Raj Ballav Das and Others Vs Haripada Das and Others

Court: Calcutta High Court

Date of Decision: July 18, 1983

Acts Referred: Evidence Act, 1872 â€" Section 101, 3, 92
Limitation Act, 1963 â€" Article 113, 58
Transfer of Property Act, 1882 â€" Section 41

Citation: AIR 1985 Cal 2

Hon'ble Judges: Padma Khastgir, J

Bench: Single Bench

Judgement

Padma Khastgir, J.
The plaintiffs Raj Ballav Das, Nani Gopal Das and Krishna Mohan Das all residing at No. 14 Buddhu Ostagar Lane,

Calcutta filed this suit against Haripada Das, Smt. Renubala Das, Dilip Kumar Das, Sabita Rani Das, Pratima Rani Das, Chhabi Rani Das, Arati

Das and Sulkkha Das for a declaration that each of the plaintiffs has 1/5th share in the premises No. 14, Buddhu Ostagar Lane, Calcutta and the

allotment in severally of their respective shares, also for a declaration that the plaintiffs 1 and 2 and the defendant No. 1 Byomkesh Chandra Das

the predecessor of the defendant 2 acted as a benamdar of plaintiff 3 and one Sajan Bala Dassi in respect of their respective shares in acquiring the

premises No. 14, Buddhu Ostagar Lane, Calcutta and for other consequential reliefs.

2. According to the plaintiffs the plaintiffs and the defendants are the joint owners in possession as permanent lessees of the premises. One Rebati

Mohan Das had two sons Radha Ballav Das and Pran Ballav Das. Radha Ballav died in the year 1940 and Pran Ballav died in the year 1948

leaving his widow Sajan Bala Dassi as his own heir and legal representative. Radha Ballav left behind his widow. Suresh Nandini Das who died in

the year 1960 and Raj Ballav, Byomkesh, Nani Gopal, Krishna Mohan and Haripada Das as his sons and Labonya Prova Das as his daughter.

Byomkesh died in the year 1977 leaving behind his widow Renu Bala Das, Dilip Kumar as his son and Sabita, Protima, Chhabi, Arati and Sulpkha

as his daughters. The parties were residents of Dacca in Bangladesh prior to partition of India. The plaintiffs, the defendants No. 1 and their uncle

Pran Ballav Das were joint owners and in possession of a house and building numbered as No. 61, Kulutola in Dacca before the partition. After

the partition the plaintiffs decided to come to Calcutta by exchanging their property at Dacca with this property belonging to a muslim gentleman.

As a result on 7th Aug. 1950 by an agreement in writing between Sajan Bala Dassi, the widow of Pran Ballav Das the plaintiffs in one part and one

Samsul Haque Chowdhury on the other part agreed that premises No. 61, Kulutola of Dacca would be exchanged with premises No. 14, Buddhu

Ostagar Lane, Calcutta belonging to the said Samsul Haque Chowdhury. Apart from the exchange of the two properties the plaintiffs as also the

other co-owners would pay a sum of Rs. 5,500/- to the said Samsul Haque Chowdhury. The price of the premises No. 14, Buddhu Ostagar

Lane, was assessed verbally at Rs. 20,000/-and the premises No. 61, Kulutola Dacca was assessed at Rs. 14,500/-. Under the circumstances the

difference in value was paid in cash. The plaintiff No. 1 paid a further sum of Rs. 634/- as and by way of advance to the said Samsul Haque

Chowdhury. According to the plaintiffs although the said cheque was granted by the plaintiff 1 it was given for and on behalf of all the owners.

Permanent deeds of lease were executed in respect of 14, Buddhu Ostagar Lane, Calcutta in favour of the plaintiffs. Similarly a registered deed of

lease was executed in respect of premises No. 61, Kulutola Dacca. After the execution of the lease plaintiffs Nos. 1 and 2 and the defendant 1

Haripada Das and the said Byomkesh Ch. Das came to Calcutta with their families leaving plaintiff No. 3. Krishan Mohan Das and the widow of

Pran Ballav Das, Sajan Bala Dassi at Dacca, according to the plaintiff for the purpose of giving possession of the Dacca Property to Samsul

Haque Chowdhury and also to look after the common interests of the plaintiffs and the defendant. It was agreed according to the plaintiff that the

lease in respect of 14, Buddhu Ostagar Lane, Calcutta would be executed by the parties present in Calcutta for themselves and also as the

benamdars of plaintiff 3 and the said Sajan Bala Dassi. Execution and registration of the lease was effected by the other parties and not by the

plaintiff 3 and the said Sajan Bala Dassi. It was the plaintiff"s case that the lease was entered into by the parties present in Calcutta as benamdars

of the plaintiff 3 and the said Sajan Bala Dassi. On 4th Nov. 1950 a registered lease was executed in respect of No. 14 Buddhu Ostagar Lane,

Calcutta : the plaintiffs 1 and 2 and the defendant No. 1 and the said Byomkesh Chandra Das executed the said lease as lessees but according to

the plaintiff they acted also as benamdars so far the shares of plaintiff 3 and Sajan Bala Dassi were concerned. By a further deed d(. 30th Jan.

1951 executed by the said Samsul Haque Chowdhury through their constituted attorney in favour of the plaintiffs 1 and 2, the defendant 1 and the

said Byomkesh Chandra Das the right to receive rent was acquired by them. The plaintiffs again asserted that such right also was created as

benamdars in favour of plaintiff 3 and the said Sajan Bala Dassi.

3. According to the plaintiff the plaintiff 3 and Sajan Bala Dassi came to Calcutta in May. 1951 and occupied their respective undivided shares by

residing in the said premises. The said Sajan Bala Dassi died in October, 1967 childless leaving the parties to the suit as her heirs and legal

representatives. Under the circumstances according to the plaintiffs the defendant 1 has an equal 1/5th share in the premises No. 14, Buddhu

Ostagar Lane, Calcutta along with the defendants 2 to 8 who as heirs and legal representatives of Byomkesh Chandra Das inherited 1/5th share in

the said premises.

4. According to the defendants plaintiff 3 Krishna Mohan Das does not have any share in the premises No. 14, Buddhu Ostagar Lane, Calcutta as

a lessee. They also denied the case of benami inasmuch as the lease in respect of the said premises was not taken in the benami name of any

person. The plaintiff 3 and the said Sajan Bala Dassi did not come to Calcutta to be a party to the lease. The permanent lease executed by Samsul

Haque Chowdhury in respect of the said premises was in favour of plaintiffs 1 and 2 and one Byomkesh Chandra Das. The defendant No. 1 did

not act as a benamdar for the plaintiff 3 or the said Sajan Bala Dassi. Inasmuch as the plaintiff 3 and Sajan Bala Dassi were close relations they

were allowed to come and stay in the said premises but by virtue of such possession they did not became the joint owners of the said premises.

Under the circumstances according to the defendants plaintiffs 1 and 2 have an equal 1/3rd share and the defendants 2 to 8 as heirs and legal

representatives of Byomkesh Chandra Das were entitled to 1/3rd share in the said premises. The plaintiff 3 was residing in the said premises as a

mere licencee. Under the circumstances he has no right, title and interest in the said premises save and except that of a licencee. The defendants

further claimed that the business carried on in Card Board Boxes under the name and style of ""S. S. Card Board Box Co."" in the said premises

No. 14. Buddhu Ostagar Lane, Calcutta also formed part of the joint family properties which should be divided among the co-owners.

5. The following issues were raised and settled at the trial :

1. Are the plaintiffs 1 and 2 and the defendants jointly entitled to the leasehold property situate at premises No. 14. Buddhu Ostagar Lane.

Calcutta, as alleged in the written statement?

2. Is the Card-Board business carried on under the name and style of S. S. Card Board Box Company at the said premises. a joint family business

as alleged in the written statement?

3(a) Has Krishna Mohan Das, the plaintiff 3, any right, title or interest in the premises No. 14. Buddhu Ostagar Lane. Calcutta as alleged in the

plaint?

3(b) Is Krishna Mohan Das, the plaintiff 3, interested in the Card Board Business under the name and style of S. S. Card Board Box Company

carried on at premises No. 14. Buddhu Ostagar Lane, Calcutta?

4. To what relief, if any, are the parties entitled?

6. Raj Ballav Das, Haripada Das, Dilip Kumar Das, Sisir Kumar Biswas and Renubala Das gave evidence. Raj Ballav Das gave evidence in

support of the plaint. He stated that the premises was taken on lease in the benami name of the defendant 1 as also in the name of Sajan Bala Dasi

apart from the parties of the said lease. He contended that inasmuch as the property at Kulutola. Dacca belonged to all the brothers and one Sajan

Bala Dasi by exchange of the said property they have also acquired a right in the Calcutta Property. He stated that M/s. S. S. Card Board Box

Co. was not a joint family business but he was the sole proprietor of the said business. In fact Corporation licence had been granted in his name as

the sole proprietor of the said business. He could not give any sufficient explanation as to why the lease could not be taken also in the name of

defendant No. 1 as also Sajan Bala Dasi although he stated that there were disturbances in Dacca during those periods but it was difficult to

accept his statement that due to that difficult-situation it was not possible for the plaintiff 3 or Sajan Bala Dasi to execute any Power of Attorney in

favour of the plaintiff or the other brothers so that the lease could also be executed in their favour. In respect of the Dacca lease in respect of

property. Raj Ballav Das executed the lease for self and also on behalf of his brothers Byomkesh Das, Nani Gopal Das, Haripada Das. Krishna

Mohan Das. He could not assign any valid reason as to why the lease executed in respect of the Calcutta Property could not mention the name of

Krishna Mohan Das as also Sajan Bala Dasi. Krishna Mohan Das came to Calcutta in May 1951. The Corporation records were mutated in the

name of Raj Ballav. Byomkesh. Nani Gopal and Haripada Das. According to the defendants both Krishna Mohan Das and Sajan Bala Dasi had

no desire to come to India but they stayed in Dacca and took possession of the stationery shop run by the joint family known as ""Metro Stores

along with the furniture, utensils and other movable properties belonging to the joint family. Under the circumstances it was the case of the

defendants that by way of exchange both Krishna Mohan Das and Sajan Bala Dasi opted for the movables belonging to the joint family.

7. Krishna Mohan Das in his evidence supported Raj Ballav Das. In the deed of perpetual lease being exhibit "E", Byomkesh. Nani Gopal,

Haripada and Raj Ballav were parties to the said lease. The name of Krishna Mohan or Sajan Bala did not appear there. The case of benami had

been purported to be made out in the suit although no explanation and/or reason could be given as to why the lease could not be executed by the

other brothers on his behalf and on behalf of Sajan Bala Dasi. Since his visit to India in the year 1951 he took no steps to have his name mutated

with the records of the Corporation of Calcutta nor any rectification of the deed of lease, was made.

8. According to Haripada Das. Raj Ballav, Radha Ballav, Nani Gopal, Byomkesh and Haripada are interested as lessees for 99 years of the

property situate at 14, Buddhu Ostagar Lane, Calcutta. Krishna Mohan Das and Sajan Bala Dassi did not come to India but stayed back at

Dacca and looked after the family stationery shop known as ''Metro Stores"", and also decided to take the entire utensils and furnitures belonging to

the joint family. He also claimed that S. S. Card Board Box Co. did not belong to Raj Ballav Das but it belonged to all joint family members.

According to him the said Metro Stores was a big shop of the value of Rs. 8000/- to 9000/- at that time whereas the value of the property at

Kulutola was assessed at Rs. 14,500/-. According to his evidence Krishna Mohan Das came to Calcutta in the year 1960 after the death of his

mother. In para 10 of the Written Statement filed on behalf of the defendant it was admitted that the plaintiff No. 3 as also Sajan Bala Dasi took

the lease in respect of premises No. 14, Buddhu Ostagar Lane, Calcutta for which they did not come to Calcutta. Then again in para 15 they

stated that the plaintiffs 1 and 2 and the defendant 1 had equal 1/3rd share and not 1/5th share in the premises No. 14, Buddhu Ostagar Lane,

Calcutta and the defendants 2 to 8 as heirs of Byomkesh Das had inherited the undivided 1/3rd share in the said premises. He maintained that

Krishna Mohan Das and Sajan Bala Dassi relinquished their interest in the property in order to take charge of the business and other household

articles including utensils and furniture.

9. Nani Gopal Das supported the case of Raj Ballav Das being the plaintiff 2 and he only claimed 1/5th share in No. 14, Buddhu Ostagar Lane,

Calcutta. He admitted that the lease in respect of the Calcutta Property was executed by the four brothers Raj Ballav, Byomkesh, Nani Gopal and

Haripada and he also admitted that the deed of lease in respect of the Dacca Property was not signed by him but Raj Ballav Das signed on his

behalf. In fact Byomkesh, Haripada and Nani Gopal gave the power of attorney to Raj Ballav to sign the document on their behalf. They executed

that the power of attorney at Dacca in favour of Raj Ballav Das which was also registered there.

10. Renu Bala Dasi and Dilip Kumar Das corroborated the evidence of the defendant No. 1 and contended that they were entitled to 1/3rd share

and not 1/5th share as stated in the plaint. The evidence of Dilip Kumar Das regarding the business of S. S. Card Board Box Co. was full of

contradiction and unacceptable to this Court.

11. The two main points for consideration before this Court were whether there was a case of benami as asserted by the plaintiffs as also whether

the right to enforce the partition by the plaintiff 3 on the basis of such benami had by law of limitation become time barred, so far the question of

limitation is concerned.

12. In the case reported in AIR 1930 270 (Privy Council) it was held that there could be no right to sue until there is an accrual of the right

asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is

instituted.

13. In the case reported in AIR 1931 9 (Privy Council) it had been held that under Article 120 of the Limitation Act there could be no right to sue

unless there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the

defendant. The principles laid down in the case reported in AIR 1930 270 (Privy Council) were relied on and reiterated.

14. In the case reported in Gannon Dunkerley and Co., Ltd. Vs. Union of India (UOI), it was held that under Article 120 there was no right to sue

until there was an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the

defendant against whom the suit is instituted. The principle laid down in AIR 1930 270 (Privy Council) was followed in that case.

15. In the case reported in Pothukutchi Appa Rao and Others Vs. Secretary of State for India in Council, it was held :

There is nothing in law which says that the moment a person''s right is denied, he is bound at his peril to bring a suit for declaration. It would be

most unreasonable to hold that a bare repudiation of a person''s title, without even an overt act, would make it incumbent on him to bring a

declaratory suit. A party surely has a right to elect as to when he may bring a suit for vindicating his right, when there are several or successive

denials. True, a mere continuation of a prior cause of action does not give rise to a fresh right, for instance, where property is attached, the

procuring of the attachment is the wrongful denial and the cause of action arises when the attachment is effected; in such a case it is wrong to hold

that there has been a ""continuing wrong"" so as to give a fresh starting point during the whole period the attachment subsists. But from this it does

not follow that an owner can never ignore an attack against his title, however casual or trivial, without his right to sue being imperiled in respect of a

subsequent invasion. It is for the plaintiff to decide at his option, on which act he chooses to found his cause, of action, and when he does so it is

with reference to the particular infringement he alleges that the limitation should be reckoned.

16. In the case reported in Mst. Rukhmabai Vs. Lala Laxminarayan and Others, it was held :

Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the

said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose.

There can be no ''right to sue'' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat

to infringe that right, by the defendant against whom the suit is instituted. Where there are successive invasions or denials of a right, the right to sue

under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit.

Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so

as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat

effectively invades or jeopardizes the said right"".

The legal position may be briefly stated thus : The right to sue under Article 120 of the Limitation Act accrues when the defendant has clearly and

unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and

innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives

rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right"".

17. In the case reported in 40 CWN 566 : Rai Kiran Chandra Roy Bahadur and Others Vs. Tarak Nath Gangopadhyay and Others, it was held :

A wrong entry in a record of rights prepared under Chap. X of the Bengal Tenancy Act itself furnished to the person in respect of whose rights

the wrong entry is made a cause of action for bringing a suit for the declaration of his right, irrespective of whether a present injury to his right is

threatened or not.

To such a suit the six years'' rule under Article 120 of the Limitation Act applies and the starting point of limitation is the date of the final publication

of the record-of-rights.

But the plaintiff is not bound to institute a suit for a declaration, that the entry is wrong. He can wait and when an invasion on his rights is made on

the basis of the entry, he can come and sue for a declaration of his title on the ground that the record is wrong. Such a suit will be in time if brought

within six years of the threatened invasion"".

18. In the case reported in Radha Gobinda Roy and Others Vs. Sri Sri Nilkantha Narayan Singh and Others, it was held :

Where the suit is not a purely declaratory suit but is one for declaration of title with consequential relief of recovery of rent in which it is necessary

for the Court to come to a finding as to title as a preliminary to the decree for rent and the claim for recovery of rent is not barred by time, then the

prayer for determination of title would equally be unaffected and would not be barred by time.

19. In the case reported in C. Mohammed Yunus Vs. Syed Unissa and Others, it was held :

A suit for a declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article

120. Under the article there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and

unequivocal threat to infringe that right.

The plaintiffs claiming as heirs of one F sued to obtain a declaration of their rights in a certain institution which was in the management of trustees

with an injunction restraining the defendants (other claimants) from interfering with their rights. The trustees never denied their right.

Held that if the trustees were willing to allow the plaintiffs their legitimate rights, mere denial by the defendants of the rights of the plaintiffs would

not set the period of limitation under Article 120 running against them.

20. In the case reported in Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another, it was held (at p. 317) :

If a party who wants the suit to be struck down as time barred cannot specify a firm date for terminus a quo, it cannot ask the court to find the

issue on limitation in its favour.....

21. The source of all such authorities is AIR 1930 270 (Privy Council) where Sir Binod Mitter delivering the judgment of the Board, lays down the

law, in reference to Article 120 as under :

There can be "no right to sue" until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat

to infringe that right, by the defendant against whom the suit is instituted"".

22. Article 113 of the new Limitation Act which corresponds to Article 120 of the previous Act provided as follows :

113. Any suit for which no Three years When the right to

period of limitation is sue accrues.

provided elsewhere in this

Schedule.

23. Article 58 of the Limitation Act provides that to obtain any other declaration the limitation is three years from the date when the right to sue first

accrues. In view of the fact that earlier of the filing of the present suit for partition there was no positive denial of the plaintiff 3"s right to the

property and in view of the fact that when such positive denial came in the written statement for the first time the plaintiff No. 3"s claim for a

declaration of share in the suit premises and/or partition of the same does not appear to be barred by the Law of Limitation. Under the

circumstances the defendants'' assertion that the plaintiff No. 3"s claim for declaration of share as also for partition of the properties is barred by

the Law of Limitation is unacceptable to this Court.

24. So far the claim of benami is concerned, apart from the oral evidence given by the plaintiffs in the suit the plaintiffs could not render any cogent

evidence. In respect that the lease was taken in respect of the suit premises in the benami name of the plaintiff 3 and one Sajan Bala Dassi. (Sic)

There was no clear admission in the written statement by the defendants to that effect but the written statement was not drafted in a happy manner.

The deed of lease executed in respect of the Calcutta Property did not contain the names of the plaintiff 3 as also the said Sajan Bala Dassi.

Moreover the Corporation records had not also been mutated in their names, admittedly even after the arrival of the plaintiff 3 in Calcutta long

prior to the filing of the suit.

Although the corresponding lease executed in respect of the Dacca property contained their names the Power of Attorney was granted in favour of

one of the brothers by the other co-owners for the purpose of execution of the lease on behalf of all the owners. Similarly the lease deed in respect

of the Calcutta property could also be executed to that effect if it was the intention of the parties that the plaintiff 3 as also Sajan Bala Dassi would

also have some interest in the Calcutta property. It had been contended by the learned lawyer appearing on behalf of the defendants that in view of

the provisions of Sections 91 and 92 of the Evidence Act no oral evidence could be admitted in respect of the said deed of lease to vary and/or

enlarge the scope of the said lease.

25. In the case reported in Ram Narayan Pandey and Others Vs. Kedar Nath Tewari and Others, it was held (at p. 464) :

In my opinion the language of Section 92 lends no support to the argument of the learned counsel. Both Section 92 and Section 91 that precede

it, speak of the ''terms'' of a contract, and what they say is that if the terms have been incorporated in the form of a document then in all cases like

the present where the law requires the contract to be reduced to writing, the terms of the contract must be proved by the document itself or by

secondary evidence thereof in appropriate cases, and that no oral evidence shall be admitted for the purpose of contradicting, varying, adding to or

subtracting from the terms of the contract. But the question as to who are the parties to the contract is not a term of the contract. The contracting

parties arc the authors of the terms of the contract and not the terms of the contract themselves. Section 92 itself recognises the distinction between

the ""terms"" of a contract and the contracting parties when it speaks of ""the terms of any such contract.....etc."" in its opening sentence and of its

terms"" towards the close, and also makes pointed reference to ""the parties to the instrument"" while providing for exclusion of oral evidence for the

purpose of contradicting, varying etc. from the ""terms"" of the contract.

That the terms of the contract are something distinct from the parties thereto is apparent also from the Contract Act. Section 2 of which speaks of

proposal and promise and then provides in Clause (c) that the person making the proposal is called the promisor, and the person accepting the

proposal is called the promisee, and Clause (e) clarified the matter further by providing that every promise and every set of promises, forming the

consideration for each other, is an agreement. The same conclusion follows from Section 58 of the Transfer of Property Act which contains

separate definitions of mortgage, mortgagor, mortgagee, mortgage-money and mortgage deed. In other words, the mortgagor and the mortgagee

are parties to the contract of mortgage, the terms of which are set out in the mortgage deed, but they are not the terms thereof. I am, therefore,

clearly of the opinion that the reference to the terms of the contract in Sections 91 and 92 of the Evidence Act does not extend to the parties to the

contract and that what is excluded by Section 92 is oral evidence designed to contradict, vary, add to or subtract from the terms agreed upon by

the parties, and not as to who are the real contracting parties"".

26. In the case reported in (1981) 85 CWN 172 Pulin Behari Addy v. Debendra Nath Addy a Division Bench of this High Court held :

Now about the point of law. The submissions made on behalf of the appellant, that the case of benami has to be proved beyond reasonable

doubt, finds support from the decision of the Judicial Committee in AIR 1926 PC 77 (supra). But this view is opposed to the observations of Lord

Hobhouse in the case of Uman Prasad v. Gandharp Singh in (1886-87) 14 Ind App 127 and of Lord Shaw in the case of Hakim Khan v. Bharat

in (1919) 23 C WN 321 : (AIR 1918 PC 137), and these observations have been consistently followed by our Court. It will be sufficient to refer

to the Bench decision of Bhuban Mohini Dasi and Others Vs. Kumud Bala Dasi and Others, . Sir Ashutosh Mukherjee presiding over the Bench

has stated that benami transactions are very familiar in Indian practice and hence slight quantity of evidence is necessary to show that a transaction

is a benami one. The decision must rest on legal grounds based on legal testimony and not on suspicion. It seems that in a civil suit the Court should

decide according to the preponderance of probability. This is not a criminal proceeding where the case has to be proved beyond reasonable

doubt.....

In the case of Dilip v. Nawaz Kunwar reported in (1908) ILR 30 All 258 (PC) Sir Arthur Wilson has stated that when the evidence adduced by

the parties is not convincing and is open to criticism, the Court should rely on the surrounding circumstances, the position of the parties, their

relation to one another, the motive which governs their action and their subsequent conduct. Venkataramiah, J. has stated in the latest case of

Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, that in benami cases the source of the money is the most important test.

The Court has to take into consideration the possession of the property, the motive governing the transaction, the position of the parties, the

custody of the document and the parties" conduct in dealing with the property, i. e. the surrounding circumstances"".

27. In the case reported in Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, it was held (at pp. 732-33) :

The second case which is loosely termed as a benami transaction is a case where a person who is the owner of the property executes a

conveyance in favour of another without the intention of transferring the title to the property thereunder. In this case, the transferor continues to be

the real owner. The, difference between the two kinds of benami transactions referred to above lies in the fact that whereas in the former case

there is an operative transfer from the transferor to the transferee though the transferee holds the property for the benefit of the person who has

contributed the purchase money, in the latter case, there is no operative transfer at all and the title rests with the transferor notwithstanding the

execution of the conveyance. One common feature, however, in both these cases is that the real title is divorced from the ostensible title and they

are vested in different persons. The question whether a transaction is a benami transaction or not mainly depends upon the intention of the person

who has contributed the purchase money in the former case and upon the intention of the person who has executed the conveyance in the latter

case. The principle underlying the former case is also statutorily recognised in Section 82 of the Trusts Act, 1882, which 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. This view is in accord with the following observations made by this Court in Meenakshi Mills, Madurai Vs. The

Commissioner of Income Tax, Madras, :--

In this connection, it is necessary to note that the word ''benami'' is used to denote, two classes of transactions which differ from each other in

their legal character and incidents. In one sense, it signifies a transaction which is real, as for example when A sells properties to B but the sale

deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of

transactions which is usually termed as benami. But the word ''benami'' is also occasionally used, perhaps not quite accurately, to refer to a sham

transaction, as for example, when A purports to sell his property to B without intending that, his title should cease or pass to B. The fundamental

difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the

transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in

the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B,

to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether

the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.

The principle enunciated by Lord Macmillan in the case of AIR 1931 175 (Privy Council) has been followed by this Court in Jaydayal Poddar

(Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, where Sarkaria J. observed thus (at p. 172) :

It is well settled that the burden of proving that"" a particular sale is benami and the apparent purchaser is not the real owner, always rests on the

person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly

prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the

intention of the party or parties concerned and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But

such difficulties do not relieve the person asserting the transaction to be benami or 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 formulas or acid tests, uniformly applicable in all situations, can be laid down; yet in weighing the

probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source from which the purchase

money came; (2) the nature and possession of the property after the purchase; (3) motive if any, for giving the transaction a benami colour; (4) the

position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title deeds after the sale

and (6) the conduct of the parties concerned in dealing with the property after the sale"".

28. The principle governing the I determination of the question whether a transfer is a benami transaction or not may be summed up thus : (1) the

burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) if it is proved that the

purchase money came from a person other than the person in whose favour the property is transferred, the purchase is prima facie assumed to be

for the benefit of the person who supplied the purchase money, unless there is evidence to the contrary; (3) the true character of the transaction is

governed by the intention of the person who has contributed the purchase money and (4) the question as to what his intention was has to be

decided on the basis of the surrounding circumstances, the relationship of the parties, the motive governing their action in bringing about the

transaction and their subsequent conduct etc.

29. In view of the judgment reported in Ram Narayan Pandey and Others Vs. Kedar Nath Tewari and Others, oral evidence is permissible to

show who were the actual contracting parties.

30. In view of the facts and circumstances of this case and in view of the admission made in the Written Statement that lease was executed by the

proof of evidence and also in view of the fact that no case of the plaintiff No. 3 and the said Sajan Bala Dassi having agreed to take the stationery

store known as ""Metro Stores"" as also of accepting the brass utensils having been made in the written statement itself and in view of the fact that

the consideration money for the Calcutta property came in exchange of the property at Coolutola, Dacca admittedly belonging to the parties in

equal shares with the said Sajan Bala Dassi and in view of the fact that the plaintiff 3 as also the said Sajan Bala Dassi lived in Calcutta the

premises uninterruptedly since 1951 or according to the defendants since 1961 till date, this Court answers the issues in the manner following :

Issue No. 1 in the negative. Issue No. 2 in the negative. Issue No. 3(a) in the positive. Issue no. 3(b) in the negative. So far issue No. 4 is

concerned this Court passes a decree in terms of prayers (1) and (2) and appoints Miss Aruna Mukherjee, Advocate as a Commissioner of

Partition to effect partition in metes and bounds into five equal shares. The remuneration of the Commissioner is fixed at 60 G. Ms. to be shared by

the parties equally. Each party to pay and bear its own costs. Commissioner of Partition, Registrar and all parties to act on a signed copy of the

minutes of this order on the usual undertaking. Stay granted for a fortnight from date.