that the house was that of his wife, the plaintiff. Reference in this behalf can also be made to Ext. PW9/D-3, his previous statement in a Court at Bombay.

38. Therefore, when the entries with regard to the title of the mother of the plaintiff qua the suit land were clear, no other and further inquiry as envisaged under Section 17(b) of the Registration Act in this behalf was required. Even if such an inquiry made, the same would have not resulted in any information because no change in the ownership had taken place after the execution of the sale deed in favour of the plaintiff by a registered document because the mother was the real owner of the suit land whereas the plaintiff only a Benamidar.

39. The defendant, on the other hand, on going through the entries in the revenue record and after having been satisfied qua the clear-cut title of the mother of the plaintiff over the suit land had purchased the same on payment of consideration. Even the plaintiff and her husband seem to have participated in the negotiation of the sale of land to the defendant, as has come on record by way of testimony of the scribe of the sale deed D.W.-3 Rakesh Narain Sharma and the marginal witnesses thereto D.W.-4 Shiv Shankar Sharma and D.W.-12 Tenzin Wangyal.

40. At this juncture, it is relevant to make reference to Section 41 of the Transfer of Property Act, which reads as under:

"41. Transfer by ostensible owner.

Where, with the consent, express or implied, of the persons interested in immoveable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer has acted-in good faith."

41. The legal principles settled in Chandi Prosad Ganguly and others Vs. Gadadhar Singha Roy and others ,, which read as follows:

"38 Reasonable care has been explained to mean such care as an ordinary man of business would take, and this obviously would vary with circumstances. Some circumstances would prima facie arouse suspicion and would call for a detailed enquiry; other circumstances would make only a nominal enquiry sufficient. What would an ordinary man of business feel on learning that his proposed transferor had just acquired her titled from her son and grandson? I have no doubt that an ordinary man of business would feel that the transferor's power looked very suspicious; for a transfer to a woman from her son and grandson is very unusual. The first care of an ordinary man of business in such circumstances would be to try and find out if the transfer from the son and grandson was a genuine transaction for consideration. ..."

42. The law laid down Privy Council in Nageshar Prasad Pande v. Raja Pateshri Partab Narain Singh and another, AIR 1915 Privy Council 103 , also reads as follows:

"Where A's name had been entered n the revenue papers but the ownership of the property had vested in B by virtue of a prior supratnama by the last male holder and by virtue of a will of his wife to whom the property had been sold by her husband, A's transferee cannot claim to have a good title to the property unless he can show that after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith."

43. Further, the judgment in Har Narain Prasad vs. Ashiq Husain and Others,AIR 1942 313 (Oudh) , the relevant portion whereof reads as follows, has also been relied upon on behalf of the plaintiff. The relevant extract thereof reads as follows:

"If the transferee has not made necessary inquiries about the title of the real owner, the protection afforded by S.41 is not available to him

A mere inspection of the revenue record is not a sufficient inquiry and a transferee who acts on an entry in the village record of rights as evidence of the title of his transferor cannot be held to have acted in good faith."

44. The law laid down by Hon"ble Apex Court in Sadig Hussein and others v. Cooperative Central Bank Yeotmal and others, AIR (39) 1952 Nagpur 106, reads as follows:

"7. The principle question for decision is whether the defendants 1 and 4 are entitled to the protection of Section 41 of the Transfer of Property "Act. This section is an exception to the general rule that no person can dispose of an interest in property that is not vested in him and therefore the onus is on the transferee to bring his case within this section. The transferee has to prove the following elements, namely (a) that the transferor is the ostensible owner, (b) that he is clothed with the insignia of ownership with the consent express or implied of the real owner (c) that the transfer is for consideration and (d) that the transferee has acted in good faith taking reasonable care to ascertain that the transferor had power to transfer. If any one of these elements is absent, the transferee is not entitled to the benefit of this section. The question whether the section applies to a given set of facts is a question of law. Unfortunately the lower appellate court has mixed up the findings of fact and the conclusions to be drawn therefrom."

45. On this issue, the judgment of Punjab & Haryana High Court in Gurbinder Singh and Others Vs. Lal Singh and Others, , has also been relied upon. The relevant portion thereof reads as follows:

"In order to deprive a real owner of his rights in immovable property under Section 41 it must be established that he had given his consent express or implied to another to represent himself as the owner of the said property and that mere inactivity on the part of the real owner even with the knowledge of the transfer could not amount to implied consent within Section 41 and could not debar him from acquiring his property from the transferee with the period of limitation unless by some word or conduct on his part he had induced the transferee to believe that his transferor was competent to make the transfer."

46. Similarly, the ratio of the judgment of Allahabad High Court in Mehdi Hasan Vs. Ram Ker, , relied on behalf of the plaintiff also reads as follows:

"23..... It is not clear that the defendant -respondent did not act like a prudent person nor did he make proper enquiry before obtaining a sale deed from Smt. Khatibunnisa. The mere fact that the name of Smt. Khatibunnisa was recorded at the relevant time in the revenue papers was not enough in law to enable the defendants-respondent to plead that he was a bona fide purchaser of the property for value and that the sale deed in his favour could not therefore, be assailed by the plaintiff."

47. The overwhelming case law relied upon by learned counsel for the plaintiff is hardly of any help in this case for the reason that it is specifically pleaded and proved that she was a Benamidar so far as the suit land is concerned and that it is her mother, who was recorded as owner in possession of the suit land. She, therefore, was competent to transfer the suit land in favour of the defendant.

The defendant hence is a bona fide purchaser of the suit land on payment of consideration.

48. Therefore, it is clear that the defendant is a bona fide purchaser and the learned Single Judge has not committed any illegality and irregularity while arriving at such conclusion.

Point No. 4

Whether the transaction of sale in issue is violative of the provisions contained under Section 31 of FERA and Section 118 of H.P. Tenancy and Land Reforms Act?

49. On this point, it is deemed appropriate to make reference to Section 31 of the Foreign Exchange Regulation Act, 1973, which reads as follows:

"31. Restriction on acquisition, holding, etc., of immovable property in India.--

(1) No person who is not a citizen of India and no company (other than a banking company) which is not incorporated under any law in force in India [***] shall, except with the previous general or special permission of the Reserve Bank, acquire or hold or transfer or dispose of by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India: Provided that nothing in this sub-section shall apply to the acquisition or transfer of any such immovable property by way of lease for a period not exceeding five years.

(2) Any person or company referred to in Sub-section (1) and requiring a special permission under that sub-section for acquiring, or holding, or transferring, or disposing of, by sale, mortgage, lease, gift, settlement or otherwise any immovable property situate in India may make an application to the Reserve Bank in such form and containing such particulars as may be specified by the Reserve Bank.

(3) On receipt of an application under sub-section (2), the Reserve Bank may, after making such inquiry as it deems fit, either grant or refuse to grant the permission applied for:

Provided that no permission shall be refused unless the applicant has been given a reasonable opportunity for making a representation in the matter:

Provided further that if before the expiry of a period of ninety days from the date on which the application was received by the Reserve Bank, the Reserve Bank does not communicate to the applicant that the permission applied for has been refused, it shall be presumed that the Reserve Bank has granted such permission. Explanation.--In computing the period of ninety days for the purposes of the second proviso, the period, if any, taken by the Reserve Bank for giving an opportunity to the applicant for making a representation under the first proviso shall be excluded.

(4) Every person and company referred to in Sub-section (1) holding at the commencement of this Act any immovable property situate in India shall, before

the expiry of a period of ninety days from such commencement or such further period as the Reserve Bank may allow in this behalf, make a declaration in such form as may be specified by the Reserve Bank regarding the immovable property or properties held by such person or company."

50. Learned Single Judge has discussed and decided the controversy qua the permission as envisaged under Section 31 of the FERA under Issue No. 3. The permission as envisaged under the Section has been granted by the Reserve Bank of India vide letter No. 795/C-432-87/88 dated 7th October, 1987 on the following conditions:

"(i) The property so acquired should be used solely for bona fide residential purpose for self and the family

(ii) The property should not be transferred or disposed of by way of sale, lease (for a period exceeding 5 years), gift, mortgage or otherwise in any manner without prior permission of the Reserve Bank of India,

(iii) No new construction on/and extensions/additions to the property should be made without prior permission

(iv) Income, if any, accruing from the property or the sale proceeds thereof, if sold at a later date, or any income that may accrue on investment of the sale proceeds will not be allowed to be repatriated outside India in any manner."

51. In this case, the plea of the plaintiff is that the defendant had violated conditions No. 1 and 3 enshrined in the letter *ibid*, whereby Reserve Bank of India has accorded permission to the defendant to acquire the suit land. The plea so raised, however, is beyond the pleadings as nothing to this effect finds mention in the plaint. Any how, the permission has been granted by the Reserve Bank of India vide letter referred to hereinabove. Nothing finds mention in Section 31 of the Act reproduced in this judgment in *para supra* that *ex post facto* permission cannot be granted.

52. On the other hand, the order of mutation is Ext. PW4/1, which has been proved by PW-4 Banbari Lal. The above letter, whereby permission was granted by the Reserve Bank of India, finds mention in the order of mutation. Above all, nothing has come on record by way of the report of the Local Commissioner that the buildings constructed over the suit land by the defendant are being used for the purposes other than specified in the letter, whereby Reserve Bank of India has accorded the permission or that no permission has been obtained for raising the construction of such buildings from the authorities. Otherwise also, on account of there being violation, if any, on the part of the defendant, it is exclusively within the domain of the Reserve Bank of India to take action against the defendant and the plaintiff has nothing to do in this behalf.

53. In the grounds of this appeal, the violation of condition Nos. 1 and 3 has been pleaded as one of the grounds. The plaintiff, however, has miserably failed to plead and prove that the structure the defendant raised over the suit land is

not being used for bona fide residential purposes and that after the grant of permission by the Reserve Bank of India, the defendant has raised new construction over the land in dispute without prior permission. Reliance has been placed on the judgment of the Apex Court in *Winston Tan and Another Vs. Union of India (UOI) and Another*, . It is seen from this that the same is under SAFEMA (Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976) and not FERA (Foreign Exchange Regulation Act, 1973). Learned Senior Advocate has failed to satisfy us as to how this judgment is attracted in the present case.

54. On the other hand, the judgment rendered by a coordinate Bench of Delhi High Court in *Ajit Prasad Jain Vs. N.K. Widhani and Others*, clinches the controversy, as it has been held in this judgment that Section 31 of the FERA does not place restriction on foreign citizen to enter into an agreement to sell or transfer any immovable property situated in India. The law laid down in this judgment reads as follows:

"26. In support of the objection under this issue defendants have relied upon Section 31 of the Foreign Exchange Regulation Act, 1973. The contention of defendants is that defendant No. 2 is not a citizen of India and as such he could not transfer or dispose of by sale, settlement or otherwise any immoveable property situate in India without prior permission of the Reserve Bank of India and as such the agreement to sell is void. In support of the contention that defendant No. 2 has acquired citizenship of German Democratic Republic reliance is placed on citizenship certificate dated 17.7.1970 (Ex. D6/1). It does appear from the said certificate that defendant No. 2 had acquired citizenship of German Democratic Republic but in my view that has no effect on the validity of the agreement in question. Section 31 of the Foreign Exchange Regulation Act on which reliance has been placed by the defendants only places a restriction on a foreign citizen on transfer or sale, mortgage, lease, gift, settlement or otherwise of any immoveable property situate in India except with the previous general or special permission of the Reserve Bank of India. The said provisions do not place any restriction on entering into agreement like Ex. PW2/1. The said provisions also do not place an absolute bar to the transfer or sale of any property and as such it cannot be said that the agreement itself will become void. It is well settled that a contract for sale by itself does not create any interest in or charge on such property (See: Section 54 of the Transfer of Property Act). Thus it cannot be held that the agreement is void on the objection raised in preliminary objection No. 4 based on Section 31 of the Foreign Exchange Regulation Act. The said provisions do not bar grant of relief of specific performance to the plaintiff and the question of permission of the Reserve Bank of India will arise if at all, at the stage of execution of the sale deed. Consequently, issue No. 5A is also answered against the defendants."

55. Learned Single Judge, therefore, has rightly understood this part of the controversy while answering issue No. 3A against the plaintiff.

56. Similarly, Section 118 of H.P. Tenancy and Land Reforms Act also reads as under:

"118. Transfer of land to non-agriculturists barred.--(1) Notwithstanding anything to the contrary contained in any law, contract, agreement, custom or usage for the time being in force, but save as otherwise provided in this Chapter, no transfer of land (including transfer by a decree of a civil court or for recovery of arrears of land revenue) by way of sale, gift, will, exchange, lease, mortgage with possession, creation of a tenancy or in any other manner shall be valid in favour of a person who is not an agriculturist."

57. This ground, as now raised in the memorandum of appeal is, however, not available to the plaintiff for the reason that it was not her case pleaded in the plaint that the acquisition of the land by the defendant was barred under Section 118 of the H.P. Tenancy and Land Reforms Act.

58. In view of what has been stated hereinabove, we find no merit in this appeal and the same as such deserves dismissal. Consequently, the appeal is dismissed, however, with no order as to costs.