Thakur Bhim Singh (Dead) By Lrs And Anr. vs Thakur Kan Singh on 21 December, 1979

Equivalent citations: AIR1980SC727, (1980)3SCC72, [1980]2SCR628, 1979()WLN788, AIR 1980 SUPREME COURT 727, 1980 (3) SCC 72

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Bench: E.S. Venkataramiah, P.N. Shinghal

JUDGMENT

E.S. Venkataramiah, J.

1. These two cross appeals by certificate arise out of a suit for possession of a house situate in Bikaner and for damages for use and occupation thereof filed in Civil Original Case No. 17 of 1957 on the file of the District Judge, Bikaner. The plaintiffs in the suit are the appellants in Civil Appeal No. 626 of 1971 and the defendant is the appellant in Civil Appeal No. 629 of 1971. The genealogy showing the relationship between the parties is given below:

S u r S i n g h | |
_____|_____
| | | | Gad Singh Bharat Singh Bhim Singh Kan Singh | Died in (p.I.) (Deft.) | Sept. 1955) | |_____ | | | | | | | | Duley Dhaney Dee | Singh Singh Singh | | | _____|_ | | Himmat Dalip Singh Singh (P.2.) (Died in Sept. 56)

2. Gad Singh, Bharat Singh, Bhim Singh (plaintiff No. 1) and Kan Singh (defendant) are the sons of Sur Singh. Bharat Singh died unmarried in September, 1955. Gad Singh died thereafter leaving behind him three sons, Duley Singh, Dhaney Singh and Deep Singh. Dalip Singh, the second son of plaintiff No. 1 died in September, 1956. Bharat Singh and the defendant were residing in the house which was the subject matter of the suit. After the death of Bharat Singh, the plaintiffs Bhim Singh and Himmat Singh filed the suit out of which this appeal arises against Kan Singh, the defendant for recovery of possession of the suit house and other ancillary reliefs. In the plaint, they pleaded that the suit house belonged to them by virtue of a patta dated July 12, 1940 issued in their names; that the defendant who was the brother of plaintiff No. 1 and uncle of plaintiff No. 2 was living in a part of the house with their consent; that plaintiff No. 2 and his younger brother Dalip Singh were also living in the house till the year 1956: that the defendant had refused to receive a notice issued by them in the month of September, 1957 calling upon him to hand over possession of the house to the plaintiffs; that the defendant had done so on account of personal ill will and that the plaintiffs were,

therefore, entitled to recover possession of the suit house and damages from the defendant. These were briefly the allegations made in the plaint. On the above basis, the plaintiffs prayed for a decree for the reliefs referred to above.

3. In the written statement, the defendant did not admit the existence of the patta on the basis of which the plaintiffs claimed title to the suit house. He denied the allegation that the plaintiffs were the owners in possession of the suit house. He claimed that he was the exclusive owner of the suit house, and in support of the said claim stated as follows:

4. There was a partition amongst the sons of Sur Singh in the year 1929. At that partition, Gad Singh and plaintiff No. 1 became separated and they were given all the family properties which were situated In their village, Roda. As Bharat Singh and the defendant had been educated at the expense of the family, they were not given any share in the property. Bharat Singh and he settled in Bikaner and lived together as members of joint Hindu family. Bharat Singh died on September 2, 1955 leaving the defendant as a surviving coparcener. On his death, the defendant became the owner of the properties of Bharat Singh 'as a member of joint Hindu family'. He further pleaded that from the year 1928, Bharat Singh and he who were working as the Aid-de-Camp and Private Secretary respectively of the Maharaja of Bikaner were living in the suit house which then belonged to the Maharaja. The defendant filed an application for purchasing the house. The proceedings had not terminated when the defendant left the service of the Maharaja and went to Banaras for higher studies. On his return from Banaras, he joined the service of the Maharaja in the civil department of Bikaner. After a long time on account of the joint efforts of Bharat Singh and the defendant, the sale of the house was sanctioned. Bharat Singh who was living jointly with him paid the consideration for the sale on November 4, 1939 'out of the join income.' Thus according to the defendant, Bharat Singh and he became its owners from the date of payment of the consideration He further pleaded that 'if the patta of the property had been granted in the names of the plaintiffs due to some reasons, political and other surrounding circumstances and for the safety of the property, it cannot affect the right of the defendant'. It was also stated that Bharat Singh and the defendant had not executed any sale deed in favour of the plaintiffs and so they could not become owners of the suit house. In another part of the written statement, the defendant pleaded thus:

> The plaintiffs have taken the entire ancestral property of the village. Still they are harassing the defendant due to avarice. The defendant and Thakur Bharat Singh had been doing Government service. So there was always danger of removal or confiscation of the property. Even if Thakur Bharat Singh might have written or given his consent for entering the names of the plaintiffs in the patta in this view, it is not binding. The plaintiffs are at the most 'benami' even though the patta which is not admitted might be proved.

5. It is thus seen that the defendant put forward a two fold claim to the suit house one on the basis of the right of survivorship and another cm the basis of a joint purchase along with Bharat Singh. Even though in one part of the written statement, he declined to admit the existence of the patta, in paragraph 13 of the written statement which is extracted above, he put forward the plea that the plaintiffs were at the most holding the property as benamdars. He, however, did not claim that he

was entitled to the property as an heir of Bharat Singh alongwith plaintiff No. 1 and Gad Singh who would have inherited the estate of Bharat Singh on his death being his nearest heirs.

6. In the reply, the plaintiffs denied that the defendant was entitled to the suit house as a surviving coparcener on the death of Bharat Singh. They, however, pleaded that plaintiff No. 1 had purchased the suit house out of his income; that Bharat Singh used to love plaintiff No. 2 'as his son' and was thinking of adopting him but he died all of a sudden and that the defendant had not disclosed in his written statement the special political circumstances under which the names, of the plaintiffs were entered in the patta. They denied that the defendant bad any interest in the suit house.

7. On the basis of the oral and documentary evidence produced before him, the learned District Judge who tried the suit held that Bharat Singh had secured the house from the Government of Bikaner for the plaintiffs with their money; that the patta of the house had been granted by the Patta Court in favour of the plaintiffs; that the plaintiffs were in possession of the suit house till September, 1956 and that the defendant being their close relative was living in the house not on his own account but with the plaintiffs' permission. The learned District Judge also held that the defendant had failed to prove that the suit house had been acquired by him and Bharat Singh with their joint fund. Accordingly he decreed the suit for possession of the house in favour of the plaintiffs and further directed that the defendant should pay damages for use and occupation at the rate of Rs. 50 per month from September 20, 1956 till the possession of the house was restored to them. Aggrieved by the decree of the trial court, the defendant tiled an appeal before the High Court of Rajasthan in Civil First Appeal No. 31 of 1960. The High Court rejected the case of the plaintiffs that the consideration for the house had been paid by Bharat Singh out of the funds belonging to them and also the case of the defendant that the house had been purchased by Bharat Singh with the aid of joint family funds belonging to himself and the defendant. The High Court held that the house had been purchased by Bharat Singh out of his own money in the names of the plaintiffs without any intention to confer any beneficial interest on them. It further held that the suit house belonged to Bharat Singh and on his death, Gad Singh, plaintiff No. 1 and the defendant succeeded to his estate which included the suit house in equal shares. Accordingly in substitution of the decree passed by the trial court, the High Court made a decree for joint possession in favour of plaintiff No. 1. The rest of the claim of the plaintiffs was rejected. Dissatisfied with the decree of the High Court, the plaintiffs and the defendant have filed these two appeals as mentioned above.

8. The principal issue which arises for consideration relates to the ownership of the suit house. It is admitted on all hands that though Bharat Singh and the defendant were living in the suit house from the year 1928, it continued to be the property of the Maharaja of Bikaner till the date on which the patta (Exh. 4) was issued by the Patta Court of Bikaner and that on the issue of the patta, the State Government ceased to be its owner. It is also not disputed that the patta constituted the title deed in respect of the suit house and it was issued in the names of the plaintiffs on receipt of a sum of Rs. 5,000. On January 11, 1930, the defendant had made an application, a certified copy of which is marked as Exhibit A-116 to the Revenue Minister of the State of Bikaner making enquiry about the price of the suit house on coming to know that the State Government intended to sell it. After the above application was made, the defendant left the service of the State of Bikaner and went to Banaras for studies. Bharat Singh who was also an employee of the State Government was working

as the Aid-de-Camp of the Maharaja in 1939. At the request of Bharat Singh, an order was made by the Maharaja on May 4, 1939 sanctioning the sale of the suit house for a sum of Rs. 5,000. Exhibit A-118 is the certified copy of the said order. Exhibit A-120 is a certified copy of the order of Tehsil Malmandi showing that a sum of Rs. 5,000 had been deposited on behalf of Bharat Singh towards the price of the suit house. It also shows that Bharat Singh was asked to intimate the name of the person in whose favour the patta should be prepared. Presumably, the patta was issued in the names of the plaintiffs as desired by Bharat Singh and Exhibit A-121 shows that it was handed over on September 30, 1940. The patta was produced before the trial court by the plaintiffs.

9. By the time the patta was issued in the names of the plaintiffs, the mother of plaintiff No. 2 had died. He was about eight years of age in 1940 and he and his younger brother, Dalip Singh were under the protection of Bharat Singh who was a bachelor. They were staying with him in the suit house. The defendant also was residing in it. The plaintiffs who claimed title to the property under the patta in the course of the trial attempted to prove that the sum of Rs. 5,000 which was paid by way of consideration for the patta by Bharat Singh came out of the jewels of the mother of plaintiff No. 2 which had come into the possession of Bharat Singh on her death. The plaintiff No. 2 who gave evidence in the trial court stated that he had not given any money to Bharat Singh for the purchase of the house but he had come to know from his father, plaintiff No. 1 that it had been purchased with his money. Jaswant Singh (P.W. 2) and Kesri Singh (P.W. 3) to whose evidence we will make a reference in some detail at a later stage also stated that they had heard from Bharat Singh that the jewels of the mother of plaintiff No. 2 were with him suggesting that they could have been the source of the price house. Plaintiff No. 1 who could have given evidence on the above question did not enter the witness box. It is stated that he was a person of weak mind and after the death of Bharat Singh was behaving almost like a mad man. The defendant stated in the course of his evidence that the mother of plaintiff No. 2 had gold jewels weighing about 3-4 tolas only. In this state of evidence, it is difficult to hold that the plaintiffs have established that the consideration for the suit house was paid by them. The finding of the trial court that the house had been purchased by Bharat Singh for the plaintiffs with their money cannot be upheld. The case of the defendant that the price of the suit house was paid out of the funds belonging to him and Bharat Singh has been rejected both by the trial court and the High Court. On going through the evidence adduced by the defendant, we feel that there is no reason for us to disturb the concurrent findings arrived at by the trial court and the High Court on the above question. We shall therefore, proceed to decide the question of title on the basis that the consideration for the purchase of the house was paid by Bharat Singh out of his own funds.

10. It was contended by the learned Counsel for the defendant that since the plaintiffs had failed to establish that they had contributed the price paid for the suit house, the suit should be dismissed without going into the question whether Bharat Singh had purchased the suit house with his money in the names of the plaintiffs for the benefit of plaintiff No. 2. The plaint does not disclose the name of the person or persons who paid the sale price of the suit house. The suit is based on the patta standing in the names of the plaintiffs. In the written statement of the defendant, there was an allegation to the effect that even though the patta was standing in the names of the plaintiffs, they were only benamidars and the real title was with Bharat Singh and the defendant. The particulars of the circumstances which compelled Bharat Singh or the defendant to take the patta in the names of

the plaintiffs were not disclosed although it was stated that it had been done owing to some political and other surrounding circumstances and for the safety of the property. From the evidence led by the parties, we are satisfied that they knew during the trial of the suit that the question whether the transfer effected under the patta was a benami transaction or not arose for consideration in the case. Even in the appeal before the High Court, the main question on which arguments were addressed was whether the transaction was a benami transaction or not. Merely because the plaintiffs attempted to prove in the trial court that the money paid for purchasing the house came out of their funds, they cannot in the circumstances of this case be prevented from claiming title to the property on the basis that even though Bharat Singh had paid the consideration therefore. plaintiff No. 2 alone was entitled to the suit house. Reference may be made here to the decision of this Court in Bhagwati Prasad v. Shri Chandrainaul where the Court observed as follows:

> There can be no doubt that if a party asks for a relief on a clear and specific grounds, and in the issues or at the trial, no other ground is covered either directly or by necessary implication, it would not be open to the said party to attempt to sustain the same claim on a ground which is entirely new.... But in considering the application of this doctrine to the facts of the present case, it is necessary to bear in mind the other principle that considerations of form cannot over-ride the legitimate considerations of substance. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is: did the parties know that the matter in question was involved in the trial, and did they lead evidence about it?

11. After holding that the parties to the said case were not taken by surprise, the Court granted the relief prayed for by the plaintiff on the basis that defendant was a licensee even though the plaintiff had pleaded in his plaint that the defendant was tenant. In the above ease, the Court distinguished the decision in Trojan and Co. Ltd. v. RM. N.N. Hagappa Chettiar [1953] S.C.R. 789 on which much reliance was placed by the learned Counsel for the defendant before us. In the case of Trojan and. Co. Ltd. (supra), this Court came to the conclusion that the alternative claim on which relief was sought was not at all within the knowledge of the parties in the course of the trial. The case before us is not of the nature.

12. In Ismail Mussajee Mookerdum v. Hafiz Boo 33 I.A. 86 the plaintiff laid claim to a property which had been transferred in her name by her mother alleging that she had paid the purchase money to her mother. The court came to the conclusion that she had failed to prove that she had paid the consideration. Still a decree was made in her favour holding that she had become the owner

of the property by virtue of the transfer in her favour even though consideration had not been paid by her since it had been established in the case that her mother intended to transfer the beneficial interest in the property in her favour. This is borne out from the following passage at page 95:

> In her evidence, which was very confused, she tried to say that she paid that purchase-money to her mother. This was clearly untrue: as both Courts have found. The fact, therefore, remains that the properties purchased by the sale proceeds were purchased no doubt in Hafiz Boo's name, but were purchased out of funds emanating from her mother's estate. This circumstance no doubt, if taken alone, affords evidence that the transaction was benami, but there is, in their Lordships' opinion, enough in the facts of the case to negative any such inference.

13. Moreover no plea was raised on behalf of the defendant before the High Court in this case contending that the High Court should not go into the question whether the transfer under the patta was a benami transaction or not. We, therefore, reject the above contention and proceed to examine whether the High Court was right in arriving at the conclusion that the plaintiffs were only benamidars holding the property for the benefit of its real owner, Bharat Singh as the consideration therefore had emanated from him.

14. Under the English law, when real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser. It is, however, open to the transferee to rebut that presumption by showing that the intention of the person who contributed the purchase money was that the transferee should himself acquire the beneficial interest in the property. There is, however, an exception to the above rule of presumption made by the English law when the person who gets the legal title under the conveyance is either a child or the wife of the person who contributes the purchase money or his grand child, whose father is dead. The rule applicable in such cases is known as the doctrine of advancement which requires the court to presume that the purchase is for the benefit of the person in whose favour the legal title is transferred even though the purchase money may have been contributed by the father or the husband or the grandfather, as the case may be, unless such presumption is rebutted by evidence showing that it was the intention of the person who paid the purchase money that the transferee should not become the real owner of the property in question. The doctrine of advancement is not in vogue in India. The counterpart of the English law of resulting trust referred to above is the Indian law of benami transactions. Two kinds of benami transactions are generally recognized in India. Where a person buys a property with his own money but in the name of another person without any intention to benefit such other person, the transaction is called benami. In that case, the transferee holds the property for the benefit of the person who has contributed the purchase money, and he is the real owner. 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 recognized in Section 82 of the Indian 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 v. The Commissioner of Income-Tax, Madras [1956] S.C.R. 691 at p. 722.:

> 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.

15. In Mohammad Sadiq All Khan v. Fakhr Jahan Begum and Ors. 59 I.A. 1 the facts were these: A Mahemmodan bought an immovable property taking the conveyance in the name of his daughter who was five years of age. The income was credited to a separate account, but it was in part applied to purposes with which she had no concern. Upon her marriage, the deed was sent for the inspection of her father-in-law. After the death of the donor it was contended that the property was part of his estate, the purchase being benami. The Judicial Committee of the Privy Council held that there was a valid gift to the daughter because there was proof of a bona fide intention to give, and that intention was established. In the course of the above decision, it was observed thus:

> The purchase of this property was a very natural provision by Baqar Ali for the daughter of his favourite wife, and though there may be no presumption of

> advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. The sending of the deed for the inspection of the lady's father-in-law, which the Chief Court held to be established, was clearly a representation that the property was hers, and their Lordships agree with the learned Judges in the conclusion to which they came.

16. In Manmohan Dass and Ors, v. Mr. Ramdei and Anr. A.I.R. 1931 P.C. 175. Lord Macmillan speaking for the Judicial Committee observed:

> In order to determine the question of the validity or invalidity of the deed of gift in question it is of assistance to consider.
>
> 'the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct.' Dalip Singh v. Nawal Kanwar 35 LA. 104 (P.C.) always remembering that the onus of proof rests upon the party impeaching the deed.

17. The principle enunciated by Lord Macmillan in the case of Manmohan Dass and Ors. (supra) has been followed by this Court in Jayadayal Poddar (deceased) through his L. Rs. and Anr. v. Mst. Bibi Hazara and Ors. Sarkaria, J. observed thus:

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

18. The principle governing the determination of the question whether a transfer is a benami transaction or not may be summed up thus: (1) The burden of showing that a transfer is a benami transaction lies on the person who asserts that it is such a transaction; (2) 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 motives governing their action in bringing about the transaction and their subsequent conduct etc.

19. Now we shall refer to the facts of the present case. When the suit house was purchased from the Maharaja of Bikaner, Bharat Singh was a bachelor and he did not marry till his death in the year 1955. The wife of Bhim Singh had died before 1939 leaving behind her two young children. Plaintiff No. 2 was about eight years old in the year 1939 and his younger brother Dalip Singh was about two years old. These two children were living with Bharat Singh. Bhim Singh, plaintiff No. 1 was almost in indigent condition. The defendant had by then acquired a degree in law and also had practised as a lawyer for some time. It is stated that the defendant had again been employed in the service of the State of Bikaner. The patta was issued in the names of plaintiffs 1 and 2 at the request of Bharat Singh. Even though the defendant stated in the written statement that the patta had been taken in the names of the plaintiffs owing to certain political circumstances, he had not disclosed in the course of his evidence those circumstances which compelled Bharat Singh to secure the patta in the names of the plaintiffs, though at one stage, he stated that it was under his advice that Bharat Singh got the patta in the names of the plaintiffs. Bharat Singh had no motive to suppress from the knowledge of the public that he had acquired the property. It was suggested in the course of the arguments that he had taken the patta in the names of the plaintiffs because he was in the service of the State. We do not find any substance in this submission because the property was being purchased from the State Government itself and there was no need for him to shield his title from the knowledge of the State Government. It appears that Bharat Singh acquired the suit house for the benefit of plaintiff No. 2 for the following circumstances: The first circumstance is that the original patta had been handed over by Bharat Singh to plaintiff No. 2 on his passing B.Sc. Examination. This fact is proved by the evidence of plaintiff No. 2 and it is corroborated by the fact that the patta was produced by the plaintiffs before the Court. In the course of his evidence, the defendant no doubt stated that the patta had been stolen by plaintiff No. 2 from the suit house during the twelve days following the death of Bharat Singh when the keys of Bharat Singh's residence had been handed over to plaintiff No. 2 by the defendant. It is difficult to believe the above statement of the defendant because of two circumstances (i) that the defendant did not state in the written statement that the patta had been stolen by plaintiff No. 2 and (ii) that within a month or two after the death of Bharat Singh, plaintiff No. 2 wrote a letter which is marked as Exhibit A-124 to the defendant stating that the rumour which the defendant was spreading that plaintiff No. 2 had stolen some articles from the suit house was not true since whenever plaintiff No. 2 opened room or any of the almirahs of Bharat Singh in the suit house, Devi Singh, the son of the defendant was keeping watch over him. That letter has been produced by the defendant and there is no reference in it to a false rumour being spread about the theft of the patta by plaintiff No. 2. Plaintiff No. 2 however, while asserting

his claim to the suit house in the course of that letter stated that he had seen that the patta had been executed in his favour; and that the patta contained his name. The defendant does not appear to have sent any reply to Exhibit A. 124 nor did he call upon the plaintiffs to return the patta to him. He did not also file a complaint stating that the patta had been stolen by plaintiff No. 2. We are of the view that there is no reason to disbelieve the evidence of plaintiff No. 2 that the patta had been handed over to him by Bharat Singh on his passing the B.Sc. examination. This conduct of Bharat Singh establishes that it was the intention of Bharat Singh when he secured the patta from the State Government in the names of the plaintiffs that plaintiff No. 2 whom he loved should become the owner. It is no doubt true that the name of plaintiff No. 1 is also included in the patta. It may have been so included by way of abundant caution as plaintiff No. 2 was a minor when the patta was issued. The above circumstance is similar to the one which persuaded their Lordships of the Privy Council in the case of Mohammad Sadiq All Khan (supra) to hold that the property involved in that case belonged to the person in whose favour the conveyance had been executed.

20. The second circumstance which supports the view that Bharat Singh intended that plaintiff No. 2 should become the owner of the suit house is proved by the declarations made by Bharat Singh regarding the title to the suit house. Jaswant Singh (P.W. 2) was a former Prime Minister of the State of Bikaner. His wife was a cousin of plaintiff No: 1, Bharat Singh and the defendant. Being a close relative of Bharat Singh who was also the Aid-de-Camp of the Maharaja of Bikaner, he was quite intimate with Bharat Singh who used to discuss with him about Ms personal affairs. P.W. 2 has stated in the course of his evidence that Bharat Singh thought it proper to purchase the house in the name of plaintiff No. 2 and that he intended to make plaintiff No. 2 his heir and successor. He has also stated that Bharat Singh had expressed his desire to give all his property to plaintiff No. 2 by a will and that be had told Kesri Singh (P.W. 3) just a day prior to his (Bharat Singh's) death that a will was to be executed. This statement of Jaswant Singh (PW. 2) is corroborated by the evidence of Kesri Singh (P.W, 3) whose wife was also a cousin of Bharat Singh, plaintiff No. 1 and the defendant. The relevant portion of the deposition of Kesri Singh (P.W. 3) reads thus:

> I came from Jaipur to Bikaner by train one day before the death of Bharat Singh and when I was returning after a walk I found Bharat Singh standing at the gate of his house. I asked Bharat Singh to accompany me to my house to have tea etc. Bharat Singh came with me to my house. Bharat Singh told me at my house that he was not quite all right and that he might die at any time. He wanted to execute a will. He further told me that his house really belonged to Himmat Singh. It has been purchased in his name. He wanted to give even other property to Himmat Singh.... By other property which Bharat Singh wanted to give to Himmat Singh was meant Motor car, bank balance and the presents which he had. The house regarding which my talk took place with Bharat Singh at my house was the house in dispute.

21. There is no reason to disbelieve the evidence of these two witnesses. Their evidence is corroborated by the deposition of Dr. Himmat Singh (D.W. 6) who was the Secretary of a Club in Bikaner of which Bharat Singh was a member. He was examined by the defendant himself as his witness. In the course of his cross-examination, Dr. Himmat Singh (D.W. 6) referred to what Bharat Singh had told him a few months prior to his death. The substance of his deposition is found in the

judgment of the trial court, the relevant portion of which reads thus:

> D.W. 6 Dr. Himmat Singh is the Secretary of the Sardul Club, Bikaner. He is the Senior Eye-Surgeon in the Government Hospital, Bikaner. He has stated that Bharat Singh was the member of Sardul Club. A sum of Rs. 42S/6/-remained outstanding against him till the year 1955. This amount was received on 28-10-1955. He has said that he does not know who deposited this amount. On the merits of the case, he has stated that he intimately knew Bharat Singh and members of his family. Bhim Singh and his sons Himmat Singh and Dalip Singh used to live in this house. Bharat Singh took this house for Bhim Singh and Himmat Singh. Four months before his death, Bharat Singh told the witness that he bad already taken the house for Bhim Singh and Himmat Singh and that whatever else would remain with him shall go to them. Dr. Himmat Singh refutes the defendant's stand and supports the plaintiff's case.

22. It was argued on behalf of the defendant that there is some variation between the deposition of Dr. Himmat Singh (D.W. 6) and the above passage found in the judgment of the trial court and that the evidence of D.W. 6 should not be believed as he had turned hostile.

23. The deposition of Dr. Himmat Singh (D.W. 6) was read out to us. It was also brought to our notice that an application had been made by the defendant to treat D.W. 6 as hostile and that it had not been granted by the trial court. Even though there is a slight variation between what is stated by D.W. 6 and what is contained in the judgment of the trial court with regard to certain details, we do not feel that the said variation is of any substantial nature. The evidence of D.W. 6 suggests that Bharat Singh was of the view even during his life time that the suit house belonged to plaintiffs and not to himself. Even though an application had been made by the defendant to treat D.W. 6 as hostile, we feel that this part of the evidence of D.W. 6 cannot be rejected on that ground since it is consistent with the evidence of Jaswant Singh (P.W. 2) and Kesri Singh (P.W. 3).

24. It is seen from the judgment of the High Court that the effect of the statement of Kesri Singh (P.W.3) in his deposition that Bharat Singh had told him that the suit house was the property of plaintiff No. 2 has not been considered. The High Court while dealing with the evidence of Jaswant Singh (P.W. 2) and Kesri Singh (P.W. 3) laid more emphasis on those parts of their evidence where there was a reference to the alleged utilisation of the jewels or moneys belonging to the plaintiffs by Bharat Singh for the purpose of acquiring the suit house. The High Court has also observed in the course of its judgment that neither of them had stated that Bharat Singh had told them that he was purchasing or had purchased the suit house as a gift to Bhim Singh and Himmat Singh. The above observation does not appear to be consistent with the evidence of Kesri Singh (P.W. 3) discussed above.

25. It was, however, contended on behalf of the defendant that the statement made by Bharat Singh in the year 1955 could not be accepted as evidence in proof of the nature of the transaction which had taken place in the year 1940. It was contended that the question whether a transaction was of a benami nature or not should be decided on the basis of evidence about facts which had taken place at or about the time of the transaction and not by statements made several years after the date of the

transaction. In support of the above contention, the learned Counsel for the defendant relied on the decision of the House of Lords in Shephard and Anr. v. Cartwright and Anr. [1955] A.C. 431. The facts of that case were these: In 1929, a father, with an associate, promoted several private companies and caused a large part of the shares, for which he subscribed, to be allotted in varying proportions to his three children, one of them being then an infant. There was no evidence as to the circumstances in which the allotments were made. The companies were successful and in 1934 the father and his associate promoted a public company which acquired the shares of all the companies. The children signed the requisite documents at the request of their father without understanding what they were doing. He received a cash consideration and at various times sold, and received the proceeds of sale of, their shares in the new company. He subsequently placed to the credit of the children respectively in separate deposit accounts the exact amount of the cash consideration for the old shares and round sums in each case equivalent to proceeds of sale of the new shares. Later he obtained the children's signatures to documents, of the contents of which they were ignorant, authorising him to withdraw money from these accounts and without then knowledge he drew on the accounts, which were by the end of 1936 exhausted, part of the sums withdrawn being dealt with for the benefit of the children but a large part remaining unaccounted for. He died in 1949. In the action filed against his executors, it was contended by them that the subsequent conduct of the father showed that when the shares were got allotted by him in the names of the children in 1929, he did not intend to make them the real owners of the shares and that the presumption of advancement had been rebutted. This contention was met by the plea that the subsequent conduct of the father in dealing with the shares as if they were his own could not be relied upon either in his favour or in favour of his representatives, executors and administrators to prove that he had no intention to create any beneficial interest in his children in the shares in question when they were obtained. On these facts, the House of Lords held that the subsequent acts and declarations of the father could not be relied upon in his favour or in favour of his executors to rebut the presumption of advancement. Viscount Simonds in the course of his judgment observed thus:

> My Lords, I do not distinguish between the purchase of shares and the acquisition of shares upon allotment, and I think that the law is clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord Eldon said, give way to slight circumstances: Finch v. Finch (1808) 15 Ves. 43.
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> It must then be asked by what evidence can the presumption be rebutted, and it would, I think, be very unfortunate if any doubt were cast (as I think it has been by certain passages in the judgments under review) upon the well settled law on this subject. It is, I think, correctly stated in substantially the same terms in every text book that I have consulted and supported by authority extending over a long period of time. I will take, as an example, a passage from Snell's Equity, 24th ed., p. 153, which is as follows:

> The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration.... But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.

26. The above passage, we are of the view, does not really assist the defendant in this case. What was held by the House of Lords in the case of Shephard and Anr. (supra) was that the presumption of advancement could be displaced only by a statement or conduct anterior to or contemporaneous to the purchase nor could any conduct of the children operate against them as admissions against their interest as they acted without the knowledge of the facts. In the instant case, we are concerned with the conduct and declarations of Bharat Singh subsequent to the transaction which were against his interest. The evidence regarding such conduct and declarations is not being used in his favour but against the legal representative of Bharat Singh i.e. the defendant who would have become entitled to claim a share in the suit house if it had formed part of his estate. Such conduct or declaration would be admissible even according to the above decision of the House of Lords in which the statement of law in Snell's Equity to the effect 'but subsequent declarations are admissible as evidence only against the party who made them, and not in his favour' is quoted with approval. The declarations made by Bharat Singh would be admissible as admissions under the provisions of the Indian Evidence Act being statements made by him against his proprietary interest under Section 21 and Section 32(3) of the Indian Evidence Act.

27. The defendant cannot also derive any assistance from the decision of this Court in Bibi Saddiqa Fatima v. Saiyed Mohammad Mahmood Hasan . The question before the Court in the case of Bibi Siddiqa Fatima (supra) was whether a property which had been purchased by a husband in his wife's name out of the fund belonging to a waqf of which he was a Mutawalli could be claimed by the wife as her own property. This Court held that the wife who was the ostensible owner could not be treated as a real owner having regard to the fact that the purchase money had come out of a fund belonging to a waqf over which her husband who was the Mutawalli had no uncontrolled or absolute interest. In reaching the above conclusion, this Court observed thus:

> We may again emphasize that in a case of this nature, all the aspects of the benami law including the question of burden of proof cannot justifiably be applied fully. Once it is found, as it has been consistently found, that the property was acquired with the money of the waqf, a presumption would arise that the property is a waqf property irrespective of the fact as to in whose name it was acquired. The Mutawalli by transgressing the limits of his power and showing undue favour to one of the beneficiaries in disregard to a large number of other beneficiaries could not be and should not be permitted to gain advantage by this method for one beneficiary which in substance would be gaining advantage for himself. In such a situation it will not be unreasonable to say-rather it would be quite legitimate to infer, that it was for the plaintiff to establish that the property acquired was her personal property and not the property of the waqf.

28. It was next contended that the defendant had spent money on the repairs and reconstruction of the building subsequent to the date of the patta and that therefore, he must be held to have acquired some interest in it. We have gone through the evidence bearing on the above question. We are satisfied that the defendant has not established that he had spent any money at all for construction and repairs. Even if he has spent some money in that way with the knowledge of the actual state of affairs, it would not in law confer on the defendant any proprietary interest in the property.

29. It is also significant that neither Gad Singh during his life time nor his children after his death have laid any claim to a shard in the suit house which they were entitled to claim alongwith the defendant if it was in fact a part of the estate of Bharat Singh. Their conduct also probabalises; the case of the plaintiffs that Bharat Singh did not intend to retain for himself any interest in the suit house.

30. On the material placed before us, we are satisfied that the transaction under which the patta was obtained was not a benami transaction and that Bharat Singh had acquired the suit house with his money with the intention of constituting plaintiff No. 2 as the absolute owner thereof. Plaintiff No. 2 is, therefore, entitled to a decree for possession of the suit house.

31. The trial court passed a decree directing the defendant to pay damages for use and occupation in respect of the suit house at the rate of Rs. 50/- per month from September 20, 1956 till the possession of the house was delivered to the plaintiffs. The operation of the decree of the trial court was stayed by the High Court during the pendency of the appeal before it. In view of the decree passed by the High Court, the defendant has continued to be in possession of the suit house till now. Nearly twenty years have elapsed from the date of the institution of the suit. In the circumstances, we are of the view that the defendant should be directed to pay mesne profits at the rate of Rs. 50/- per month till today and that an enquiry should be made by the trial court under Order 20, Rule 12 of the CPC to determine the mesne profits payable by the defendant hereafter till the date of delivery of possession.

32. In the result, the decree passed by the High Court is set aside and a decree is passed directing the defendant to deliver possession of the suit house to plaintiff No. 2 and to pay mesne profits to him at the rate of Rs. 50/- per month from September 20, 1956 till today and also to pay future mesne profits as per decree to be passed by the trial court under Order 20, Rule 12 of the CPC.

33. For the foregoing reasons, Civil Appeal No. 626 of 1971 is accordingly allowed with costs throughout. Civil Appeal No. 629 of 1971 is dismissed but without costs.