

Equivalent citations: AIR 1998 Pat 1

Bench: S Chattopadhyaya, M Eqbal

Rukaiya Begum And Ors. vs Fazalur Rahman And Ors. on 14/5/1997

JUDGMENT

M.Y. Eqbal, J.

1. The Defendants-Appellants have filed this appeal under Clause 10 of the Letters Patent of the Patna High Court Rules;, challenging the judgment and order passed by the learned single Judge of this Court in F.A. No. 130 of 1982 (R) whereby and whereunder the learned single Judge reversed the judgment and decree passed by the trial Court and decreed the suit for partition in respect of part of the properties.

2. The plaintiffs-respondents filed P.S. No. 8 of 1976 claiming half share in the suit properties left by Late Muslim Khan. The said suit was dismissed by the learned 2nd Additional Subordinate Judge, Giridih, in terms of the judgment and decree dated 23-5-1982.

3. The brief facts of the case are as follows:- The

plaintiffs-respondents filed the aforesaid suit claiming partition of half share in the suit properties allegedly left by Late Muslim Khan and after his death they inherited the same according to the law of inheritance under the Mahomedan Law. From the genealogical table given in "the plaint as also in the impugned judgment, it appears that Late Muslim Khan had two wives, namely, Most. Moriam and Bibi Sitabo. The defendants-appellants are the sons, daughters and order heirs from the first wife of Late Muslim Khan, while the plaintiffs-respondents are the heirs and successors from the second wife of Late Muslim Khan. The plaintiffs' case was that Late Muslim Khan who was a business man and he died and possessed the ancestral residential house bearing Holding No. 311 in Ward No. 4 of Giridih Municipality and another house bearing Holding No. 337 of Ward No. 4 of Giridih Municipality. He had also acquired two other houses in Giridih town in the name of his daughter-Kulsum Bibi. The plaintiffs' further case was that Muslim Khan died in the year 1925 and after his death the houses bearing Holding Nos. 311 and 337 besides the family business came in possession of the four sons of Muslim Khan from the above named two wives. The plaintiffs further pleaded that the two houses bearing Holding Nos. 29 and 261 which were acquired in the name of Kulsum Bibi remained in her possession till her death in the year 1947. The plaintiffs' case was that the two sons from the first wife, namely, Habib Khan and Abdul Aziz Khan, were clever and shrewd persons and in due course took complete control of (the business of the joint family taking advantage of the simplicity of their step brothers-Rahim Khan and Abdul Zabar Khan, father of the plaintiffs. Having come in control of the family business, they received the income from such business as also rent from the tenants and utilised such income for acquiring three other houses bearing Holding Nos. 468,596 and 610 in Giridih town. According to the plaintiffs, therefore, the three houses were also acquired by the joint family business. It is further stated that even Holding Nos. 29 and 261 which were acquired by Late Muslim Khan in the name of her daughter Kulsum Bibi, came in possession of the sons of Late Muslim Khan after the death of Kulsum Bibi, which took place in the year 1947. The plaintiffs, therefore, claim 8 Annas share in the house properties mentioned in the Schedule of the plaint. The plaintiffs also challenged the transfer made by the defendants in respect of Holding Nos. 261 and 596.

The defendants-appellants contested the suit by filing written statement denying and disputing each and every allegations made in the plaint. The defendants denied the existence of any joint family business. It was also denied that Late Muslim Khan inherited the ancestral houses bearing Holding Nos. 311 and 337 or that he had acquired Holding. Nos. 29 and 261 in the name of his daughter-Bibi Kulsum. It was also denied that after the death of Muslim Khan, Holding Nos. 311 and 337 came in possession of his four sons. The defendants

categorically denied that any property was purchased from the income of the joint family business or the income derived from rent.

The defendants' case was that Late Muslim Khan had himself started the business of selling oil and perfumes on a very small scale. Out of his earnings he acquired only one house property on 16-6-1900 bearing Holding No. 337 by virtue of sale deed dated 6-6-1900 in his own name. In the year 1909 he gave that house property to his first wife-Bibi Mariam in lieu of Dower Debt and put her in possession. Bibi Mariam thereafter got her name mutated in the Zamindari Sharista of Equitable Coal Company and later on when the Giridih Municipality was constituted, she continued to pay rents and taxes.

So far the house property bearing Holding No. 311 is concerned, the defendants' case was that Bibi Mariam acquired the said house herself by a registered deed of sale dated 17-2-1900 in her own name and it was never purchased by Late Muslim Khan. Bibi Mariam died, possessed of the aforesaid two house properties, in the year 1955 leaving behind two sons, the defendants, who succeeded her and came in possession of the aforesaid two house properties. They got their names mutated in respect of those two houses and continued to pay rent and taxes. The further case of the defendants is that Holding No. 261 was acquired and purchased by the husband of Kulsum Bibi from his own money and it was never acquired and possessed by Late Muslim Khan. After the death of Bibi Kulsum in the year 1947, the properties came in the hands of the defendants as the husband of Bibi Kulsum pre-deceased her. So far the remaining suit properties are concerned, the defendants claim that those properties had been jointly acquired by the two sons of Bibi Mariam by registered Deeds of sale from time to time and the properties continued to be in their possession. It was claimed that after the death of Muslim Khan, these two sons from his first wife started their own business of stationery and other goods of merchandise. It is stated that the plaintiffs who are the step brothers always remained separate and had no concern with the business and properties of defendant No. 1 and his brothers.

4. The trial Court after considering the oral and documentary evidence dismissed the suit negating the case of the plaintiffs. The trial Court held that the plaintiffs failed to establish that the two houses bearing Holding Nos. 337 and 311 were ancestral properties acquired and possessed by Late Muslim Khan. The trial Court further held that Holding No. 337 was given by Late Muslim Khan to his first wife-Bibi Mariam and Holding No. 311 was acquired by her and it was not a benami purchase by Late Muslim Khan. The trial Court also came to a finding that no property was acquired out of the joint family fund or joint family business.

In appeal filed by the plaintiffs, the learned single Judge confirmed the findings of the trial Court by holding that the suit properties except Holding Nos. 337 and 311 are not the joint family properties and, therefore, the plaintiffs are not entitled to get any share. So far Holding No. 337 is concerned, the learned single Judge held that Bibi Mariam, the first wife of Late Muslim Khan, did not acquire any valid title in respect of Plot No. 337 by virtue of the alleged transfer made by Muslim Khan in lieu of dower debt as the said transfer by way of Hiba-Bil-Iwaz was not effected by a registered document. According to the learned single Judge, therefore, Holding No. 337 formed part of the Estate of the deceased-Muslim Khan and after his death, all his sons and daughters have inherited the said Holding and are entitled to get share.

So far Holding No. 311 is concerned, the learned single Judge held that since the defendants-appellants failed to adduce evidence to establish that Bibi Mariam had independent source of income and the said Holding was acquired by her, it shall have to be presumed that Holding No. 311 was acquired by Late Muslim Khan out of his own fund in the name of his first wife-Bibi Mariam. In that view of the matter, the learned single Judge held that the plaintiffs are entitled to get share in Holding Nos. 337 and 311 also.

5. As stated above, so far the other properties are concerned, the learned single Judge held that the plaintiffs are not entitled to get share as these properties are not joint family properties.

6. Mr. Ashgar Hussain, learned ST. Counsel appearing on behalf of the appellants assailed the judgment of the learned single Judge as being illegal, contrary to law and facts as well as evidence on record. Learned counsel

submitted that the learned single Judge has not correctly appreciated the Muslim Personal Law in the matter of gift, and presumption of jointness in the Muslim family. As against the findings of the learned single Judge with regard to Holding No. 337, learned counsel submitted that the learned single Judge was not right in holding that since the transfer of the said Holding in lieu of dower debt was not effected by a registered document, no title passed to Bibi Mariam. According to the learned counsel, the learned single Judge overlooked the fact that Holding No. 337 itself was purchased in the year 1900 on a consideration of Rs. 99/- only and in that view of the matter, no registered document was necessary for transferring the said Holding in lieu of dower as the value of the property was below Rs. 100/-. Learned counsel further submitted that during the life time of Muslim Khan the name of Bibi Mariam was mutated and rent receipt was issued in her name. Late Muslim Khan allowed the mutation in the name of his wife and this state of affairs continued for about 66 years. According to the learned counsel, therefore, this was sufficient for holding that the house property bearing Holding No. 337 was transferred to Bibi Mariam.

Mr. Hussain then assailed the findings of the learned single Judge so far it relates to the property bearing Holding No. 311 and submitted that the findings arrived at by the learned single Judge is contrary to law and based on no evidence. Learned counsel submitted that although the Benami Transaction Law of 1988 is not applicable, but in absence of any evidence it cannot be held that Holding No. 311 was the real estate of Late Muslim Khan or the said Holding was not purchased by Late Muslim Khan for the benefit of his first wife-Bibi Mariam. Learned counsel also vehemently assailed the view of the learned single Judge on the question of onus to prove the benami transaction. Mr. Hussain further advanced his submission on the question of joint family. Learned counsel submitted that in absence of any finding and the existence of any tacit contract amongst the family members of Late Muslim Khan for acquiring the property in benami for the benefit of all the members of the family, the learned single Judge was not correct in law in holding it otherwise.

On the other hand Mr. N. K. Prasad, learned Sr. Counsel appearing on behalf of the respondents, repelling the arguments of Mr. Hussain firstly submitted that there is neither any error of law nor any error of fact in the findings arrived at by the learned single Judge in holding that the house property bearing Holding No. 337 forms part of the estate of Late Muslim Khan. Learned counsel submitted that admittedly the house property bearing Holding No. 337 was purchased by Late Muslim Khan in the year 1900 for a value of Rs. 99/-. After about nine years, the said Holding was allegedly transferred by Late Muslim Khan to Bibi Mariam in lieu of dower. During the period of nine years, the value of the property must have been increased to above Rs. 100/- and in such circumstances the plea of the defendants that registration was not required as the value of the property was Rs. 99/- only cannot be accepted. Mr. Prasad, however, submitted that the plea of non-registration of the document of transfer in lieu of dower because of the valuation of the property below Rs. 99/- was not taken by the defendants in the written statement or even before the learned single Judge in appeal. The defendants-appellants, therefore, cannot be allowed to raise this point at the stage of this appeal. Mr. Prasad further submitted that admittedly Late Muslim Khan and his sons continued possession over Holding No. 337 even after the alleged transfer and, therefore, the question of acquiring title by adverse possession cannot and does not arise. So far Holding No. 311 is concerned, Mr. Prasad has not very strongly made his submission in support of the findings arrived at by the learned single Judge.

7. I will first consider the findings arrived at by the learned single Judge so far Holding No. 311 is concerned. Admittedly, the house property bearing Holding No. 311 stands in the name of Bibi Mariam under the registered Sale Deed dated 13-2-1900. The plaintiffs' case was that it was acquired by Late Muslim Khan in the name of Bibi Mariam and, therefore, it is the benami property of Late Muslim Khan.

On the other hand, the defendants-appellants denied and disputed the said allegation and stated that Bibi Mariam acquired the said Holding out of her own fund and she was never the benamidar.

8. The question with regard to acquisition of property in benami came up for consideration before various Courts in India and the law has been set at rest that if a person claims any transaction as benami transaction,

then the law requires him to establish this fact for the reason that the person in whose name the property is purchased is presumed to be the real owner of the property.

9. The question with regard to benami transaction has been gone in detail by the Apex Court in the case of Jaydayal Poddar v. Bibi Hazra 1974 (1) SCC 3 : (AIR 1974 SC 171 where the Apex Court has held as under (at page 172; of AIR) :-

"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, stalls 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 the 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, 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."

In Bhim Singh v. Kan Singh, AIR 1980 SC 727 the Apex Court following the decision rendered in the case of Jaydayal (supra) reiterated the same principle and held as under (at page 734):

"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."

The Apex Court while considering the similar question in Union of India v. Moksh Builders and Financers, AIR 1977 SC 409 has held as under (at page 413):

"The burden of proof is, however, not static and may shift during the course of the evidence. Thus while the burden initially rests on the party who would fail if no evidence is led at all, after the evidence is recorded, it rests upon the party against whom judgment would be given if no further evidence is adduced by either side i.e. on the evidence on the record. As has been held by this Court in Kalwa Devdattam v. Union of India (1964) 3 SCR 191 : AIR 1964 SC 880 that where evidence has been led by the contesting parties on the question in issue, abstract consideration of onus are out of place, and the truth or otherwise of the case must always be adjudged on the evidence led by the parties. This will be so if the Court finds that there is no difficulty in arriving at a definite conclusion. It is therefore necessary to weigh the evidence in this case and to decide whether, even if it were assumed that there was no conclusive evidence to establish or rebut the

"benami" allegation, what would, on a careful assessment of the evidence, be a reasonable probability and a legal inference from relevant and admissible evidence."

In the case of *S. K. Devi v. J. P. Singh* 1962 BLJR 314 the question for consideration before the Apex Court was as to whether the property standing in the name of the wife shall be accepted as benami purchase by the husband in the name of his wife. The Apex Court in its judgment laid down the following principle of law ;

"The law with regard to benami transactions where the property is alleged to have been bought in another's name is well settled. The burden of proof is, to begin with, on the party pleading that a transaction is benami. A variety of circumstances are relevant in this connection like the source of the consideration for the acquisition of the property, the possession of the property, the conduct of the parties or their predecessors in relation to it, the custody of the title deeds and so on. The most important fact, however, is the source of the money, but the other facts also play varying parts. This burden does not rest in one place but shifts to the other side, and it increases if the original parties to the transaction are dead. Suspicious circumstances are not sufficient to prove the benami character of a transaction; but if evidence on the other side does not exist, even slight but forceful evidence on the part of the person alleging the benami nature of the transaction may be sufficient. It is from this angle that the case has to be judged, and at the very start, we are constrained to say that, though the learned subordinate judge bore the correct law in mind, he seems to have placed the burden initially upon the plaintiff. The question of burden of proof at this late stage has become academic because when the parties have led all the evidence that they wish to lead, an inference must necessarily be drawn from the entire evidence, irrespective of the source from which it comes. In this case, each side has drawn support from the evidence brought into the case by the other. In view of the fact that the High Court went into all the evidence to draw its contrary conclusion, it becomes necessary to see whether the conclusion reached by the High Court or that reached by the subordinate Judge is right in the light of the facts established."

The similar question came up for consideration before a Bench of this Court in the case of *Bijoy Kant Dey v. Radha Kant* 1983 BLT 100 where his Lordship has held as under :

"Before me also the finding that the defendant was not a minor in the year 1940 was not challenged. Learned counsel for the two sides also agreed that on the facts of this case. The determining factor will be the finding as to who paid the consideration money. They also agreed that on the peculiar facts of this case, the other tests regarding motive, custody of documents, relationship and possession fall in the background. I think, the learned counsel were right. The question, therefore, is as to who paid the consideration money. But before I take up that question, I want to make it clear that the onus to prove the acquisition by the plaintiff in the Benami name of the defendants lies heavily on the plaintiff." The apparent state of affair is the real state of affair unless proved to the contrary." The Sale-deeds stand in the name of the defendant that is the apparent state of affair.

If the plaintiff has to succeed, he must prove that the apparent state of affair is not correct. Keeping this fact in view the evidence on this point has now to be examined."

10. In the light of the principle laid down by the Apex Court, we have to examine the evidence adduced by the parties to the effect that whether Holding No. 311 was in fact purchased by Late Muslim Khan and Bibi Mariam was merely a benamidar.

P.W. 1 (Abdul Sattar Khan) is the grandson of Late Muslim Khan. In the year 1981, when he was examined as a witness, he was 40 years of age and, therefore, admittedly has not seen Muslim Khan who died in 1925. He has deposed that he has not seen any document of title of the suit properties. He also expressed his inability to say any thing about the earnings of Late Muslim Khan. P.W. 2 is one Syed Beg, brother-in-law of Rahim Khan. He has also not seen Late Muslim Khan. He is not in a position to state any thing about the acquisition of property and earning of Late Muslim Khan. P.Ws. 3, 4 and 5 are not material witnesses and have stated nothing about acquisition of property. P.W. 6 is Fazlur Rahman Khan, another grandson of Muslim Khan,

aged about 46 years. He admitted that he has not seen the document of title and when and for how much consideration the property was purchased, he cannot say. This witness has stated that he found the name of Bibi Mariam entered in the demand register maintained by the Giridih Municipality. He further stated in para 38 of the deposition that he cannot say when the name of Bibi Mariam was entered in the Revenue Register. He also expressed his unawareness about the income of Late Muslim Khan from the business. However, in para 54 of his deposition, he admitted that some of the properties were acquired by Bibi Mariam in her own name.

11. As against the aforesaid evidence the defendants-appellants examined as many as 12 witnesses. The witnesses have proved various documents including the rent receipts, demand register etc. to show that all rent and taxes in respect of Holding Nos. 311 and 337 were paid by Bibi Mariam.

From perusal of the oral and documentary evidence, we find that there is no evidence to this effect that when Holding No. 311 was purchased in the year 1900. Late Muslim Khan was financially sound and consideration money was paid by him. There is also no evidence to show that the suit Holding was purchased by Late Muslim Khan for the benefits of the family members. On the contrary Exhibit B series, and C series are the receipts, Zamindari register and Demand register of Giridih Municipality for the period 1900 to 1975, which will go to show that even after the death of Late Muslim Khan which took place in the year 1925, the name of Bibi Mariam continued to run in the register and she continuously paid rent. Admittedly, Late Muslim Khan died in the year 1925 and Bibi Mariam in 1945 and during this period of 40 to 50 years the plaintiffs respondents never raised any grievance or objection that Holding No. 311 is joint family property. Moreover the case of the plaintiffs-respondents that there was a joint family business and out of the earnings from business, the said house bearing holding No. 311 was acquired also based on conjectures and surmises. No positive evidence has been brought on record by the plaintiffs to that effect.

12. Be that as it may, the law is well settled that amongst the Mahommedan Law there is no presumption of jointness. In the book "Mahommedan Law" by Syed Ameer Ali (vol. 2) Vth Edition, the author says :

"Among the Mahommedans there is no presumption of jointness. When the members of a Mahommedan family live in commensality, they do not necessarily form a "joint family" in the sense in which that expression is used with regard to Hindu; and, in Mahommedan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of the several members are made for the benefit of the family.

In some parts of India, however, Mahommedan families have adopted the Hindu Joint Family system. In many instances Hindu families converted to Islam have adhered to the custom and continued to live jointly. In such case the legal rights of the parties have been held to be subject to the same principles as are applicable to members of a Hindu Joint family. The onus of establishing the custom as always existing in the family is strictly on the party alleging it.

The mere fact of members of a Mahommedan family living in commensality and holding their properties jointly is not sufficient to raise the presumption which, under the Hindu Law, arise from de facto jointness."

13. In *Shukrulla v. Mts. Zuhra Bibi*, AIR 1932 Allahabad 512 the Division Bench while considering a similar question of concept of joint family in Mahommedans has held as under (at page 515):

"It is clear to us that a so called Mahommedan joint family cannot be treated as a legal unit having a corporate existence and as such possessing property. In our opinion for the determination of the rights of individuals supposed to belong to it any analogy drawn from the joint Hindu family system is misleading. The entire conception of a joint Hindu family, its constitution and the rights and obligations of its component parts are foreign to a Muslim joint family which implies nothing more than a group of individuals living and messing in commensality and owning property and carrying on business jointly. The position of total strangers combining their labour and capital in acquiring property and agreeing to live and mess together will not materially differ from that of a joint Mahommedan family, if all other conditions are identical. A joint Hindu

family both under the Bengal and Benares Law, is described by Mayne as a "family consisting of males and females constitutes a sort of corporation, some of the members of which are coparceners, that is persons who on partition would be entitled to demand ashare, while others are only entitled to maintenance."

In *Krishnajiban Sanyal v. Mohammad Masiuddin Mandal*. AIR 1921 Calcutta 653 the Division Bench of the Calcutta High Court in similar circumstances held as under (at page 656) :-

"As regards the second question, three alternative cases have been presented for acceptance, by the different parties concerned, namely, first that the mortgage money belonged to Sariatullah, Sabaktullah and Gulzar jointly as they were members of joint family; secondly that it belonged to Sariatullah alone; and thirdly, that it belonged to Sabaktullah alone. As regards the first alternative, which has been pressed upon the Court by Gulzar, it must be remembered that when the members of a Mahommedan family live in commensality. they do not form a joint family in the sense in which that expression is used with regard to Hindus, and in Mahommedan Law there is not, as there is in Hindu Law, any presumption that the acquisitions of the several members are made for the benefit of (he family jointly."

Notwithstanding the fact that there is no presumption of jointness and joint family business in Mahommedans, but in certain circumstances the Court may up-hold such eventuality. There is nothing contrary to law in Mahommedan adult members of a family carrying on family property for the benefit of all the members of the family including the minors and females, and the Court may uphold it and such legal consequences as follow from it, although the Court will not impart into it all the legal consequences, which would follow from such a family trade when it is conducted by Hindu joint family or of the legal consequences of a lawful partnership.

14. Having regard to the discussions made hereinabove, with due respect, I am of the view that the learned single Judge was not right in holding that the house property bearing Holding No. 311 forms part of the joint family property and the reasons assigned by the learned single Judge are also not in accordance with law.

15. I must also take notice of the view of the Apex Court in the case of Nand Kishore Mehra v. Sushila Mehra (1995) 4 SCC 572: (AIR 1995 SC 2145), while considering the provision of Section 3(2) of the Benami Transaction (Prohibition) Act, 1988. The Apex Court has held that although filing of the suit or taking of defence in respect of either the present or past benami transaction involving purchase of property by a person in the name of his wife or unmarried daughter is not prohibited under Sub-section (1) and (2) of Section 4 of the Act, but relief can be granted only if he can prove that the properties concerned had not been purchased for the benefit of the wife, even if he succeeds in saying that the consideration for the purchase of the properties had been paid by him.

In the instant case as stated above, there is no positive evidence to show ,that either the consideration money was paid by Late Muslim Khan or the said Holding No. 311 was acquired by him for the benefit of family members and not for the benefit of his wife, Bibi Mariam.

16. During the course of argument, Mr. N. K. Prasad very fairly conceded that the findings arrived at by the learned single Judge in respect of Holding No. 311 is not in accordance with law. inasmuch as there is no evidence much less prima facie from the side of the plaintiffs to show that Bibi Mariam was the benamidar and Late Muslim Khan acquired the said Holding out of his own earnings.

17. Having regard to the discussions made above, I have no hesitation in holding that the house property bearing holding No. 311 was acquired and held and possessed by Bibi Mariam and it does not form part of the estate of deceased Muslim Khan.

18. So far as the next item of the property bearing HoldingNo. 337 isconcerned, the learned single Judge disbelieved the case of the defendants-appellants that the said Holding was transferred by Late Muslim Khan to his wife-Bibi Mariam in lieu of dower. Admittedly there is no registered document to that effect. The

learned single Judge after considering the law settled by the Courts in India, particularly the decisions in Mahabir Pd. v. Mustafa Hussain, AIR 1937 PC 174, Ghulam Abbas v. Razia Begum, AIR 1951 Allahabad 86 and Md. Usman v. Amir Mian, AIR 1949 Patna 237 has come to the conclusion that Holding No. 337 continued to be an estate of Late Muslim Khan and Bibi Mariam did not acquire any title over the said property. I do not find any infirmity in the said finding and I up-hold the same.

19. This question was again considered by a Full Bench of this Court in the case of Commissioner of Income-tax, Bihar, Patna v. Sayed Saddique Imam, AIR 1978 Patna 197 : 1978 Tax LR 624.

20. Mr. Hussain made his alternative argument that even assuming that no effective title was passed by the transfer of property by the husband orally in lieu of dower to his wife in absence of registered document, the possession of Bibi Mariam became adverse to that of the real owner, inasmuch as by virtue of the oral transfer she was put in possession. I do not find any substance in the submission of Mr. Hussain. It is well settled that in order to perfect a title by adverse possession two ingredients are inseparable, i.e., corpus possidendi and animus possidendi. In other words the physical possession on the one hand and the intention to exclude the adversary from possession overtly without attempt at any concealment and must be adequate in continuity. Mr. N. K. Prasad rightly argued that this plea of acquisition of title by adverse possession was not taken before the trial Court. In that view of the matter, I do not find any reason to hold that Bibi Mariam acquired title by adverse possession in respect of Holding No. 337:

21. In the result, this appeal is allowed in part and the findings of the learned single Judge that the house property bearing Holding No. 311 forms part of the estate of Late Muslim Khan is set aside. Accordingly the suit is decreed in part only in respect of the house property bearing Holding No. 311 and the plaintiffs shall be entitled to get share in the said Holding. There shall be no order as to costs.

S.K. Chattopadhyaya, J.

22. I agree.