

(1973) 09 CAL CK 0021**Calcutta High Court****Case No:** Appeal No. 14 of 1968

Tara Sundari Sen

APPELLANT

Vs

Pasupati Kumar Banerjee

RESPONDENT

Date of Decision: Sept. 24, 1973**Acts Referred:**

- Limitation Act, 1908 - Article 120, 142, 144
- Specific Relief Act, 1877 - Section 42
- Transfer of Property Act, 1882 - Section 51
- Trusts Act, 1882 - Section 82

Citation: (1976) 1 ILR (Cal) 551**Hon'ble Judges:** S.K. Mukherjea, J; Ajay K. Basu, J**Bench:** Division Bench**Advocate:** B.C. Dutt and Bhabanath Dutt, for the Appellant; A.C. Bhabhra, Chandan Banerjee and Rajat Ghosh, for the Respondent**Final Decision:** Dismissed**Judgement**

S.K. Mukherjea, J.

This appeal is directed against a judgment and decree passed in a partition suit by S.K. Datta J. on November 29, 1967.

2. One Bhuban Mohan Banerjee left two sons Asutosh and Pramatha. Pramatha died intestate leaving his widow, Sm. Malatimala, the Defendant No. 2 and several daughters. Asutosh died intestate leaving three sons Nilratan, Nagendra, Rajani and two daughters Sm. Santabala and Dasmoni. Santabala married Nagendra Nath Ganguly. She died, survived by her husband, in September 1942, intestate and childless leaving some immovable properties, premises No. 33, Paikpara Raja Manindra Road and premises Nos. 27A, 27B and 27C, Anath Nath Deb Lane, Paikpara. Of her brothers, Rajani and Nagendra Nath Banerjee were alive at the time of her death, Nilratan having predeceased her.

3. Asutosh and Pramatha died siesed and possessed of premises No. 5, Ganguly Lane, Calcutta.

4. Upon the death of Asutosh, his interest in the said premises devolved on Nilratan Banerjee, Nagendra Nath Banerjee and Rajani Kanta Banerjee. Sm. Malatimala surrendered her interest in the said premises in favour of her daughters who in turn surrendered their interest in favour of their sons. The Defendant No. 7 Sm. Malatimala Debi, the wife of Nagendra Nath Banerjee, purchased by a deed dated July 25, 1953, the one-half share in the said premises from the daughters' sons of the said Pramatha Nath Banerjee deceased. In the result, the Defendant No. 7 Sm. Malatimala Debi became entitled to one-half share in premises No. 5, Ganguly Lane by the said purchase.

5. Rajani died in 1955, while the present suit was pending. It is not in dispute that the Defendant No. 1 Sm. Rakhal Dasi Debi, the Defendant No. 1A Chandi Charan, the Defendant No. 1B Chanchal Kumar and the Defendant No. 1C Chapal Kumar, the widow and sons of Rajani are entitled to 1/24th share each in the said premises. The Defendants Nos. 3, 4, 5 and 6 Provat Kumar, Hara Kumar, Hari Kumar and Biswanath, sons and heirs of Nilratan who died in 1937, are entitled to 1/24th share each in the said premises. Pasupati, the son of Nagendra Nath Banerjee the Plaintiff in the suit, is entitled to a 1/12th share. Malatimala Debi, the widow of Nagendra Nath Banerjee, is entitled to 1/12th share as an heir of her husband apart from her one-half share in the said property which she acquired by purchase as stated hereinbefore. She has, therefore, a 1/12th share in the said property.

6. Santabala, a daughter of Asutosh Banerjee, purchased premises Nos. 27A, 27B and 27C, Anath Nath Deb Lane and premises No. 23, Paikpara Raja Manindra Road, Calcutta.

7. Nagendra Nath Banerjee died intestate on November 1, 1944, leaving him surviving his son Pasupati Kumar Banerjee, the Plaintiff-Respondent and his widow Malatimala Debi, the Defendant No. 7, as his heirs and legal representatives.

8. After the death of Santabala, Nagendra Nath Ganguly sold premises No. 27B, Anath Nath Deb Lane, by an instrument dated February 8, 1946, to one Kanailal Chakrabarty who in his turn sold the same by an instrument dated July 15, 1948, to Sm. Snehalata Debi, the Defendant No. 8. He also sold by an instrument dated September 25, 1947, premises No. 33, Paikpara Raja Manindra Road, to Sm. Tarasundari Sen, the Defendant No. 9. On November 27, 1948, Nagendra Nath Ganguly died. Letters of Administration in respect of the estate of Nagendra Nath Ganguly were granted to the Defendant No. 1 Rajani Kanta Banerjee, since deceased, by the Alipore Court. Rajani Kanta Banerjee died on December 11, 1955, leaving the Defendants Nos. 1, 1A, 1B and 1C, his widow and sons respectively as his heirs and legal representatives.

9. By an order made by this Court in its testamentary and intestate jurisdiction the Defendant No. ID, Sm. Kalyani Debi, was appointed the Administratrix ad litem to the estate of Nagendra Nath Ganguly.

10. Pasupati Banerjee instituted the present suit in 1949 originally against Rajani Kanta Banerjee, Malatimala Debi, the Defendant No. 2, Provat (Kumar Banerjee, Hara Kumar Banerjee, Hari Kumar Banerjee, Biswanath Banerjee, Malatimala Debi, the Defendant No. 7, as also against Sm. Snehalata Debi, Sm. Tarasundari Sen, the transferees of the said properties and Sm. Kalyani Debi, the Administratrix ad litem to the estate of Nagendra Nath Ganguly for a declaration that Santabala is not the benamdar of Nagendra Nath Ganguly in respect of the said Paikpara properties that the Defendants Tarasundari Sen and Sm. Snehalata Debi are trustees for and on behalf of the Plaintiff and Defendants Nos. 1, 1A, 1B, 1C and 7 in respect of the said properties, for a declaration that the transfer of the said properties are void and inoperative, for an order that the relative conveyances in respect thereof be delivered up and cancelled, for partition of premises No. 5, Ganguly Lane and the properties described in Schedule "B" to the plaint and for other reliefs.

11. There is no dispute as to the shares of the parties in premises No. 5, Ganguly Lane. The Plaintiffs' case is that the sale and transfer of the properties described in Schedule "B" by Nagendra Nath Ganguly were and are void and inoperative. The sale by Nagendra Nath Ganguly claiming to be the owner of those properties was made on the basis that his wife Santabala was his benamder in respect of the said properties. The said Rajani Kanta Banerjee was a confirming party to the instruments of sale pretending to be the only heir of Sm. Santabala. The Plaintiff denies that Santabala was the benamdar of Nagendra Nath Ganguly or that Rajani Kanta Banerjee was the only heir of Santabala. His case is that the purchasers, that is to say, the Defendants Nos. 8 and 9 and the said Kanailal Chakrabarty at all material times knew that the properties which they purported to purchase belonged to the Plaintiff, the said Rajani Kanta Banerjee, since deceased and the Plaintiff's mother, Malatimala Debi, the Defendant No. 7.

12. In his written statement Rajani contended that the properties in Schedule "B" were purchased by Nagendra Nath Ganguly in the benami name of his wife. Santabala had no money of her own. The said properties having been purchased with the money of Nagendra Nath Ganguly were his absolute properties. Neither the Plaintiff nor his father Nagendra Nath Banerjee ever preferred any claim or raised any question with regard to the said properties till sometime after the death of Nagendra Nath Ganguly. Nagendra Nath Ganguly sold bona fide one of those properties to Kanailal Chakrabarty and another to Sm. Tarasundari Sen. The Plaintiff was fully aware of the said sales but never raised any objection. Rajani further stated that the Plaintiff's father Nagendra Nath Banerjee was insane at the material time, that is to say, at the time when Santabala died and succession opened. He further asserted that the properties were acquired and buildings were constructed thereon

by Nagendra Nath Ganguly out of his own income. Rajani made a declaration in the deed of release that the said properties were the absolute properties of Nagendra Nath Ganguly. Rajani's case was that he was only heir of Santabala, the Plaintiff's father having been insane at the material time.

13. Malatimala Debi, the Defendant No. 2, filed a written statement and stated that she was entitled to one-half of the Ganguly Lane properties described in Schedule "A" to the plaint.

14. Sm. Snehalata Debi, the Defendant No. 8 who purchased premises No. 27B, Anath Nath Deb Lane, from Kanailal Chakrabarty, stated in her written statement that Nagendra Nath Ganguly purchased the said properties with his own money for his own benefit, made constructions at considerable expense on the said land with his own money and, therefore, owned, possessed and enjoyed the said properties as his own absolute properties. The said Santabala Ganguly was a mere benamdar of her husband in relation to those properties.

15. Nagendra Nath Ganguly was, therefore, fully entitled to sell and convey the said property to Kanailal Chakrabarty who sold and conveyed the same to her. In those circumstances, she is the absolute owner of the said premises and is in possession thereof.

16. Sm. Tarasundari Sen, the Defendant No. 9, the purchaser of premises No. 33, Raja Mahindra Road, also claimed that the property was purchased by Nagendra Nath Ganguly in the benami name of his wife and the constructions raised in the said premises were also made with his own money. In those circumstances, Nagendra Nath Ganguly was the absolute owner of the said property and he owned and possessed the said property continuously and absolutely until he sold the same to her. She claimed that in any event at the time of death of the said Santabala the said Rajani Kanta Banerjee was her only heir and legal representative in respect of any stridhan property which she might have died possessed of inasmuch as her other brother the said Nagendra Nath Banerjee was insane at the time succession opened. She further stated that the Plaintiff and the original Defendant No. 1 and the Defendant No. 7 had at all material times full knowledge of the sale of the said premises by the said Nagendra Nath Ganguly and they expressly or impliedly consented to the sale of the said premises by the said Nagendra Nath Ganguly as the sole owner thereof and she, after reasonable care to ascertain that the said Nagendra Nath Ganguly had power to make the transfer, acted in good faith in purchasing the said property. In para. 10 of her written statement she stated that she made substantial additions, alterations and improvements in and to the said premises at an expense of about twenty-two thousand rupees. Finally, she stated that if in spite of the aforesaid contentions the Court holds that the Plaintiff and the Defendants Nos. 1 and 7 have any share or interest in the said premises the entire purchase money together with the costs incurred by her in making additions, alterations and improvements in and to the said premises should be directed to be

paid by such party or parties as the Court thinks fit.

17. The following issues were raised at the trial:

Issues

1. Is the suit bad for misjoinder of cause of action?
2. Did Santabala Debi purchase the said premises No. 27B, Anath Deb Lane and 33, Raja Manindra Road, with her own stridhan money?
3. Did the said premises No. 27B, Anath Deb Lane and 33, Raja Manindra Road, upon the death of Santabala, devolve upon the brothers Nagendra and Rajani?
4. Was Nagendra Nath Banerjee a lunatic during his lifetime and at the date of death of the said Santabala?
5. Are the Defendants Nos. 1A, 1B and 1C entitled to the share of Rajani in the said two premises?
6. Was Nagendra Nath Ganguly the absolute owner of premises No. 27B, Anath Deb Lane and No. 33, Raja Manindra Road and Santabala was his benamdar?
7. Did Sm. Tarasundari Sen purchase premises No. 33, Raja Manindra Road, for valuable consideration and without any notice or knowledge of any alleged claim of the Plaintiff and of the Defendant No. 7?
8. Did the Defendant Tarasundari Sen make substantial additions, alterations and improvements in and to the said premises at an expense of Rs. 22,000 or any other sum after the purchase of the said property? If so, is she in any event entitled to the entire purchase money together with the said sum of Rs. 22,000 or any part thereof utilised by her in making additions, alterations and improvements in and upon the said premises?
9. Has this Hon'ble Court jurisdiction to try the suit in respect of premises No. 27B, Anath Deb Lane, and/or premises No. 33, Raja Manindra Road?
10. Should leave granted under Clause 12 of the Letters Patent be revoked?
11. Is the suit barred u/s 42 of the Specific Relief Act?
12. To what relief, if any, is the Plaintiff entitled to?
18. The main question which fell for decision before the learned Judge is whether Nagendra Nath Ganguly purchased the properties in the benami name of his wife Santabala or Santabala purchased properties with moneys she received from her husband by way of gift.
19. In the conveyance of August 15, 1920, by which Santabala purchased premises No. 23, Paikpara Raja Manindra Road, subsequently re-numbered as 33, Paikpara Raja Manindra Road and 2, 1A, 27B and 27C, Anath Deb Lane, it is recited that the

property was purchased by her out of her own stridhan money. Her husband Nagendra Nath Ganguly is a signatory to the said document. On September 29, 1923, Santabala mortgaged the property in favour of Sm. Radharani Dasi. In mortgage deed Santabala is described as the mortgagor. It is recited in the mortgage deed that the mortgagor is absolutely seized and possessed of or otherwise well and sufficiently entitled to the said premises together with two-storeyed masonry building thereon. The consideration for the mortgage, namely, a sum of Rs. 6,000 is paid to Santabala and also to Nagendra Nath Ganguly by the mortgagee. In the deed of mortgage Nagendra Nath Ganguly is a confirming party. On July 7, 1926, the mortgagee released the property by an instrument. It is noteworthy that in the deed of mortgage Sm. Santabala alone is the only mortgagor and in the deed of release the only releasee. As regards the mortgage deed and the deed of release it may be legitimately contended that the description of Sm. Santabala as the absolute owner and, therefore, the sole mortgagor and the sole releasee of the property is not inconsistent with the benami character of the property. There is, however, no reason why in the conveyance of August 15, 1920, it should be specifically declared that she purchased the property out of her stridhan money and Nagendra be a signatory to the said deed. Such a declaration is not only unnecessary in a conveyance by which a husband acquires a property in the benami name of his wife but it also militates against the claim that the property was not purchased by the wife out of her personal funds. The only purpose of Nagendra Nath Ganguly having been a signatory to the said document must have been to represent to the world at large that the property was being acquired by Sm. Santabala as her absolute property and that her husband had no right, title or interest in the same. In fact, the evidence of all the documents executed before the death of Santabala is that Santabala purchased the properties on her own and not on behalf of her husband as his benamdar. There is no reason why the Plaintiff's case that she received the money as a gift from her husband should be disbelieved especially in view of the common case that Santabala had no private means of her own apart from what she might have received from her husband by way of gift.

20. It is noteworthy that Nagendra Nath Ganguly never asserted, while his wife was alive, that the properties were his own held in the benami name of his wife. It was only after she died that he made an application to the Collector, Corporation of Calcutta, for mutation of his name as owner of those properties in place of his deceased wife. There he stated that he came into possession of the properties on September 21, 1942, that is to say, after Santabala died. He, therefore, admitted that Santabala was in sole possession of the property while she was alive, a situation incompatible with the benami character of the property. If Nagendra Nath Ganguly were the absolute owner of the property he should have claimed that he was throughout in possession of the same.

21. On February 3, 1945, Rajani who permanently lived under the shelter of Nagendra Nath Ganguly with his children and who was one of the heirs and legal

representatives of Santabala in respect of her stridhan properties, executed a deed of release in respect of the same in favour of Nagendra Nath Ganguly. The deed recited as follows:

And whereas the said Releasee after having purchased the said schedule properties wholly with his money and for his exclusive benefits aforesaid and, thereafter, had been all along enjoying and possessing the said properties and every part thereof together with the structures thereon by constructing valuable structures on the same with his own money for his sole benefit and as exclusively belonging to him by realising rents and on payment of taxes and other charges And whereas having regard to the fact that the said schedule properties had been purchased in the name of his wife the said Santabala Debi, since deceased, doubt may arise that she and on her death the Releasor may claim right title interest to the said schedule properties or the structures raised thereon or in any portion of them And whereas the parties hereto have agreed that the Releasor would execute a proper Indenture in favour of the said Releasee disclaiming and releasing the said Schedule properties with the structures and every part of them Now This Indenture Witnesseth that in pursuance of the said Agreement and in consideration of the premises the said Releasor declares that the said Schedule properties with structures and every part of them have been purchased and constructed by the said Releasee with his own money and for his exclusive benefit and that at no time the said properties or any part of them belonged to or possessed by the said Santabala Debi in her own right or for her own benefit and she had no claim thereto and further that as her husband's legal representative no right title interest or claim in the said Scheduled properties with structures thereon or any portion of them has devolved on the said Releasor and that the said Scheduled properties together with the structures thereon exclusively and absolutely belonging to the said Releasee and that the said Releasor disclaims any right to and releases the said properties and every part of them from all claims demands rights or interests as his of the said Santabala Debi deceased.

The deed of release executed by Rajani by which he disclaimed any right, title and interest in the property, contains an admission against his own interest and as such should have ordinarily a great deal of probative value on the question of the ownership of the property. It has to be remembered however that Rajani was a protege of Nagendra Nath Ganguly from whom he had received considerable benefit. Moreover, it was in their common interest to exclude Nagendra Nath Banerjee, who was entitled to one-half share of Santabala's ajoutuka stridhan on Santabala's death the other half share devolving on Rajani. In the facts of this case, it will be clear that, that is the reason why Rajani in the deed of release declared that Nagendra Nath Banerjee was insane and incompetent to inherit.

22. By his will Nagendra Nath Ganguly bequeathed substantial properties to Rajani's eldest son Chandi and his daughter Kalyani. There is evidence that

Nagendra Nath Ganguly maintained Rajani and his family for years. In fact, it transpires that he mortgaged premises Nos. 27A, 27B, 27C, Anath Nath Deb Lane, to the Bengal Central Bank Ltd. to pay off the debts of Chandi. In the mortgage deed he asserted that he was the owner of the properties, his wife Santabala having been his benambar in respect thereof.

23. On February 12, 1945, Nagendra Nath Ganguly entered into an agreement for sale with one Kanailal Chakrabarty in respect of premises No. 27B, Anath Nath Deb Lane.

24. On February 5, 1945, Nagendra Nath Ganguly made an affidavit stating that the Anath Nath Deb Lane properties were his personal properties.

25. On February 8, 1946, he sold premises No. 27B, Anath Nath Deb Lane, to Kanailal Chakrabarty from whom Snehalata, the Defendant No. 8, subsequently purchased the same.

26. Likewise on August 31, 1947, Nagendra agreed to sell premises No. 33, Paikpara Raja Manindra Road, to Sm. Tarasundari Sen, the Defendant No. 9 and on September 25, 1947, he sold the property to her. Upendra, the husband of Rajani's daughter Kalyani and an Advocate by profession, assisted in the execution of these deeds. It is clear from the evidence on record that no enquiry, or at least no adequate enquiry, was made by the purchasers into his title of the properties which Nagendra sold to Kanailal Chakrabarty or to Sm. Tarasundari Sen. It is strange that the purchasers did not reasonably satisfy themselves that the properties were in fact benami properties or that Nagendra Nath Banerjee was in fact insane and, therefore, not competent to inherit from Santabala. In the absence of any deed of release or disclaimer executed by Nagendra Nath Banerjee, to rely merely on the assertions made by Nagendra Nath Ganguly and Rajani that the properties were acquired by Santabala as the benamdar of her husband was highly unsafe. No assertion by Nagendra Nath Ganguly himself or Rajani could" affect the right, title and interest of Nagendra Nath Banerjee as an heir of Santabala in respect of her ajoutuka stridhan. Rajani's interest was adverse to that of Nagendra Nath Banerjee because, if the property was Santabala's ajoutuka stridhan, Nagendra was entitled to one-half and Rajani to the other half share. If purchasers chose to purchase properties solely on the basis of assertions of benami and insanity made by those who had a direct interest in the assertions they made without making due enquiries, they have only to thank themselves, if patent and fatal defects in the vendor's title are detected subsequently.

27. At the trial the Defendants Nos. 8 and 9 relied on the admission made by the Plaintiff that the source of the moneys with which the property was purchased by Santabala was the husband's income or savings. There is evidence that Nagendra Nath Ganguly employed Alijan Mistri, a contractor, to build the house. He paid the contractor and the supervisor Ambika Charan Maity in cash and by cheques from

time to time. That is the evidence of Jiban Krishna Maity, a local pleader. Alijan Mistry is dead. Therefore, his evidence is not available.

28. The secretary of the Suhrid Library, Jiban Krishna Maity and Upendra Nath, a relation of Santabala, deposed that Nagendra had let out a room to the library in premises No. 33, Raja Manindra Road. The Defendants relied on other relevant facts. Nagendra Nath Ganguly was in occupation of the house. He borrowed money from Bengal Central Bank on the security of the property mortgaged by his wife. He was a confirming party to the deed of mortgage. He had disposed of the properties by successive wills. That was a fact of which the Plaintiff and his father ought to have been reasonably aware. Moreover, when Nagendra sold those properties neither the Plaintiff nor his father objected to the sale. Rajani had executed a deed of disclaimer in respect of those properties. There he had declared that those properties belonged absolutely to Nagendra. When the Plaintiff was asked by Nagendra to execute a deed of release, he did not assert his rights in respect of those properties. He merely took time to consider. The fact remains that Nagendra Nath Banerjee and after him the Plaintiff did not object to Nagendra remaining in occupation after Santabala's death. There is no evidence, at least no documentary evidence, that they granted any permission to Nagendra Nath Ganguly to live in the house.

29. The Plaintiff did not take any steps for the protection of the property during the riots in the neighbourhood. Rates and taxes were paid by Nagendra and not by the Plaintiff's father or the Plaintiff. The Plaintiff did not make any formal demand in writing for recovery of his share in the properties before he brought the suit for partition. The suit was filed long after Nagendra Nath Ganguly died.

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

31. The more pertinent question is whether the payments were made by the husband on his own account or the monies paid to the contractor or the supervisor were intended to be a gift to Santabala. Assuming that the monies spent by the husband were not intended to be a gift, the building will still be Santabala's property on the principle *Quicquid Plantatur Solo Solo cedet*.

32. In consonance with the common practice, it will also be natural for the husband to let out a portion of the property to a stranger. No rent receipt or any other document has been produced to satisfy the Court that rents were paid to Nagendra Nath Ganguly and not to Santabala, the owner of the properties as recorded in the records of the Corporation of Calcutta. The fact that Nagendra lived in one of the properties purchased by Santabala cannot be any evidence of Nagendra's ownership. It was the most natural thing for the spouses to live in the matrimonial home, irrespective of whether property in the premises, which they had made their home, belonged to either the one or the other. The fact that in the mortgage deed Nagendra Nath Ganguly figures as a debtor and a confirming party, has again very little bearing on the question of benami. In the state of law as it then was, a mortgagee who lent money against the security of a married woman's property would ordinarily protect himself by taking measures, out of abundant caution, which would make it difficult for the husband or his successor-in-interest to challenge the mortgage. No wonder, therefore, that in the mortgage deed Nagendra Nath Ganguly figures as a joint debtor along with Santabala and also as a confirming party.

33. The contention that the Plaintiff's father or the Plaintiff did not during the lifetime of Nagendra Nath Ganguly assert their title merits serious consideration. It should be remembered that Nagendra Nath Banerjee, though not proved to be insane or of unsound mind appears to have been in a state of dotage. Moreover, he was closely related to Nagendra Nath Ganguly. After all, the property belonged to Nagendra Nath Ganguly's wife. He was childless and of a fairly advanced age. Nagendra had lived there all along with his wife. It was, therefore, not improbable that the Plaintiff's father did not assert his title while Nagendra Nath Ganguly was alive. Moreover, it has not been established that Nagendra Nath Ganguly asserted his title to the properties left by Santabala to the knowledge of the Plaintiff's father. The fact that the Plaintiff took time to consider when a request was made to him to execute a deed of release is not incompatible with his assertion of title to the property. One may release one's claim to a property for good reasons even when the claim is perfectly legitimate.

34. The payment of municipal rates by Nagendra Nath Ganguly after Santabala's death may be ascribed to the fact that he remained in exclusive possession of the properties. It was not to be expected that the Plaintiff or his father would pay the rates and taxes while Nagendra Nath Ganguly enjoyed the benefit of the properties.

35. The learned Counsel appearing on behalf of the Appellant relied on the classical case of Guran Ditta v. Ram Ditta 55 I.A. 235 in which the Judicial Committee held that in India there is no presumption of an intended advancement in favour of a wife. He also relied on AIR 1937 589 (Lahore) . There it was held that where a husband purchases some property with his money in the name of his wife, it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction and if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation. In our opinion, the necessary documentary evidence is to be found in the fact that in the conveyance by which Sm. Santabala purchased the property she is described to have provided the purchase money out of her stridhan and her husband subscribed his signature to the document as an attesting witness and also in the fact that in the deed of mortgage she is declared to be fully and absolutely entitled to the said property and her husband made him self a confirming party to the said deed. The conduct of the husband and the absence of any discernible motive for purchasing the property in the benami name of Sm. Santabala is also a piece of cogent evidence in this behalf. Even if the contention that the husband accepted the rents of the properties and managed the same be held to have been proved those facts by themselves, in our opinion, do not make any difference in the facts and circumstances of the case.

36. In Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, Gajendragadkar J. in delivering the majority judgment observed:

It is true that the actual management of the property was done by the Appellant's father; but that would in evidently be so having regard to the fact, that in ordinary Hindu families, the property belonging exclusively to a female member would also be normally managed by the manager of the family, so that the fact that Appellant's mother did not take actual part in the management of the property would not materially affect the Appellant's case that the property belonged to her mother. The rent was paid by the tenants and accepted by the Appellant's father but that, again, would be consistent with what ordinarily happens in such matters in an undivided Hindu family. If the property belongs to the wife and the husband manages the property on her behalf, it would be idle to contend that the management by the husband of the properties is inconsistent with the title of his wife to the said properties. What we have said about the management of the properties would be equally true about the actual possession of the properties, because even if the wife was the owner of the properties, possession may-continue with the husband as a matter of convenience.

In Bhubanmohini Dasi v. Kumudbala Dasi 28 C.W.N. 131 it was said that there is no presumption that a property standing in the name of a Hindu female, who is a member of the joint Hindu family, belongs to the joint family and is not her stridhan

property. This rule must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. The decision of the Court in this class of cases should rest not upon suspicion but upon legal grounds established by legal testimony.

37. As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose.

38. The most important test to be applied in these cases, however, where a husband or a father pays the money and the purchase is taken in the name of a wife, or a child, there is under the general law in India no presumption of an intended advancement in favour of wife or child as there is in England.

39. Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts, or with reference to surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property.

40. It is not in dispute that the ultimate source of the consideration for the purchase of the properties is the husband. The question, however, is whether the consideration was intended to be a gift to the wife in whose name the purchase was made. There is no evidence that it was not intended to be a gift. All the evidence there is--points to one direction and one direction alone, namely, that the husband intended the wife to acquire the property solely and absolutely. All the documents executed during Santabala's lifetime, the conduct of the husband, the absence of all motives for intending the transaction to be of a benami character and plenty of motive for making a gift to the wife to make provisions for her future needs unmistakably indicate that the property or rather the consideration for the purchase of the property was intended to be a gift to the wife.

41. Counsel for the Appellant relied on *Blackwell v. Black-well* (1943) 2 All. E.R. 579. The facts in that case were as follows:

A husband and wife separated in 1941. At that date there was standing to the credit of the wife in the books of a co-operative society a sum of ♣ 103.10s. which upon the evidence represented moneys saved from a house-keeping allowance made to the wife while the parties were living together. It was contended by the wife that this sum was her own property. It was held that in the absence of any evidence of a gift by the husband this sum belonged to the husband. This case is of no assistance to the Appellant. Each case has to be decided on its own facts. In the present case, there is evidence of a gift by the husband.

42. In [Chittaluri Sitamma alias Sitabayamma and Another Vs. Saphar Sitapatirao and Others](#), it was observed:

Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion. It is true that in Indian Law, the English rule as to presumption of advancement has not been adopted, but Section 82 of the Trusts Act recognizes that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale is taken, will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not. Where the motive alleged for a benami transaction itself that the purpose in view could be served only by a genuine transfer and not by a mere benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of beneficial interest and not as a mere benami transaction.

43. The learned Counsel for the Appellant relied on *Sura Lakshmiah Chetty v. Kothandarama Pillai* L.R. 52 IndAp 275 and *Kerwick v. Kerwick* L.R. 47 IndAp 275. These cases were decided on the evidence adduced in support of the Plaintiff's allegations. They do not appear to have any relevance to the facts and circumstances of the case before us.

44. Mr. Dutt contended that the mere fact that Narendra Nath Ganguly was a witness to the conveyance where it was recited that the property was being purchased by Sm. Santabala out of her own stridhan moneys does not estop his successors-in-interest from challenging the recital and establishing that the property was not her ajautuka stridhan but was in fact purchased by her as benamdar of her husband Narendra Nath Ganguly. He relied on the decision in [Mollaya Padayachi and Another Vs. Krishnaswami Iyer and Others](#), where it was held that attestation does not by itself import consent to or knowledge of the contents of the document. He also relied on *Mt. Jasodar Dusadhin v. Mt. Sukurmani Mehtrani* AIR 1937. There it was said:

Attestation of a deed by itself estops a man from denying anything excepting that he has witnessed the execution of the deed. It conveys neither directly nor by implication any knowledge of the contents of the document and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects.

He also relied on *Banga Chandra Dhur Biswas v. Jagat Kishore Chowdhury* L.R. 43 IndAp 249 where it was held that attestation of a deed is not by itself evidence that the attesting witness consented to the transaction effected by it. He referred to *Hari Kishen Bhagat v. Kashi Pershad Singh* L.R. 42 IndAp 64. There Ameer Ali J. in

delivering the judgment of the Judicial Committee said:

When the consent of the reversioners is relied on to validate an alienation by a Hindu widow, the consent must be established by positive evidence that upon an intelligent understanding of the nature of the transaction they consented to bind their interests; it must not be inferred from ambiguous acts nor be supported by dubious oral testimony. Mere attestation of a deed does not necessarily import consent to an alienation effected by it.

Similarly in the case of *Pandurang Krishanaji v. Markandeya Tukaram* L.R. 49 IndAp 16 the Judicial Committee observed:

Attestation of a deed does not by itself estop the person attesting from denying that he knew of its contents or that he consented to the transaction which it effects.

45. The question, however, is not whether Nagendra Nath Ganguly and his successors-in-interest are estopped from denying that the property was Santabala's stridhan. The relevant question is whether the fact that Nagendra Nath Ganguly attested to the conveyance where she is described as purchasing the property out of her stridhan and the fact that in the subsequent deed of mortgage to which Nagendra Nath Ganguly is a party she is described as absolutely entitled to the property are not evidence on the question whether the property was her stridhan property or she was merely a benamdar holding the property on behalf of her husband. The fact that Nagendra Nath Ganguly was a man of the world, understanding the English language and holding a position of responsibility in the Improvement Trust must all be taken into consideration. In that context we can do no better than recall what was said in a passage in the judgment of the Judicial Committee in *Raj Lukhes Dabea v. Gokool Chunder Chowdhury* 13 M.I.A. 228:

Their Lordships cannot affirm the proposition that the mere attestation of such an instrument by a relative necessarily imports concurrence. It might, no doubt, be shown by other evidence that when he became an attesting witness, he fully understood what the transaction was and that he was a concurring party to it, but from the mere subscription of his name that inference does not necessarily arise. But considering who Juggut Ram was and what the circumstances of this family were, their Lordships are further of opinion, that his concurrence would not, in this case, be sufficient to set up the deed.

In the present case, having regard to the relationship of the parties, the superior knowledge and understanding of the attesting witness, the fact that the recitals made in the deeds to which he attested in one case and was a party in the other, it cannot be disputed that he fully understood what the transactions were, what were the contents and imports of the deeds by which the transactions were effected. In the case of *Mt. Jasodar Dusadhin v. Mt. Sukusmani Mehtrani* Supra on which Mr. Dutt relied, the learned Judge was careful to point out that there may be cases in which attestation is made in circumstances when, coupled with other evidence of

consent and acquiescence in the execution of a document, it is relevant to the question whether the attesting witness had knowledge of the contents and agreed to them. In our opinion, Nagendra Nath Ganguly had knowledge of the contents of the relevant deeds and he had agreed to the transactions which these documents brought into existence on the basis of recitals made therein.

46. An issue has been raised that the Plaintiff's father Nagendra Nath Banerjee was insane at the time when succession opened-Nagendra Nath Banerjee was never adjudicated to be a lunatic by any Court nor is there any medical evidence to support the case of insanity. The little oral evidence, that there is, is of a highly unsatisfactory nature. Jiban Krishna Maiti deposed that Nagendra was of unsound mind, but he can hardly be described as a disinterested witness. He was a particular friend of Upendra Nath Mukherjee, the husband of Rajani's daughter Kalyani. It will be remembered that Upendra Nath Mukherjee, an Advocate, assisted Nagendra Nath Ganguly in selling one of his properties to Snehalata. Even if Maiti's evidence is accepted, it will be unsafe to conclude that Nagendra Nath Banerjee was insane in the strength of his evidence alone. As the learned Judge rightly points out there are degrees of mental abnormalities and unsoundness of mind. It will require very strong evidence, evidence of an unimpeachable character to condemn a person to the forfeiture of his inheritance on the ground of insanity. The only documentary evidence on the question is a letter from the Plaintiff to Upendra Nath Mukherjee from which it appears that Nagendra Nath Banerjee was taking W.C. Roy's pills. It is, however, not in dispute that the pills are used not only for mental disorders but also for insomnia and allied ailments. In our opinion, on the available evidence it is impossible to hold that Nagendra Nath Banerjee was a lunatic at the time of the death of Sm. Santabala Debi or at all.

47. A question has been raised as to whether Sm. Tarasundari Sen had not bona fide purchased the premises No. 33, Raja Manindra Road, for valuable consideration without any notice or knowledge of any right, title or interest of the Plaintiff to and in the said property. It is clear that she purchased the property for valuable consideration. It is equally clear that she did not make reasonable enquiries into title. She merely relied on the statement in the deed of release executed by Rajani that Nagendra Nath Banerjee was a lunatic and on assertions made by the vendor himself and Rajani that the property was purchased by Santabala as a benamdar of her husband. Nagendra Nath Ganguly, the vendor and Rajani were interested persons and she should not have relied on their bare statements. She does not appear to have investigated the title of the property at all. If she merely relied on the statement of Upendra Nath Mukherjee, Rajani's son-in-law and Jiban Krishna Maiti, Upendra's friend, she was taking considerable risks. The conveyance by which the property was purchased by Santabala clearly recited that the property was her stridhan property. The deed of mortgage recited that she was absolutely seised and possessed of the property and her husband, was a confirming party to the said deed. Moreover, she does not seem to have made any independent enquiry to

ascertain whether Nagendra Nath Banerjee was insane. In these circumstances, the learned Judge was right in holding that Sm. Tarasundari Dasi, not having made due enquiries into title, purchased the property at her peril. The same comments may be made very legitimately as regards the property purchased by Sm. Snehalata Debi. She does not appear to have made due enquiries or investigated into Nagendra Nath Ganguly's title. In these circumstances, we are firmly of opinion that the purchasers, though they are purchasers for value, are not entitled to take any advantage of the fact that they had no notice or knowledge of the Plaintiff's and his mother's right, title or interest or claim in respect of the properties because they must be held to have wilfully shut their eyes to the defect of the vendor's title by refraining from making due and reasonable enquiries.

48. It was contended on behalf of the Appellant Sm. Tarasundari Sen that she spent a sum of Rs. 22,000 on making additions, alterations and improvements in the said property. Her husband has given evidence that the said sum of Rs. 22,000 has been actually spent on the property and he has relied on some books of account. He has, however, produced receipts or vouchers for the sum of Rs. 3,671 only. Apart from the books of account there is nothing to corroborate that she has spent anything more. The learned Judge has found that it is difficult to hold that she has spent more than Rs. 3,671. There is nothing except the oral testimony of the husband, who has a very strong interest in the fate of this litigation, to corroborate the evidence furnished by the books of account.

49. It was held in [Shripati Raoji Khopare Vs. Vishwanath](#), that the amount spent for improvements is a fact within the special knowledge of the transferee and it is for him to lead satisfactory evidence in support of his claim. In the absence of corroboration by receipts or vouchers or by oral evidence of disinterested persons or of the people to whom payments were made, we do not see any reason why we should interfere with the finding of the learned trial Judge.

50. Sm. Tarasundari Sen claimed that the monies she spent on the improvements of the property purchased by her and in any event the entire purchase money should be directed to be paid to her. Section 51 of the Transfer of Property Act provides as follows:

When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

51. The amount to be paid or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction.

When, under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them.

52. Sm. Tarasundari Sen, in order to succeed in her claim for compensation for the improvement made by her, has to establish that she purchased the property in good faith. It is abundantly clear that she or those who enquired on her behalf into the title of Nagendra Nath Ganguly to the property purchased by her did not make due enquiries in that behalf. As I have already indicated she relied upon the vendor's and Rajani (Kanta Banerjee's assertions that Nagendra Nath Banerjee was a lunatic. No independent enquiry was made as to whether that was a fact. In tracing the title of the property she should have ascertained whether the property was, in fact, acquired by Santabala as a benambar of her husband and who were the heirs of Santabala if the property happened to be hers and not her husband's. These essential enquiries were not made by her. One must, therefore, conclude that in this case the purchaser wilfully shut her eyes to all defects of title which she could have found on making reasonable investigation into the vendor's title.

53. In the case of the London Joint Stock Bank v. Charles James Simmons L.R. 1892 A.C. 201 Lord Herschell observed:

If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further enquiry.

In that view of the matter it cannot be held that she purchased the property in good faith.

54. Sm. Tarasundari Sen has pleaded that she spent Rs. 22,000 on improvement. She does not say nor is there any evidence as to what is the value of the improvements at the time of the disposal of the suit, that is to say, at the time of her eviction. The value of the improvements in the buildings must be held to have depreciated in course of years and the depreciated value of the improvements is a matter to be decided on evidence. No evidence on this point has been given. She has been able to satisfy the learned trial Judge that she spent Rs. 3,671 on improvements. The evidence that she spent Rs. 3,671 is of no consequence in deciding the value of the improvements made by her at the time of passing the decree. Apart from the fact that in our opinion she did not believe in good faith that she had an absolute title to the property in the sense of Section 51 of the Transfer of Property Act, she has adduced no evidence on the value of the improvements at the relevant date. In that view of the matter no relief can be given to her in law for the improvements alleged to have been made by her.

55. Mr. B.G. Dutt, learned Counsel appearing on behalf of the Appellant, heavily relied on the decision of the Madras High Court in [Venkataswami Naidu and Another](#)

Vs. Muniappa Mudaliar and Others, and a Bench decision of this Court in Hari Bhusan Halder Vs. Sheikh Abdul and Others, . There it was held that where a person in bona fide belief that a certain property belongs to him spends money upon it and the true owner stands by and allows him to spend money and make improvements upon his land, the true owner is estopped from asserting his title to the land as against the person making improvements in such bona fide belief.

56. He also relied on a decision of the Judicial Committee in Kidar Nath v. Mathu Mal ILR 40 P.C. 555 where compensation was granted for the improvements made by the Appellant. Reliance was also placed on Plimmer v. The Mayor Councilors and Citizens of the City of Wellington L.R. 9 A.C. 699 and Willmott v. Barber L.R. 15 Ch. D. 96 These cases have no application because it is nowhere laid down that a person who does not bona fide believe that he is entitled to a certain property and yet makes improvements is entitled to compensation. Not to make reasonable investigation into the vendor's title is not to act in good faith and any belief founded on enquiry which is not reasonable or on no enquiry at all is hardly a belief held in good faith. The provisions of Section 51 of the Transfer of Property Act are clear and, in our opinion, Sm. Tarasundari Sen in claiming compensation for the improvements made by her cannot claim the benefit conferred by that section. In that view of the matter her claim for compensation for improvements must be dismissed.

57. It was contended on behalf of the Appellant that the Court had no jurisdiction to try the suit. Reliance was placed on the case of Krishna Kishore De v. Amar Nath Khettry 31 C.L.J. 272, Manindra Chandra Nandy v. Lal Mohan Ray ILR 56 Cal. 930, Doongarsee Syamji Joshi v. Mukhia Tirbhuwan AIR 1947 All. 375 and Hongkong and Shanghai Banking Corp. Vs. Official Assignee of Calcutta, The decisions in Krishna Kishore De v. Amar Nath Khettry 31 C.L.J. 272 and Hongkong and Shanghai Banking Corp. Vs. Official Assignee of Calcutta, related to cases where lands outside jurisdiction and lands within jurisdiction were the subject-matter of separate mortgage instruments. In Manindra Chandra Nandy v. Lal Mohan Ray ILR 56 Cal. 930 no leave was taken under Clause 12 of the Letters Patent to institute the suit. The Allahabad case AIR 1947 All. 375 was decided entirely on the facts of that case. In Surendra Krishna Ray v. Shree Shree Iswar Bhubaneswari Thakurani ILR 60 Cal. 54 it was held by a Division Bench of this Court presided over by Rankin C.J. that if a suit is brought in the Original Side of the High Court of Calcutta regarding lands partly within and partly outside its jurisdiction, the Court's discretion to grant leave under Clause 12 of the Letters Patent is not necessarily ousted by reason that some of the Defendants are concerned entirely with the mofussil lands. In the present case, the Plaintiff, his mother and the heirs of Rajani Kanta Banerjee each have an interest in the properties both within and outside the jurisdiction of this Court and those properties are sought to be partitioned in the suit. They are alleged to be the joint owners of all the properties. The fact that Nilratan's heirs have no interest in the properties outside jurisdiction does not take away the jurisdiction of the Court to entertain the suit. We are, therefore, of the opinion that the suit cannot be

dismissed on the ground of lack of jurisdiction.

58. One of the questions raised in this appeal, is whether the appeal is bad for misjoinder of parties and causes of action. The substance of this contention is that not every party to the suit is interested in every property which is the subject-matter of partition or declaration of title. For example, Provat, Hara Kumar, Hari Kumar and Biswanath, the Defendants Nos. 3, 4, 5 and 6, that is to say, the heirs of Nilratan Banerjee who died in 1937, do not claim any interest in the properties specified in Schedule "B" to the plaint, that is to say, the properties which were purchased by Santabala and claimed by Nagendra Nath Ganguly as properties purchased by her as his benamdar. Sm. Snehalata Debi and Sm. Tarasundari Sen, the purchasers of properties sold by Nagendra Nath Ganguly or his successor-in-interest, have no claim in the property situate in the premises No. 5, Ganguly Lane. Mr. Dutt relied on the decision of the Allahabad High Court in *Afzal Shah v. Lachmi Narain* ILR 40 All. 7 where it was found that

the suit was bad for misjoinder of parties and causes of action, in that there was no community of interest between the various Defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the Plaintiff. The High Court permitted the suit to be withdrawn on terms as to costs, with liberty to the Plaintiff to bring separate suits against each of the Defendants.

59. Mr. Dutt relied on *Ramtaran Nag Mazumdar v. Hari Charan Nag Mazumdar* 18 C.L.J. 556 where it was decided that plots belonging to some and not to all the co-sharers, cannot be brought into hotchpot in a suit for partition and also in *Sris Chandra Datta Chaudhuri v. Mahim Chandra Datta Chaudhuri* 23 C.L.J. 231 is held that a partition suit can include the property wherein each of the parties to the suit does not claim an interest.

60. Reliance was also placed on *Nilakanta Iyer v. Ramnarayan Iyer and Ors.* AIR 1949 Mad. 410. There in a suit for partition besides impleading his brothers, father, mother and sister as Defendants, the Plaintiff impleaded the sister's husband as one of the Defendants. The claim of the Plaintiff as representing his family consisting of himself, his father and brothers against the sister's husband with reference to certain leases was that the title in them vested in the family and the sister's husband was only a benamdar. But the averments in the plaint itself showed that the sister's husband claimed a paramount title. It was held that the claim against the sister's husband could not be tacked on to a general suit for partition. The claim to the leases was not based under the same right under which the partition was sought. Hence, the suit was bad for misjoinder of parties and causes of action.

61. It is hardly necessary to stress that whether a suit is bad for multifariousness or for misjoinder of parties depends on the facts and circumstances of the case. The

Plaintiff's case is that not only he but also his mother, the Defendant No. 7, as also Rajani Kanta Banerjee's heirs have a share in all the properties. It is true that Nilratan Banerjee's heirs have no interest in Schedule "B" properties. Nevertheless, the fact remains that the suit is essentially for declaration of title to Schedule "B" properties or for a determination of the question as to whether Nagendra Nath Banerjee was a lunatic at the time when Santabala died. In other words, the real issues in the suit are whether Schedule "B" properties were benami properties of Nagendra Nath Ganguly and whether Nagendra Nath Banerjee was insane at the material time.

62. In [Anukul Chandra Chakravarty Vs. Province of Bengal, Pabna Collectorate and Others](#), it is held that when common questions of law and fact are involved, a suit impleading several Defendants will not be multifarious only because the Plaintiff's causes of action against the several Defendants he has joined are different. Broadly speaking where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the Court will allow the joinder of Plaintiffs or Defendants subject to its discretion as to how the action should be tried.

63. In [Annapurna Debya Vs. Amiyanath Banerjee and Others](#), it was said:

In a suit for partition, it is incumbent upon the Court, before the preliminary decree is made, to determine whether the properties included in the suit are the joint properties, as alleged, of the parties to the litigation. A question can be raised and tried in a partition suit, though its solution interest only some of the parties to the litigation. In suits for partition questions may and do frequently arise which interest only some of the parties. A suit for partition may and does often involve the investigation of disputed questions of title and an attempt to avoid them, can only lead to needless multiplicity of litigation.... The limitations attending proceedings in partition are constantly weakening and the tendency to do full and complete justice to the parties in one action, is becoming irresistible. All persons who have an interest in the partition are proper parties and matters in controversy amongst persons so interested in the partition must be decided in the suit.

64. So far as the stranger purchasers are concerned, the Plaintiff has very rightly joined them as parties to the suit. In [Ranjit Kumar Pal Chowdhury Vs. Murari Mohan Pal Chowdhury and Others](#), it was said:

It was well-established that properties in which all the Defendants do not claim interest may be included in a suit for partition, provided all the co-sharer Defendants have an interest therein.

Where in a suit for partition the Plaintiff alleges that some of the properties which are really parts of the joint family estate stood in the name of strangers and challenges the entire series of transactions by which the ostensible title was

transferred to the strangers, the Plaintiff has a right to include the properties and to implead the stranger Defendants.

65. In Ranjit Kumar Pal Chowdhury Vs. Murari Mohan Pal Chowdhury and Others, it was said:

A mere finding that there was different causes of action as against the different sets of Defendants is not sufficient to conclude that the condition under Order 1, Rule 3 as to common act or transaction was not satisfied.

The question as to joinder depends not on a common cause of action but on common basis of acts or series of acts.

66. In Ranjit Kumar Pal Chowdhury Vs. Murari Mohan Pal Chowdhury and Others, the facts were as follows:

The Plaintiff filed a suit for partition. The substance of his case was that K who was the karta of the joint family in order to save the properties, resorted to various kinds of fictitious transactions for the purpose of transferring the ostensible title in the joint family properties in favour of strangers. Therefore, in spite of those transfers some of which were benami and the others fraudulent they never ceased to be joint family properties. The Plaintiff claimed on these allegations his share of all the properties including the properties transferred to the strangers and impleaded the strangers as well in order to obtain a decision in their presence to the effect that in spite of the transfers to them the properties remained joint family properties.

67. It was held that on these allegations the suit was not bad for multifariousness.

68. In Rajendra Kumar Bose v. Brojendra Kumar Bose 37 C.L.J. 191 the Court observed:

Although partial partition by suit is allowed where different portions of the property lie in different jurisdictions, or some portion of the property is at the time incapable of partition or is from its nature impartible or is held jointly with strangers who cannot be joined as parties to a general suit for partition, these exceptions must not be taken to have frittered away the fundamental rule that a partition suit should embrace all the joint property. This rule is neither arbitrary nor technical; it is founded on sound and weighty reasons. If the rule were not recognised and firmly applied multiplicity of litigation would be inevitable result. If suits for partition were allowed to be instituted in fragments, the jurisdiction of the trial Court and the forum of appeal might be altered. The rule further ensures a just partition; parties might otherwise be greatly prejudiced as regards equitable distribution, retention of possession, liability for improvements and adjustment of accounts. There may be very special cases where the application of the rule may be justly relaxed.

69. In Nundo Kumar Naskar v. Banomali Gayan ILR 29 Cal. 871 A brought a suit against B and others for ejectment from land making the landlord a Defendant to

the suit, on the allegation that he (A), having obtained a lease of the land from the landlord, took possession but, subsequently, was forcibly dispossessed by the Defendants (second party) in collusion with the landlord. The defence of the Defendants (second party) mainly was that the suit was bad for multifariousness inasmuch as they were severally in possession of definite and distinct portions of the land under different demises by the first Defendant and that there was no community of interest.

70. It was held that the suit was not bad for misjoinder of causes of action. The cause of action of a Plaintiff suing in ejectment cannot be affected by the title under which the Defendants profess to hold possession for what concerns the Plaintiff is that another is wrongfully in possession of what belongs to him; and that fact gives him his cause of action and it is a matter of indifference to him on what ground different persons in possession may seek to justify the wrongful detention of what is his. What the Plaintiff is entitled to claim is the recovery of possession of his land as a whole and not a fragment and all persons, who oppose him in the enforcement of that right, are concerned in his cause of action and ought accordingly to be made parties to the suit.

71. In this case there are common questions of fact vis-a-vis all the parties other than Nilratan Banerjee's theirs, namely, whether the properties in Schedule "B" were purchased by Santabala as her husband's benamdar or on her own account and whether Nagendra Nath Banerjee was insane at the time when succession opened on Santabala's death. These are questions of fact having sufficient importance in proportion to the rest of the action to make it desirable that the whole of the matter should be disposed of in one suit. So far as Nilratan Banerjee's heirs are concerned there is no dispute that they have an interest only in the property in Schedule "A" and none in Schedule "B". Their shares are also not in dispute. In that view of the matter we are of the opinion that the parties and causes of action have been properly joined in one suit and the suit is not bad for misjoinder of parties or causes of action.

72. A point of limitation was taken by the Appellant before the learned trial Judge as also before us. The learned Judge recorded in his judgment that the plea of limitation was not taken in the pleadings and no issue was raised on that question. Counsel for the Appellant relied on *Inayat Husen v. Ali Husen* ILR 20 All. 182. In that case it was held that in a suit for possession of immoveable property it is for the Plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the Defendant can be called upon to substantiate a plea of adverse possession.

73. In a later Bench decision in *Jai Chand Bahadur v. Girwar Singh* ILR 41 All. 669 the Allahabad High Court expressly dissented from the view taken in the earlier case and held that in cases to which Article 144 of the First Schedule to the Indian Limitation Act, 1908, applies, the defence being a title acquired by adverse

possession for more than 12 years, it is not necessary for the Plaintiff, as in cases falling under Article 142, to prove that he has been in possession at a period within 12 years from the commencement of the suit; it is sufficient if he establishes a *prima facie* title and it is then for the Defendant to make good his plea of adverse possession. We do not agree that the period of limitation started from the date of Santabala's death. We are in agreement with the learned Judge that until there was a clear and unequivocal attack on the title of the Plaintiff's father or of the Plaintiff to the properties left by Santabala, the period of limitation did not begin to run. Their title was not challenged by Nagendra Nath Ganguly or by his purchasers on or before September 4, 1943, beyond six years from the date of the limitation of the suit.

74. In C. Mohammed Yunus Vs. Syed Unissa and Others, it was held that a suit for a declaration of a right and 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.

75. On November 1, 1944, Nagendra Nath Banerjee, the Plaintiff's father, died. There is not a shred of evidence that Nagendra Nath Ganguly asserted any title adverse to the Plaintiff's father while he was alive. The mere fact that Nagendra Nath Ganguly, who was closely related to Nagendra Nath Banerjee, continued to be in occupation of the properties left by Santabala cannot be construed as an act of adverse possession nor as a denial of title of Plaintiff's father to the properties left by her. In that view of the matter we must hold that the suit is not barred by limitation.

76. It was argued that the Plaintiff is not entitled to declarations he has asked for because although able to seek reliefs other than a mere declaration of title, he has omitted to do so. This is a defence u/s 42 of the Specific Relief Act. The Plaintiff has asked for three declarations, that is to say, that Santabala was not the benamdar of Nagendra Nath Ganguly in respect of the premises mentioned in Schedule "B" to the plaint, that the Defendants Nos. 8 and 9 are trustees for and on behalf of the Plaintiff and on behalf of the Defendants Nos. 1, 1A, 1B, 1C and 7, the heirs of Rajani Kanta Banerjee and that the conveyance and/or transfer of the properties mentioned in paras. 8 and 9 of the plaint are void and inoperative. He has also prayed that the conveyance be delivered up for cancellation. It is not in dispute that the prayer for the third declaration is fully competent. It is not necessary to go into the question whether a negative declaration can be given. The Plaintiff has asked for injunction restraining the Defendants Nos. 8 and 9 from asserting any title to or interest in any of the properties mentioned in paras. 8 and 9 of the plaint. There are also prayers for partition and possession. These are the consequential reliefs which the Plaintiff could ask for. He has asked for all those reliefs. In the case of C. Mohammed Yunus Vs. Syed Unissa and Others, it was observed: That whether

further relief claimed in a particular case as consequential upon a declaration is adequate must always depend upon the facts and circumstances of each case. A suit for declaration with a consequential relief for injunction is not a suit for declaration simpliciter: It is a suit for declaration with further relief.

77. In the facts of this case, it must, therefore, be held that the declaratory reliefs are not barred under the provisions of Section 42 of the Specific Relief Act.

78. In the view we have taken it must be held that the case has been decided correctly by the learned trial Judge. The decree passed by the learned Judge is, therefore, affirmed and the appeal is dismissed. In the facts and circumstances of this case we direct that the Appellant do pay half the Plaintiff-Respondent's costs of this appeal. All other parties will pay and bear their own costs.

Ajay K. Basu J.

79. I agree.