Patna High Court
Suresh Kumar Prasad And Ors. vs Syed Imam Ali And Ors. on 4 February, 1986
Equivalent citations: AIR 1986 Pat 353, 1987 (35) BLJR 82
Author: S B Sanyal
Bench: S B Sanyal
JUDGMENT Satya Brata Sanyal, J.

1. The plaintiff is the appellant in both the appeals. The plaintiff's suit for partition is for allotment of 9 annas, 7 pies and 4 krants share of the land pertaining to plots Nos. 813 and 815, khatas Nos. 111 and 104 comprising in touzi No. 389. The plaintiffs suit was decreed by the trial court to the extent of 5 annas, 4 pies only. As against these, two appeals were preferred. In Title Appeal No. 218 of 1959 the plaintiff claimed the balance share of 4 annas and odd while in Tide Appeal No. 229 of 1959 the defendants assailed the decree in favour of the plaintiff. The lower appellate court dismissed the appeal of the plaintiff and allowed that of the defendants, i.e., the suit was dismissed in its totality. Second Appeal No. 377 of 1964 by the plaintiff is to restore the trial court's decree and Second Appeal No. 558 of 1964 by the plaintiff is with respect to 4 annas and odd share refused concurrently by both the courts below. Both the appeals were disposed of by a common judgment.

2. Mr. Tara Kant Jha appearing on behalf of the appellants at the outset stated that he does not press Second Appeal No. 558 of 1964 by which both the courts below dismissed the suit with respect to 4 annas share. Second Appeal No. 558 of 1964 is thus dismissed as not being pressed.

Second Appeal No. 377 of 1964.

3. The result of Second Appeal No. 377 of 1964 depends on the true and correct construction of a deed of Tamliknama (Exhibit 1), dated 18-3-1924, which is the document of title of the settlor of the plaintiff.

4. Facts : Entire interest in touzi No. 389, to which the suit land appertains, was owned by Md. Mehdi Hassan alias Badshah Nawab. On his death on 19th March, 1919, his properties vested in his two brothers, namely, Manjle Nawab and Chote Nawab and two sisters Mosst. Razia Begum and Wajihulnissa Begum. The brothers took 1/3rd each and the sisters to the extent of 1/6th share each. On 18-3-1924 Chote Nawab executed a deed of Tamliknama (Exhibit 1) in favour of his son Saiyad Md. Mehdi alias Mian. Manjle Nawab died issueless on 11th June, 1934, leaving his brother Chote Nawab as his sole surviving living heir. Chote Nawab died on 17-2-1935 leaving one son Mian and three daughters, namely, Mosst. Mahdetunnissa Begum, Mosst, Halimatun Nissa Begum and Mosst. Latifulnissa Begum. On such heritage Mian got 2/5th share and his sisters got 1/5th share each. In May 1937 there was exchange and partition between Mian and his two sisters for which a deed of exchange and partition dated 23rd May, 1937, was executed. In this deed Mian got 2/5th share of Halimatun Nissa Begum and Latifulnissa Begum and thus became proprietor in touzi No. 389 to the extent of 9 annas 7 pies and 4 krants which consisted of 5 annas 4 pies share which he got from his father by the deed of Tamliknama (Ext. 1) and 2/5th share which was on his heritage from his father and 2/5th share of Halimatun Nissa and Latifulnissa. Since in this appeal we are concerned with Mian's 5 annas 4 pies share only obtained through Tamliknama (Ext. 1), it is not necessary to deal

with the case of his heritage of the rest 4 annas share and the cases of the parties in relation thereto.

5. The plaintiff claims to be a settlee from Mian of his share on 25th Jeth 1350 fasli (1933) with regard to survey plot No. 813 appertaining to khata No. 111 and survey plot No. 815 appertaining to khata No. 104 Mouza Dhakanpura measuring .68 decimal and .60 decimal respectively comprising an area of 1.28 acres (2 bighas, 1 katha and 18dhurs). Seven written statements were filed, one by defendant No. 2, the second on behalf of defendants 1, 3, 4 and 5, the third on behalf of defendants Nos. 6 and 7, the fourth by defendant No. 8, the fifth on behalf of defendants 9 to 11, the sixth on behalf of defendant No. 13 and the seventh on behalf of defendant No. 14. The suit has been contested only by defendants 6 and 7, being the sons of defendant No. 2 and defendants 9 to 11 and 13 and 14 as transferees from defendants 6 and 7. The common defence on behalf of the defendants is lack of unity of title and possession with either Mobarak Ali, husband of defendant No. 2, or the donees from him, namely defendants 6 and 7. According to them, Mian had no right, title and possession of the land settled with the plaintiff on 25th Jeth 1350 Fa. It is actually a myth. According to them, Mobarak Ali took settlement of the entire share of 5 annas 4 pies of Manjle Nawab from the Manager of Court of Wards in the year 1930 and the same year Chote Nawab gifted the entire bakasht land of the touzi which he obtained from Badsha Nawab to his son-in-law Mobarak Ali, father of defendants 6 and 7. Mobarak Ali subsequently acquired from the ladies their share. In this way Mobarak Ali is said to have come in possession over the entire area of the suit plots and remained in such possession by mutation of his name in the Patna Administration Committee and payment of tax till the month of May 1951 when he gifted these lands to his sons who figured as defendants Nos. 6 and 7.

6. The touzi has vested in the State of Bihar by virtue of the Bihar Land Reforms Act and, therefore, the only dispute is with respect to bakasht land of the Malik, which is subject matter of dispute in the present suit.

7. The two second appeals were admitted in the years 1964 and 1966; therefore, they will be governed by the Code of Civil Procedure as it stood prior to its amendment of 1976.

8. The main dispute between the parties is what was assigned by Chote Nawab by execution of the Tamliknama (Ext. 1) in the concerned touzi, i.e., whether the right to collect rent as well as bakasht land or only the right to collect rent, excepting the bakasht lands which comprise the plots in dispute. According to Mr. Tara Kant Jha, by Tamliknama(Ext. 1) Chote Nawab gave away everything except what has been excluded in the said Tamliknama. According to the respondents. Chote Nawab conveyed only the milkiyat interest which automatically excludes the culturable lands of the Malik. Mr. Jha further submits if by the Tamliknama of 1924 Chote Nawab conveyed the touzis which included landlord's culturable land as well, the gift or Hukumnama (Ext. C/12) by Chote Nawab in the year 1930 in favour of Mobarak Ali, even assuming it to be genuine, would be a bag of wind as Chote Nawab had already parted with his right in the entire touzi by the deed of Tamliknama of 1924. According to learned counsel, once the interpretation of Tamliknama, as is sought to be put by him, is accepted then the title to the touzis vests in the settlor and he shall have every right to settle the bakasht land of the touzi with the plaintiff. Mian is cosharer of his sisters from whom Mobarak Ali also derives his title. Mobarak Ali and the plaintiff if not cosharers are at least co-owners having

derived their respective title from cosharer landlords. In absence of a pleading of ouster, the lower appellate court erred in law to hold, absence of unity of title and possession as well as adverse possession in favour of the defendants.

Mr. T. K. Jha further submitted that once the title of the settlor is held not to have been decided in accordance with law, the approach to the question of plaintiffs settlement by the lower appellate court by reversing the judgment of the trial court, will also be vitiated requiring a fresh approach to the whole question. The finding of the lower appellate court as to adverse possession by reversing the judgment of the trial court also needs a reconsideration as it has been arrived at on wrong notion of law as to ouster. Mr. Mukherjee on behalf of the respondents, on the other hand, contended that even though the Tamliknama (Ext. 1) is genuine, Chote Nawab conveyed only milkiyat interest which means proprietary interest in the touzi i.e. right to collect rent and the document was correctly interpreted by the lower appellate court, learned counsel further submitted that the lower appellate court disbelived the settlement of the plaintiff, which is a finding of fact and, therefore, cannot be interfered in second appeal. The court below further finds no unity of title and possession, which disentitles the plaintiff to maintain a suit for partition. It has also been submitted that the appeal has abated for non-substitution of the heirs of appellant No. 4, the real owner, who died in December, 1976, which is being strongly assailed by Mr. Tara Kant Jha. I will deal with the question of abatement in the concluding paragraph of my judgment, as 1 am of the opinion that the appeal has not at all abated.

Tamliknama :

9. The trial court has construed the Tamliknama in paragraph 16 of its judgment. It held that the stand of the defendants that the bakasht interests in the two touzis were retained by Chote Nawab and not conveyed under the said document does not seem to be justified on a perusal of the document as a whole. The only land excepted is the land of Bisunprit, Barhmotar, Niajaz Dargah and Chanda Chandedarana. The lower appellate court considered this question in paragraph 18 of its judgment. It held that since there is an express mention of the words 'Hakikat Milkiyat' in mouza Dhakhanpura, the gift is confined to the right of collection of rent in the said touzi. It further referred to the schedule of the document, particularly serial Nos. 72 and 73 (touzis Nos. 136 and 7361), where transfer of khudkasht land has been mentioned in support of its interpretation. It concluded that there being no such mention of khudkasht land with respect to the concerned touzi, by necessary implication bakasht lands were excluded and not conveyed under the deed.

10. Before I enter into the question of interpretation of the Tamliknama, 1 would like to extract that part of the Tamliknama whose interpretation is the bone of contention between the parties :

"Ikrar karta hun wo likh deta hun ki Hasas Mawajiyat Mofasile zail jiska number touzi wo jama sadar wagera zazaid waslika haja mundarj hai. Jo maliyat takhmine No. 5000/-Rupaya ke hai Azariya Hakikat Milkiyat ko apane mein jalkar wo Bankar Aahar wo Pokhar wo Houz wo Talab wo Chah, Pokhta wo Khan wo Nadi wo Nala wo Dih wo Dagar wo Bagate Amba wo Mahwa wo Tar wo Khajur wo Digar Darkhatan Phaldar Wagair Faldar Mein Jamla Hak wo Hukuk wo Abwab Jamindari Janiya Man Motalik. The Siwaya Araziyat Bisunprit wo Barhmotar wo Niajaz Dargah wo

Chanda Chandedarana Bahak Nawab Zada S. Mohammad Rizvi urf Miyan Salamhau wo pesar Manmokir Kaum Syed Sakin Mohalla Mogalpura Thana Elaka Khaje Kalan Min Mahiat Shahar Patna, Pesha Zamindari ke Tamlik Karke Zayadad Hai Tamlik Shuda Mundaraje Apane Kabij wo Dakhil Malik Mustakil Gard ana Mana Manmokir Ya Waresan Kayam."

11. It is well settled that the construction of a document of title or of a document which is the foundation of the rights of the parties necessarily raises a question of law (See Sir Chuni Lal Mehta v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, Radha Sundar Datta v. Md. Jahadur Rahim, AIR 1959 SC 24 and ICI India Pvt. Ltd. v. Commr. of Income-tax, AIR 1972 SC 1524). As such, if the Tamliknama (Ext. 1), which is the source of title of the settlor, is found to have been wrongly construed by the lower appellate court, a case for interference will be clearly made out.

12. A close look to the aforesaid extract from the Tamliknama manifests that the milkiyat interest inclusive of jalkar, bankar, aahar, ponds, reservoirs, tanks, brick built and mud built wells, nadis, water channels, banks thereof (dih), pathways (dagar), orchards of mango, mahua, toddy, palm and date palm trees and other fruit bearing and non-fruit bearing trees together with all right and interests and all zamindari abwabs appertaining thereto assigned and conveyed except (Siwaye) land (Araziyat) of Bisunprit wo Barhmotar wo Niajaz Dargah wo Chanda Chandedarana, etc. Now the first question is what does the word 'Milkiyal' connote. In order to ascertain the commonly accepted meaning of the word 'Milkiyat' the Court is entitled to have recourse to dictionary. In the Dictionary of Urdu to English by John Shakespeare made for managing the affairs of the East India Company, 4th Edition, the English equivalent of the word 'Milkiyat' is "property, possession, right". The word 'milk' means land in Bhargava's Standard Illustrated Dictionary of the Hindi language compiled and edited by Prof. R. C. Pathak, (Reprint April 1983) and 'milki' to mean landlord, landowner, a rich man. In the case of Mt. Sasiman Chowdharani v. Sibnarain Chowdhary, 39 Ind Cas 755 : (AIR 1917 Patna 627 (2)) a Division Bench of the Patna High Court while construing the words "bad wafat man muqir kulli wa kul huquq_malikiat_par kul ikhtiar Musammatan maskurin ko hasil hai" in a document held that the word 'milkiat' or 'malikiat' implies something appertaining to a malik. The word 'malik' means literally one who holds 'milk' or land. In Venkataramaiya's Law Lexicon the word 'milkiat" is said to define ownership and not the quality of the estate. In my opinion, therefore, the words 'hakikat milkiat' cannot be confined to mean only landlord's right to collect rent from the estate. It will mean the landlord's property, possession and right in an estate. Bakasht land is the landlord's own land in an estate or touzi to which he has a right and possession.

13. Now I revert to alternate contention of exception and reservation in the deed. The claim is based on the words : "Siwaye Araziyat Bisunprit wo Barhmotar wo Niajaz Dargah....." A person who would except some part of the property from the parcels which are clearly described must use language apt for the purpose (See Grigsby v.

Melville (1973) 3 All ER 455). The deed of Tamliknama excluded only certain lands, such as, Bisunprit etc. Exception is always a part of a thing granted because only a thing included can be excepted. The rule for construing exceptions is that what will pass by words in a grant will be excepted by the same or like words in an exception. The deed assigned proprietor's right and interest appertaining to the touzi. It then proceeds to exclude from the assignment, the kind of land

not being conveyed even though appertains to the touzi. There is no reservation in the deed by which Chote Nawab retained the bakasht land to himself. Whatever the donor wanted to be excepted it was so done. As a corollary bakasht land which forms part of a touzi was not excluded from being transferred.

14. The other reasoning of the lower appellate court in fortification of its decision that bakasht land was not conveyed is by resort to the schedule of the document. It is true where words of description in the body of the deed refer to a schedule as more particularly describing the property conveyed, the schedule will in general be construed as limiting the description in the deed, and only the premises mentioned in the schedule will pass. It is also equally established that a thing mentioned in the schedule, to which there is no reference in the body of the deed, will not pass (See Halsbury 4th Edition, 12th Volume paras 1523 and 1530). The body of the document says the shares (hasas) of mouzas, touzi numbers specified below in the deed being assigned/conveyed. In the recital of the deed, the schedule is not referred to as showing the quality and content of the touzi. Further the lower appellate court excepted the bakasht land from the concerned touzi because in respect of two touzis 136 and 7361 in the schedule, there is reference of khudkasht. From a perusal of the entire schedule it appears that in relation to some touzis 'Hakikat Milkiyat' is also written and in relation to majority of other touzis nothing is mentioned. Resort to the schedule, if at all permissible in law, could have been relevant, had all the touzis been similarly described by mention of the words 'Hakikat Milkiyat' or 'Khud kast' or both. The description in the schedule, therefore, is innocuous and cannot be decisive.

15. Intention of the parties to the instrument has to be gathered as expressed by words used in their ordinary natural sense as the words are the sole guide to the intention. To ascertain the intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Further in case of a conflict between one part of the document and in another with respect to the same property, it is well settled that earlier disposition of absolute title should prevail and latter direction of disposition should be disregarded (See Ram Kishorlal v. Kamalnarayan. AIR 1963 SC 890). Extrinsic evidence of that intention is not admissible save in the case of latent ambiguity which cannot otherwise be resolved. It is said surrounding circumstances however strong will not prevail over the clear language in the instrument (See National Society for Prevention of Cruelty to Children v. Scottish National Society 1915 AC 207 (HL) and the case of Grigsby (1973 (3) All ER 455) (supra)). Lands which have been excepted from being conveyed have been expressly mentioned in the deed, namely, lands of Bisunprit, Brahmotar, Niajaz Dargah, Chanda Chandedarana. Thus I am of opinion that every right in the touzi has passed save the lands expressly excepted in the deed of Tamliknama. The intention is clear from the document itself to convey all land other than aforesaid.

16. I, therefore, hold that the reasoning of the lower appellate court that since the deed mentions 'Milkiyat' interest only, the land-owner conveyed only the right to collect rent is patently erroneous. The lower appellate court erred in law to reverse the finding of the trial court in interpreting the Tamliknama, the title of the settlor. The trial court rightly held that the deed of gift conveyed everything pertaining to the touzi except the lands of Bisunprit, Brahmotar, Niajaz Dargah, Chanda Chandedarana.

17. The lower appellate court after having so held took up the consideration of the settlement by Mian to the plaintiff. With respect to the Hukumnamas, Exts. 3 and 3(a), which are the documents of settlement, it approaches the question with a dice highly loaded against the plaintiff which would be manifest from the following sentence in paragraph 19 of the judgment of the lower appellate court :

"In this background (the settlor has no right and title in the bakasht land) it was not difficult for him to bring into existence papers like the two sada Hukumnamas, Exts. 3 and 3(a), purporting to be executed by him (Syed Mian) in his favour about this settlement."

It then proceeds to deal with the rent receipts granted by Mian (Exts. 4 to 4(d)) in support of the settlement. Exhibits 4 to 4(d) were of the years 1944 to 1948. They were granted under the signature of P.W. 2. Exhibits 4(e) and 4(f), rent receipts, were by the Court of Wards for Mian's share of the years 1949 to 1959 issued by one Gobardhan Prasad but also proved by P.W. 2. The court of appeal below rejected the rent receipts because Gobardhan Prasad was not examined to prove Exhibits 4(e) and 4(f). It says in paragraph 19 as hereunder :

"In such circumstances, plaintiffs omission to put him in the witness box to testify his having granted these receipts on due payment of rents is no doubt a circumstance which would seem to support the defendants' allegation against their genuineness. Regard being had to these facts, these two receipts filed by the plaintiff are also not helpful to his claim."

But it completely omits to give any reason for rejection of Exhibits 4 to (d) duly proved by the plaintiff in support of the settlement. It appears that in support of the settlement the settlee executed registered kabuliats (Ext. 2 dated 1-5-1926, Ext. 2(a) dated 29-7-1933 and Ext. 2(b) dated 14-7-1940). They are for the years 1334 to 1352 fasli i.e., 1927 to 1945, showing that the bakasht lands were in the thicca of Jagernath Prasad. The court of appeal below rejected all the registered kabuliats merely on the ground that in the third kabuliat there is no mention of bakasht land, forgetting that the kabuliats were meant for cultivation of the land in the years 1926 and 1933 even after the oral gift and/or settlement by Chote Nawab to Mobarak Ali, father of defendants 6 and 7. The lower appellate court says as follows :

"Though it has been admitted for the plaintiff that all these kabuliats related to the same thika properties but the complete absence of mention of any of Bakasht land in this village in the third kabuliat though the two earlier kabuliats specifically mentioned it, has not been explained."

After having so observed, he finds that the existence of these kabuliats would not also appear to be particularly helpful to the plaintiff in proof of his claim of settlement of these lands. The sheet-anchor of the defendants is the gift of 1930 by Chote Nawab by Sada Hukumnama (Ext. C/12). Under the Mohammadan Law gift can be effected even orally but must be followed by delivery of possession. The trial court has considered this question in paragraph 21 of its judgment where it held that Chote Nawab in the year 1930, when the gift was made in favour of Mobarak Ali, was not possessed of the baksht land in view of Ext. C (14) dated 28-6-1936 as also the admission of D.W. 5 that Mian was possessed of the bakasht land being so recorded prior to the date of the gift of 1930. If

that be so, Chote Nawab could not have delivered possession in the year 1930 to back up the oral gift by delivery of possession of the land in favour of Mobarak Ali. Ext. C (14) of the year 1936 shows settlee's possession from Mian in the year 1936 and D.W. 5's admission shows that prior to 1930 Mian was the recorded tenant of the bakasht land. The lower appellate court has not adverted to these reasonings anywhere in its judgment of reversal which is the source of title of the defendants from Chote Nawab.

I have referred to the aforesaid consideration of the evidence by the lower appellate court only with a view to show its wrong legal approach to those questions overwhelmed with the idea that by the Tamliknama (Ext. 1) Chote Nawab did not convey the bakasht lands in dispute to his son Mian from whom the plaintiff claimed to have taken settlement of the lands in question. Once it is found that the lower appellate court erred in law in interpreting the document of title of the settlor and adopted a wrong legal approach to a case and thus arrived at a finding, a case for interference under Section 100 of the Code of Civil Procedure is clearly made out. This is not all.

18. Another grave error of law committed by the lower appellate court is its finding on the question of ouster and adverse possession. It applied a wrong legal test to the facts found. It is well known that possession of the land by co-owner, however long it might be, cannot confer on him any right unless it is adverse to other co-owners. Mere exercise of possession exclusively and continuously is also not enough. Prima facie acts of dispossession may not evidence ouster. Definite act of ouster has to be pleaded and then proved. The burden of proof is on the person claiming to displace the lawful title of co-heir. The possession of one of the tenants-in-common must be treated as possession of both and cannot be held as adverse to the other. See Baijnath Sahu v. Jaimangal Prasad Singh, AIR 1937 Patna 56; Dipnarain Rai v. Pundeo Rai, AIR 1947 Patna 99 : Udaychand v. Subodh Gopal, AIR 1971 SC 376 and P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314. In the instant case ouster has not been pleaded. What has been pleaded by defendants 6 and 7 in paragraphs 6, 10 and 11 is that : the plaintiff has no title to the land in suit and he or his alleged settlor was not in possession within 12 years prior to the institution of the-suit ; the defendants by their continued possession for over 12 years acquired valid title to the settled land; the defendants' possession is uninterrupted as a matter of right without any interference by any cosharer but believing in the valid title of late Mobarak Ali they knowingly allowed the transfer of the land to take place to the transferees of defendants 6 and 7 and for this reason there is no unity of title or possession between the plaintiff and the defendants to maintain a suit for partition.

The lower appellate court in paragraph 30 observed:

"Consequent upon his (Mobarak Ali's) settlement from the entire body of its cosharer landlords and his continuance in possession subsequent thereto for over 12 years by payment of rent for certain years at least thereafter and also by mutation of his name over this holding in the eye of law to ripen his title into it by adverse possession and this was quite enough to make good the defect if any in his title to it. The land as shown above was arable and when Mobarak Ali after his settlement was enjoying its produce that was I think sufficient to constitute ouster of others if any claiming right in it....."

The words quoted above from the judgment of the lower appellate court only indicate that Mobarak Ali alone was in enjoyment of the usufruct of the land but that is not enough to constitute adverse possessioa as between cosharers, co-owners and co-heirs.

19. I may dispose of here an objection raised by Mr. Mukherji, learned counsel for the defendants, that Mobarak Ali was neither a co-sharer nor a co-owner nor a coheir and, therefore, the law in relation to ouster will not apply. This submission has to be rejected. Mobarak Ali may not be a cosharer but both the plaintiff and Mobarak Ali derived their title from the cosharer landlord. Therefore, both of them would be holding the status of co-owner with respect to the property in question.

20. I may also point out here that once the plaintiff gives up his claim with respect to 4 annas share many of the composite reasons assigned by the lower appellate court, which resulted in the dismissal of the plaintiffs appeal and allowance of the appeal of the defendants by a common judgment, will become redundant and irrelevant. I am in complete agreement with the trial court, that the plaintiff had no right, title and possession with respect to the said 4 annas share.

21. Now coming to the question of ow. Thabatement of the appeal, the sole plaintiff died on 21-11-66. His heirs were substituted. One Israr Hussain claiming to be the real owner also sought to be substituted and he was provisionally added as a party appellant on 29-8-67. Israr Hussain died in December 1976 leaving behind certain heirs. No substitution of Israr Hussain was effected. This Court by its order No. 34 dated 29-8-67 observed that the question of competency of the appeal would be considered at the time of hearing of the appeal. Mr. Mukherji, learned counsel appearing for the respondents, contended that the original plaintiff was only a benamidar and not the true owner. Therefore, in absence of the substitution of the heirs of Israr Hussain the entire appeal abated in view of the decision in the case of Jamuna Rai v. Chandradip Rai, AIR 1961 Patna 178. Learned counsel for the appellants, on the other hand, submitted that the question whether the original plaintiff was the benamidar of the true owner Israr Hussain, has been raised for the first time in the appeal and never before in the courts below. Therefore, this question cannot be gone into. He further contended that a benamidar can sue though the real owner is not a party and any decision against the benamidar will bind the real owner. Benamidar is really a trustee for the real owner. See Ch. Gur Narayan v. Sheolal Singh, AIR 1918 PC 140. 1 am also of the opinion that benamidar represents the real owner and the continuance of the name of the benamidar will not permit the abatement of the appeal. The substituted heirs of the benamidar represented by Mr. Tara Kant Jha do not press that part of the affidavit by which they wanted to be transposed to the category of the respondents but intended to continue the appeal as the heirs of the sole plaintiff. The decision reported in AIR 1961 Patna 178 only lays down that under Order 22 Rules 3 and 10 with Rule 11 suit includes appeal for the purpose of abatement and is. therefore, of no help to Mr. Mukherji. The heirs of the plaintiff being already brought on record within time, they are perfectly justified to pursue the appeal to its finality which will enure to the benefit of the real owner. In that view of the matter, it is not at all required to be decided whether the original plaintiff was a benamidar of Israr Hussain.

22. Some compromise petitions have been filed between the plaintiff and the transferees from defendants Nos. 6 and 7. During the course of argument Mr. Tara Kant Jha stated that defendants 6 and 7 have sold substantial portion of the suit land to different persons who are parties to the suit. The plaintiff compromised with some or all of them. The land sold by defendants 6 and 7 prior to the institution of the suit should be allotted to their share. Their 2/3rd share according to him comes to 1 bigha, 7 kathas and 18 2/3 dhurs. Even assuming that the defendants have sold more than 1 bigha, 7 kathas and 18 2/3 dhurs before the suit, the learned counsel very fairly stated that the entire area so sold before the suit may also be allotted to the defendants even though it may be in little excess of their share; only the remaining land may be allotted to the share of the plaintiff in case the appeal succeeds. The sales effected during the pendency of the suit, however, should depend upon the result of the suit and the appeal. The offer completely protects the interest of the transferees from defendants Nos. 6 and 7, who took conveyance prior to the institution of the suit, some of whom are defendants in this appeal.

23. In the result, the judgment of the lower appellate court is set aside with respect to plaintiffs claim of 5 annas, 4 pies and odd and the case is remanded back to the lower appellate court to decide it afresh bearing in view the observations made in this judgment in accordance with law. The lower appellate court should also dispose of the compromise petitions bearing in view the concession made on behalf of the appellants in this Court as noted in the previous paragraph of this judgment. The suit being of the year 1959, I further direct the lower appellate court to dispose of the appeal within six months of the receipt of this judgment. The appeal is accordingly allowed. There will be no order as to costs.