CASE NO.:
Appeal (civil) 8098 of 2004

PETITIONER:
Binapani Paul

RESPONDENT:
Pratima Ghosh & Ors

DATE OF JUDGMENT: 27/04/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T

S.B. SINHA, J :

One Dr. Ashutosh Ghosh (Dr. Ghosh), a Physician practising at Rangoon was a prosperous person. He purchased two immovable properties in Calcutta in the year 1927 situate at 79/3-A and 79/3-B, Lower Circular Road, Calcutta, in his own name. Suprovabala was his wife. They at the relevant time had seven daughters, including the appellant herein and a son named, Amal. Respondent Nos. 1 and 2 are his wife and daughter. Suprovabala intended to purchase the premises situate at No. 24, Convent Road, Calcutta belonging to the estate of Late Edwin St. Clair Vallentine. She executed a power of attorney in favour of one Atul Chandra Ghosh, brother of Dr. Ghosh, the relevant portion whereof reads as under:

"\005Whereas I have decided to purchase premises No.24, Convent Road, Calcutta, belongings to the Estate of Late Mr. Edwin St. Chair Vallente at the price of Rs.26000/- (Rupees Twenty Six thousand only) but the agreement for sale has not yet been entered into with the Administration General of Bengal as Administrator to the Estate of Edwin St. Clair Vallente now therefore know. Yet that I hereby appoint Atul Chandra Ghosh of 79/3-A, Lower Circular Road, Calcutta my attorney to do and execute for me and in my name and all acts, matters and things that may be necessary in order to complete the said purchase and particularly the following: \005
In witness whereof I set and subscribe my hand and seal at Rangoon this 23rd day of September 1935 in the presence of
Date: 23.09.1935
No.1986
Date of Registry: 17.10.1935

Sd/- Smt. Supravabla Ghosh

Sd/- K.N. Ganguli
Advocate High Court & Councilor
Corporation of Rangoon
Sd/- S.N. Ganduly, Advocate, High Court
Sd/- Ashutosh Ghosh M.B. (Cal)
Medical Practioner\005"

The said power of attorney, however, was preceded and followed by two telegrams of Dr. Ghosh addressed to his brother in relation to execution thereof as also purchase of the said property. The said power of attorney was executed before a Magistrate at Rangoon. Dr. Ghosh was an attesting witness therein. Interestingly, Suprovabala described herself as daughter of Babu Rangalal Ghosh and not the wife of Dr. Ghosh therein. A registered indenture was executed on 16.11.1935 by the Administrator General of Bengal to the estate of Edurn St. Clair Vallentine in favour of Suprovabala for a sum of Rs. 26,000/-. Indisputably, during the life time of Dr. Ghosh,

the name of Suprovabala was mutated. She had all along been in possession of the said property. Dr. Ghosh died in Rangoon in the year 1940. Suprovabala continued to reside in the suit premises. She died on 26.05.1942 leaving, as indicated hereinbefore, seven daughters and son Amal. Amal was married to Respondent No. 1 herein in 1946.

In the year 1958, the daughters of Suprovabala got their names mutated in place of their mother. Amal objected thereto, but his objection was rejected. Marriage of four sisters of Amal took place in the suit premises during the period 1944 to 1970. Although initially all the sisters and the brother were living together in the said house, inter alia, after their marriage the daughters of Suprovabala started living at their respective husbands' places. However, three sisters allegedly continued to live in the said house till May, 1958 but they had to leave it because of ill-treatment of Amal and his wife. It appears that in the year 1964, two unmarried daughters of Suprovabala who had been living there were also compelled to leave the house. They filed a suit for maintenance with liberty to claim their right to take appropriate legal action to recover their share of the said premises at an appropriate time, which was allowed by the High Court. Three out of the seven daughters of Dr. Ghosh filed a suit for partition against Amal on 19.09.1973 claiming 3/7th share of the property of their mother, a final decree for partition as also a decree for accounts.

Amal in his written statement filed in the suit inter alia contended that Suprovabala was benamdar of Dr. Ghosh. Suprovabala, therefore, had only a limited interest under the Hindu Women's Right to Property Act, 1937 and on her death Amal became the absolute owner. Amal died during pendency of the suit whereupon Respondent Nos. 1 and 2 were substituted in his place.

Before the learned Trial Judge, plaintiff - Binapani examined herself as PW-3. A common relation of the parties being Chandi Charan Ghosh examined himself as PW-4. Respondent No. 1 did not examine herself. Putul Ghosh, daughter of Amal who was born only in 1954 examined herself as DW-1.

The learned Trial Judge decreed the suit holding that Dr. Ghosh intended to purchase the said property for the benefit of his wife. The Trial Court in its judgment opined that if Dr. Ghosh wanted to purchase the property for himself, there was no necessity for execution of power of attorney by Suprovabala in favour of Atul Chandra Ghosh. It was noticed that the power of attorney had been attested by Dr. Ghosh which is a pointer to show that the property was purchased by him for the benefit of his wife. Circumstances surrounding the same, it was held, also led to the said concusion. It was, therefore, not held to be a case of benami transaction. A first appeal was preferred thereagainst before the High Court by Respondent Nos. 1 and 2. A Division Bench of the High Court although completed hearing of the appeal on 25.01.2002, delivered judgment after 19 months, i.e., on 29.07.2003.

The High Court opined that:

(i) it was for the plaintiff to prove that Dr. Ghosh purchased the property for the benefit of his wife;
(ii) purchase by Suprovabala through an attorney does not negative the nature of transaction being a benami one;
(iii) mutation of names of all the heirs of Suprovabala was of no consequence.
(iv) Dr. Ghosh could not have gifted the property in favour of his wife being impermissible under the Dayabhaga School of Hindu Law.

Mr. S.B. Sanyal, learned senior counsel appearing on behalf of the appellant, submitted that the High Court committed a manifest error in passing the impugned judgment insofar:

(i) the onus of proof had wrongly been placed upon the plaintiff;

(ii) the defendant had not been able to show any motive for the benami purchase.
(iii) the presumption that an apparent state of affairs is the real state of affairs has not been rebutted by adduction of any cogent evidence.
(iv) contribution of purchase money is only one of the factors for proving benami transaction but intention also plays a significant role in relation thereto which was required to be determined having regard to the surrounding circumstances, the relationship of the parties, the motive governing their action and the subsequent conduct of the parties.
(v) Putul Ghosh (DW-1) cannot be said to have any knowledge about the transaction and there was no reason as to why her mother Pratima Ghosh did not examine herself as a witness.

Mr. Devadatt Kamat, learned counsel appearing on behalf of Respondent Nos. 4 to 7 supplemented the argument of Mr. Sanyal stating that the High Court cursorily dealt with the question of intention in relation to the transaction in question. Our attention has also been drawn to Section 5 of the Power of Attorney Act, 1882.

Mr. Bhaskar P. Gupta, learned senior counsel appearing on behalf of Respondent Nos. 1 and 2, on the other hand, would submit that:

(i) the suit property having been acquired in the year 1935, as purchases of property in the benami name of wives being prevalent at the relevant time, the case was required to be considered from that angle.
(ii) a transaction in benami may be entered into for no apparent reason.
(iii) doctrine of advancement has no application in India.
(iv) Benami Transactions (Prohibition) Act, 1988 has no retrospective effect. The source of money being an important factor for determining benami nature of transaction, the onus lay on the plaintiffs.
(v) the parties being governed by the Dayabhaga School of Hindu Law, Dr. Ghosh could not have made a gift of immovable property in favour of his wife.

Before embarking upon the rival contentions of the parties, we may also notice that Dr. Ghosh had a life insurance. Suprovabala was his nominee and after his death, the entire amount of insurance was received by her.

A question as to whether a transaction evidences a benami nature thereof is always difficult to answer. It is a case where despite some evidence brought on records by the plaintiffs that Suprovabala paid the consideration amount or at least a part of it, we may proceed to determine the issues between the parties on the premise that the amount of consideration was provided by Dr. Ghosh. A person may for various reasons intend to purchase a property in the name of his wife. It may be for one reason or the other. There may or may not be a practice in respect thereto. A purported prevalent practice in this behalf, as was observed by the Judicial Committee, in Sura Lakshmiah Chetty and Others v. Kothandarama Pillai [AIR 1925 PC 121] and Gopeekrist Gosain v. Gungapersaud Gosain [(1854) 6 Moore's Indian Appeals 53], is in our opinion not of much importance. A court of law is required to determine such a question. Without anything more, it cannot determine the same on the basis of such an alleged practice only.

Dr. Ghosh was a prosperous person. He must be a medical practitioner of repute. He had purchased two very valuable properties in Calcutta in quick succession being situate at 79/3-A and 79/3-B, Lower Circular Road, Calcutta, which is a very prime area in the town of Calcutta. The property in question was purchased in 1935. Admittedly, renovations were made in the year 1938. He died in the year 1940 at Rangoon. At that point of time, none of his children was married. He had seven daughters. In

1935, Hindu Women's Right to Property Act, 1937 did not come into force. He, therefore, might have been of the opinion that in case of his early death, which appears to have been his premonition, something should be kept apart for his wife and daughters. When a person develops such an intention, it would be opposed to the essential characteristics of a benami transaction. He furthermore was not a debtor. He was not required to avoid any liability. He had no apparent motive for entering into a benami transaction. The plaintiffs' case that he had done so for the benefit of his wife, therefore, must be considered from that angle.

Amal appears to be the eldest amongst the children. When a son is the eldest amongst the children, expectation of a father will always be that on his death, he would look after his mother and sisters. Son would perform his duties not only by providing maintenance to the daughters, to which they were otherwise entitled to, but also they were to be married. Dr Ghosh's eagerness to purchase the property is evidenced by two telegrams dated 20th and 24th September, 1935.

Mr. Gupta's submission that the said telegrams are relevant to show Dr. Ghosh's personal involvement in the transaction may not be of much significance. They were at Rangoon. Negotiations for purchase were to be held with the Administrator General of Bengal. Earnest money was to be deposited. The deed was to be drawn up. In those days, a Hindu wife was supposed to maintain some 'purdah'. We do not know whether she knew English or not. She, therefore, was not expected to draft a telegram and go to post office for the purpose of transmission thereof. But, the power of attorney executed by her plays an important role. The power of attorney must have also been drafted at the behest of Dr. Ghosh. Ordinarily, Suprovabala would be described as the wife of Dr. Ghosh. She was not. She was described as the daughter of Babu Rangalal Ghosh. Dr. Ghosh himself was an attesting witness. He being in the position of husband and if we accept the case of the defendants \026 respondents that he intended to have a benami transaction, ordinarily, he would not get his wife described as daughter of somebody instead of his own wife. Such unusual step on the part of Dr. Ghosh leads to one conclusion that he intended to purchase the property for the benefit of his wife. The recitals made in the power of attorney are also of much significance. It was categorically stated that it was Suprovabala who had decided to purchase the said property and it was she who was appointing her husband's brother as her attorney.

In Tara Sundari Sen v. Pasupati Kumar Banerjee & Ors. [1974 CLJ 370], it was observed:

"\005The 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. Shantabala as her absolute property and that her husband had no right, title or interest in the same\005"

It was further observed therein:

"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 of his wife Shantabala to enable her to acquire the properties. If that be so, the properties were Shantabala's Ajoutuka Stridhana. That Nagendra made 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 Shantabala 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 Shantabala 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 trademen. Therefore, the fact that payments were made by Nagendra Nath Ganguly is not inconsistent with the case that the premises belonged to Shantabala absolutely."

In a given situation, execution of a power of attorney may not be of importance but then the backdrop of events and the manner in which the power of attorney was drafted as well as the very fact that Dr. Ghosh himself became an attesting witness thereto, the same plays very significant role. If in the light of the so-called practice as then existed, i.e., to purchase property in the name of his wife, Dr. Ghosh intended to enter into a benami transaction, his intention, therefor, would have been clear and unambiguous or in any event, the same would have been explicit from the surrounding circumstances. They were not. Moreover, immediately after the purchase, the name of Suprovabala was mutated. She started paying tax. There is no evidence to show that Dr. Ghosh took an active role except providing for the amount in regard to the construction of the house. Evidence on records clearly show that Suprovabala had also been looking after the constructions of the house along with Chandi Charan Ghosh (PW-4).

The fact, which we have noticed hereinbefore, viz., that an insurance was also made in her name is also a pointer to show that Dr. Ghosh intended to provide sufficient money at the hands of his wife. [See Ext. A (13)] Ordinarily, a son would be made a nominee. We must place on record the social condition as thence prevailing, viz., a son under the law was bound to maintain his family and, therefore, the entire property at the disposal of the father would be given to the son.

We do not have any direct evidence of conclusive nature in this regard before us. We must, therefore, deal with the matter on reasonable probabilities and legal inferences.

Dr. Ghosh indisputably was a person having a superior knowledge and understanding. He was holding a responsible position in the society. He was in a noble profession. When he made attestation of the deed of the power of attorney keeping in view the fact that he was the husband there cannot be any doubt that he fully understood in regard to the nature of the transaction as also the contents and merits thereof.

We may at this juncture also notice a Constitution Bench decision of this Court in Kanakarathanammal v. V.S. Loganatha Mudaliar [AIR 1965 SC 271 : (1964) 6 SCR 1] wherein this Court had an occasion to deal with the question of providing money to the wife, the purpose for purchase of the property vis-‘-vis a transaction which was benami in nature. For the purpose of inferring acknowledgement and/ or admission by husband that the property was purchased by his wife, this Court, upon taking into consideration the provisions of Mysore Hindu Law Women’s Rights Act (10 of 1933), opined:

"12. We have carefully considered the arguments thus presented to us by the respective parties and we are satisfied that it would be straining the language of Section 10(2)(b) to hold that the

property purchased in the name of the wife with the money gifted to her by her husband should be taken to amount to a property gifted under Section 10(2)(b). The argument about the substance of the transaction is of no assistance in the present case, because the requirement of Section 10(2)(b) is that the property which is the subject-matter of devolution must itself be a gift from the husband to the wife. Can we say that the property purchased under the sale deed was such a gift from the husband to his wife? The answer to this question must clearly be in the negative. With what funds the property is purchased by the female is irrelevant for the purpose of Section 10(2)(d); so too the source the title to the fund with which the said property was purchased. All that is relevant to enquire is: has the property been purchased by the female, or has it been gifted to her by her husband? Now, it seems clear that in deciding under which class of properties specified by clauses (b) &(d) of Section 10(2) the present property falls, it would not be possible to entertain the argument that we must treat the gift of the money and the purchase of the property as one transaction and hold on that basis that the property itself has been gifted by the husband to his wife. The obvious question to ask in this connection is, has the property been gifted by the husband to his wife, and quite clearly a gift of immovable property worth more than Rs 100 can be made only by registered deed. The enquiry as to whether the property was purchased with the money given by the husband to the wife would in that sense be foreign to Section 10 (2)(d) gift of money which would fall under Section 10(2)(b) if converted into another kind of property would not help to take the property under the same clause, because the converted property assumes a different character and falls under Section 10(2)(d). Take a case where the husband gifts a house to his wife, and later, the wife sells the house and purchases land with the proceeds realised from the said sale. It is, we think, difficult to accede to the argument that the land purchased with the sale-proceeds of the house should, like the house itself, be treated as a gift from the husband to the wife; but that is exactly what the appellants argument; will inevitably mean. The gift that is contemplated by Section 10(2)(b) must be a gift of the very property in specie made by the husband or other relations therein mentioned. Therefore, we are satisfied that the trial court was right in coming to the conclusion that even if the property belonged to the appellants mother, her failure to implead her brothers who would inherit the property along with her makes the suit incompetent. It is true that this question had not been considered by the High Court, but since it is a pure point of law depending upon the construction of Section 10 of the Act, we do not think it necessary to remand the case for that purpose to the High Court\005"

Mr. Gupta made an endeavour to distinguish the said decision on fact of the matter submitting that therein the father wrote a large number of letters which included a discussion of the wife’s will where he had acknowledged the wife’s title to the property, but we have to consider the

crux of the matter to understand the underlying principle laid down therein.

Acceptance of acknowledgement of title comes in various forms. It may be before the transaction is entered into and may be subsequent thereto. The court has to gather the intention of the concerned parties on the basis of the circumstances surrounding the transaction and not from the conduct of the parties only at a subsequent stage. It may be true that ipso jure acknowledgement of title would mean the same should be only after the title is acquired, but, whether addressing ourselves to a question of this nature, viz., as to whether Dr. Ghosh intended to enter into a benami transaction in the name of his wife, either surrounding circumstances leading to the inference that he had no such intention must be gathered from the totality of the circumstances both preceding and subsequent to the transaction in question or if the intention of the person providing for the fund for purchasing the property has a major role to play, how it was given also assumes some significance. Apart from the fact that Dr. Ghosh himself was keen to see that the property is purchased for the benefit of his wife, we must notice that it was also mutated in her name. When a mutation takes place with the knowledge of the husband, although not conclusive, would provide for a link in the chain.

To decipher the intention of the parties, this Court must go back to the societal situation as was prevailing in 1935. Dr. Ghosh as a man of ordinary prudence wanted to make provision to protect and insure the welfare of his seven daughters and wife. In a case of this nature, the answer to such a question has to be in the affirmative. Question of intention is always relatable and peculiar to the facts of each case. [See Nawab Mirza Mohammad Sadiq Ali Khan and Others v. Nawab Fakr Jahan Begam and Another AIR 1932 PC 13]

In Chittaluri Sitamma and another v. Saphar Sitapatirao and others [AIR 1938 Madras 8], it was held:

"\005The mere suspicion that the purchases might not have wholly been made with the lady’s money will certainly not suffice to establish that the purchases were benami, nor even the suspicion that moneys belonging to Jagannadha Rao whether in a smaller measure or a larger measure, must have also contributed to these purchases. 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 character\005"

The learned counsel for both the parties have relied on a decision of this Court in Thakur Bhim Singh (Dead) By LRs and Another v. Thakur Kan Singh [(1980) 3 SCC 72] wherein it has been held that the true character of a transaction is governed by the intention of the person who contributed the purchase money and the question as to what his intention was, has to decided by:

(a) Surrounding circumstances
(b) Relationship of the parties
(c) Motives governing their action in bringing about the transaction and
(d) Their subsequent conduct.

All the four factors stated may have to be considered cumulatively. The relationship between the parties was husband and wife. Primary motive of the transaction was security for the wife and seven minor daughters as they were not protected by the law as then prevailing. The legal position obtaining at the relevant time may be considered to be a relevant factor for proving peculiar circumstances existing and the conduct of Dr. Ghosh which is demonstrated by his having signed the registered power of attorney.

This aspect of the matter has been considered by this Court in Jaydayal Poddar (Deceased) Through L.Rs. and Another v. Mst. Bibi Hazira and Others [(1974) 1 SCC 3], wherein this Court held:

"\005The 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 test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the Courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, it 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."

Source of money had never been the sole consideration. It is merely one of the relevant considerations but not determinative in character. [See Thulasi Ammal v. Official Receiver, Coimbator AIR 1934 Madras 671]

In Protimarani Debi and Anr. v. Patitpaban Mukherjee and Ors. [60 CWN 886], the Calcutta High Court observed:

"The correct proposition was stated in Official Assignee of Madras vs. Natesha Gramani (1) (A.I.R. 1927 Madras 194). There is no presumption that when a property stands in the name of a female the Court will immediately jump to the conclusion without any proof that it really belongs to the husband of the female. Before such a presumption is raised or attracted it is necessary for the person who wants to make out that the property is not the property of the female, in whose name the document stands, to establish the fact that the consideration money for the purpose had come from the husband."

It will be useful at this juncture to notice a judgment of the Calcutta High Court in K.K. Das, Receiver and others v. Sm. Amina Khatun Bibi and another [AIR 1940 Cal 356], wherein it was held that where a husband provides for the money for construction of a building on a land which is in the name of his wife, he did not intend to reserve any right in the structures raised therein.

In 1935, the appellant herein was a minor. Whether she was aged 9 years or 14 years, thus, is immaterial. She, however, had the occasion to know something about the property from her mother or father. Dr. Ghosh expired only in 1940 and Suprovabala died in 1942. If the children had no knowledge about the title of her mother, there would not have been any occasion for them to make any application for mutation of their names. Amal was marred in 1946. Allegedly, he and his wife started mal-treating the sisters. Three of them, as noticed hereinbefore, were yet to be married. The dispute between the parties rose to such a pass that three of the sisters had to leave the house. They had to seek for a shelter somewhere else. So long as the relationship between the parties was good, evidently, no problem arose. The mutation in the name of the daughters, therefore, assumes considerable significance. It is not a coincidence that three daughters had to leave the house and an application for mutation was filed in the year 1958. Amal objected thereto and it would not be a matter beyond anybody's comprehension that he had fought out the same bitterly. He must have done it and despite the same mutation was done in the name of all. Only a suggestion was given to PW-4 that the name of all the co-sharers was mutated only because husband of one of the sisters was in Calcutta Municipal Corporation. If that be so, it was expected of Amal to prefer an appeal thereagainst. It was expected that he would file a suit for declaration to assert his own title as he did in the suit.

Mr. Gupta has relied upon a decision of the Patna High Court in Shahdeo Karan Singh and others v. Usman Ali Khan [AIR 1939 Patna 462] wherein it was held that obtaining mutation of names do not establish a gift. This may be so. But, however, in this case, we are concerned with the conduct of the parties.

The fact that Amal allowed the order of mutation to attain finality, thus, would also be a pointer to suggest that despite such bitter relationship between the parties he accepted the same; more so, when mutation of one's name in the Municipal Corporation confers upon him a variety of rights and obligations. He had rights and obligations in relation thereto because, according to him, in relation to the said property vis-'-vis Calcutta Municipal Corporation, he was residing with his wife, he allegedly inducted tenants and had been realizing rent from them.

Tenants could have denied his title. He would not have been given permission to make any additions or alterations. He, in absence of an order of mutation, might not be given other amenities, if he had filed such an application in his own name. He, therefore, knew that mutation of names of all the parties in the Calcutta Municipal Corporation may bring forth to him many obstacles in future in the enjoyment of the property. At least he could have taken such a step even after the suit filed by two of the sisters for maintenance. The suit was decreed. Even in the said suit, the right to claim partition in the properties had been kept reserved.

We have seen hereinbefore that the appellant examined herself as a witness. The wife of Amal even did not do so. An adverse inference should be drawn against her.

In Tulsi and Others v. Chandrika Prasad and Others [(2006) 8 SCC 322], this Court observed:

"Before the courts below, the Appellant No. 1 did not examine herself. The Respondents categorically averred in the plaint that the mortgage amount was tendered to her as also to her husband. Having regard to the peculiar facts and circumstances of this case, we are of the opinion that she should have examined herself to deny such tender.

In Sardar Gurbakhsh Singh v. Gurdial Singh

and Another [AIR 1927 PC 230], the Privy Council emphasized the need of examination of the parties as witnesses. [See also Martand Pandharinath v. Radhabai, AIR 1931 Bom 97 and Sri Sudhir Ranjan Paul v. Sri Chhatter Singh Baid & Anr., Cal LT 1999(3) HC 261]"

Daughter of Respondent No. 1 (Respondent No. 2) who was born in 1954 examined herself as DW-1. She evidently had no knowledge about the transaction. She could not have any. At least it was expected that Respondent No. 1 might have gathered some knowledge keeping in view the conduct of her husband vis-'-vis the sisters in relation to the property. Even otherwise, she was a party to the suit. No evidence, worh the name, therefore, had been adduced on behalf of Respondent No. 1.

Interestingly, Amal pleaded ouster. If ouster is to be pleaded, the title has to be acknowledged. Once such a plea is taken, irrespective of the fact that as to whether any other plea is raised or not, conduct of the parties would be material. If, therefore, plea of ouster is not established, a' fortiori the title of other co-sharers must be held to have been accepted.

In T. Anjanappa and Others v. Somalingappa and Another [(2006) 7 SCC 570], it was held:

"12. The concept of adverse possession contemplates a hostile possession i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property."

It was further held:

"21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise\005"

[See also See also Govindammal v. R. Perumal Chettiar & Ors., (2006) 11 SCC 600 and P.T. Munichikkanna Reddy & Ors. v. Revamma and Ors., Civil Appeal No. 7062 of 2000 decided on 24th April, 2007]

Amal, therefore, could not have turned round and challenged the title

of the appellant and other respondents. [See Syed Abdul Khader v. Rami Reddy and Others (1979) 2 SCC 601]

PW-3 in her evidence made three significant statements:

(i) The property was purchased for the benefit of the mother without keeping any financial interest;
(ii) During the life time of her father, her mother used to exercise right, title and interest of the property and she continued to do so even after her father's death.
(iii) Her mother used to say that the property belonged to her.

PW-4 Chandi Charan Ghosh is a common relation. According to him, Dr. Ghosh acknowledged the title of his wife before him. We may not rely on his evidence in its entirety but we intend to emphasise that at least some evidence has been adduced on behalf of the appellant whereas no evidence, worth the name, has been adduced on behalf of the defendants \026 respondents. DW-1, as noticed hereinbefore, having born in 1954, could not have any personal knowledge either in regard to the transaction or in regard to the management of the property by Suprovabala whatsoever. She was even only four years old when the name of all co-sharers was mutated in the records of the Calcutta Municipal Corporation. She, however, admitted that there are two other houses standing in the name of Dr. Ghosh. She even could not say anything about the power of attorney. She accepted that the suit house was in the name of Suprovabala till 1958. She accepted that her father objected to the mutation but the same was granted and no further step had been taken. Although she claimed that she had been looking after the affairs, she could not give any details about the purported litigations as against the tenants initiated by her father.

Reliance placed by Mr. Gupta on Hindu Women's Right to Property Act, 1937 is misplaced as the property was purchased in the year 1935. The said Act had no application at that point of time. There, however, cannot be any doubt whatsoever in regard to the legal position that in respect of other properties of Dr. Ghosh, she had a limited interest.

Reliance by the High Court upon Mulla's Hindu Law for the proposition that husband could not give immovable property as stridhan to his wife, in our opinion, is wholly misplaced. Mulla has relied upon a decision of the Madras High Court in Venkata Rama Rau v. Venkata Suriya Rau and Another [ILR (1877) Madras 281 at 286]. What Mulla in fact says is that any gift or immovable property under Dayabhaga law would not become wife's stridhan. It is, however, not in dispute that the amount necessary for purchasing an immovable property can be a subject matter of gift by a person in favour of his wife. [See K.K. Das (supra)]

We are also really not concerned with such a situation as the situation had undergone a sea change after coming into force of the Transfer of Property Act. The Transfer of Property Act prescribes that any clog on transfer of property right to transfer would be void. Dayabhaga does not prohibit gift of immovable property in favour of his wife by her husband. It merely says that Dayabhaga did not recognize it to be her stridhan. It was only for the purpose of inheritance and succession. The same has nothing to do with the Benami Transaction of the Property and to determine the nature of transaction.

Burden of proof as regards the benami nature of transaction was also on the respondent. This aspect of the matter has been considered by this Court in Valliammal (D) By LRS. v. Subramaniam and Others [(2004) 7 SCC 233] wherein a Division Bench of this Court held:

"13. This Court in a number of judgments has held

that it is well established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami. The essence of a benami transaction is the intention of the party or parties concerned and often, 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. Refer to Jaydayal Poddar v. Bibi Hazra, Krishnanand Agnihotri v. State of M.P., Thakur Bhim Singh v. Thakur Kan Singh, Pratap Singh v. Sarojini Devi and Heirs of Vrajlal J. Ganatra v. Heirs of Parshottam S. Shah. It has been held in the judgments referred to above that the question whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid. After saying so, this Court spelt out the following six circumstances which can be taken as a guide to determine the nature of the transaction:

(1) the source from which the purchase money came;

(2) the nature and possession of the property, after the purchase;

(3) motive, if any, for giving the transaction a benami colour;

(4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(5) the custody of the title deeds after the sale; and

(6) the conduct of the parties concerned in dealing with the property after the sale. (Jaydayal Poddar v. Bibi Hazra1, SCC p. 7, para 6)

14. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia.

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18. It is well settled that intention of the parties is the essence of the benami transaction and the money must have been provided by the party invoking the doctrine of benami. The evidence shows clearly that the original plaintiff did not have any justification for purchasing the property in the name of Ramayee Ammal. The reason given by him is not at all acceptable. The source of money is not at all traceable to the plaintiff. No person named in the plaint or anyone else was examined as a witness. The failure of the plaintiff to examine the relevant witnesses completely demolishes his case."

For the reasons aforementioned, the impugned judgment cannot be

sustained which is set aside accordingly. The judgment of the Trial Court is restored. The appeal is allowed. In the peculiar facts and circumstances of this case, however, there shall be no order as to costs.