

Jibachhi Devi and ors. Vs. Vinod Kumar Thakur and ors.

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Court : Patna

Decided On : Mar-12-1999

Judge : N. Pandey and D.P.S. Choudhary, JJ.

Appeal No. : Letters Patent Appeal No. 109 of 1987

Appellant : Jibachhi Devi and ors.

Respondent : Vinod Kumar Thakur and ors.

Disposition : Appeal Allowed

Judgement :

N. Pandey, J.

1. This appeal has been preferred on behalf of the defendants-1st set appellants under Clause 10 of the Letters Patent of the Patna High Court, against the judgment and decree in F.A. No. 117 of 1966 whereby the judgment and decree in T.S. No.48/60/1/66 with regard to Schedule II lands was reversed.

2. It would appear from the facts on record that the plaintiffs had brought the title suit for partition by metes and bounds with respect to the properties described in Schedules I, II and III of the plaint. Schedule I was with regard to movable properties, Schedule II contains the list of the lands situated in village Shahpur and Chithi Hanuman Nagar whereas Schedule II was with respect to the lands situated

in Mouja Malarh.

3. The case of the plaintiffs, in short, was that one Ramlal Thakur was the common ancestor of the plaintiffs and defendants 1st to 4th party. From the first wife, Ramlal Thakur had four sons and from the second wife, he had two sons. One of the sons of Ram Narain Thakur died in the life time of the father in the state of jointness. Ramlal Thakur died in the year 1929 in the state of jointness remaining with his five surviving sons. As claimed in the plaint, in the year 1932, there was a partition amongst the sons of Ramlal and accordingly half of the share was allotted to the sons of the first wife and half to the sons of second wife. After partition, Rit Narain Thakur, being the eldest surviving son of Ramlal Thakur from the first wife, became karta of the joint family.

4. Further case is that in the year 1934, Rit Narain Thakur, father of the plaintiff No. 1, as karta of the family, took settlement of the lands described Schedule II of the plaint from the ex-landlord under a hukumnama in the benami name of Jageshwar Kumar (brother-in-law of Bhagwat Narain Thakur) and thereafter, the joint family of all the three brothers came in possession.

5. In the year 1936, Bhagwat Narain Thakur, father of defendant Nos. 1 and 2 also died in the jointness with his other two brothers, namely, Rit Narain Thakur and Jog Narain Thakur, leaving behind his widow Most. Deomaya Devi defendant No. 3 and sons Shobha Kant Thakur, defendant No. 1 and Kamla Kant Thakur, defendant No. 2. Defendant Nos. 3 and 4 namely, Vijay Kumar Thakur and Sunil Kumar Thakur are the sons of defendant No. 1 whereas defendant No. 5, Ashok Kumar Thakur is the son of defendant No. 2 and accordingly, defendant Nos. 1 to 5 were described as defendants first party. It has been further stated in the plaint that Rit Narain Thakur died in the year 1943 in jointness with his brother and nephew defendant Nos. 1 and 2, besides other family members. Thereafter, in the year 1944, Jog Narain Thakur also died in jointness with his nephew and sons and widow. After the death of Jag Narain Thakur, defendant No. 1 being the eldest member, became Karta of the family.

6. Further case is that after the death of Jagdishwar Kumar, his sons executed a sale deed with respect to the land which he had taken in settlement in favour of

defendant Nos. 1 and 2 in 1959 and accordingly, all the family members came in possession.

7. The case of the contesting defendants first party in short, is that the properties described in Schedule HI of the plaint were mortgaged by Ramlal thakur himself for Rs. 10,000/-. It is further stated that after the auction sale of the remaining properties, Ramlal Thakur died in the year 1929 as pauper in the state of jointness with all the six sons from both the wives. Thereafter all the sons separated from each other. Shary Narain Thakur died leaving behind his two wives Mosstt. Sandhyawati and Mosst. Kalawati. It further says that in the year 1934, Jageshwar Kumar, maternal uncle of defendant Nos. 1 and 2 took' settlement of Schedule II lands from the ex-landlord. The claim of the plaintiffs that Jageshwar Kumar was a benamidar of the family was absolutely false and baseless. Since Jageshwar Kumar had taken the settlement of his own and accordingly after his death in the year 1954, his sons acquired these properties. Thereafter, in the year 1959 the sons of Jageshwar Kumar on payment of a consideration money sold total lands through a registered sale deed in favour of defendant Nos. 1 and 2.

8. The Trial Court after consideration of all the relevant materials and evidences on record, decreed the suit for partition with respect to the properties covered by Schedule I and III. With regard to Schedule II properties, the suit was dismissed. It was held that lands of Schedule II were the self acquired property of defendant Nos. 1 and 2. It further held that even on admitted facts of the plaintiffs the joint family of Ramlal Thakur had become pauper in the year 1932. In fact, there was no means with joint family to get the land settled in the benami name of Jageshwar Kumar. Therefore, the case of the plaintiffs with regard to the benami settlement in the name of Jageshwar Kumar was totally disbelieved.

9. With respect to the disputed issued whether the separation had taken place immediately after the death of Ramlal Thakur or the family continued joint, the Trial Court had answered the issue in favour of the plaintiffs. It held that after the death of Ramlal his three sons from one wife, namely, Rit Narain, Jog Narain and Bharat Narain (father of defendant Nos. 1 and 2) remained joint while Shiv Narain and Bharat Narain sons of second wife constituted another joint family amongst

themselves.

10. The plaintiffs, therefore, only challenged that portion of the judgment and decree of the Trial Court whereby the claim for partition with regard to the Schedule-II land was rejected. Two cross appeals-one on behalf respondent No. 24 and the other on behalf of respondent No. 1 were filed against that part of the judgment whereby the plaintiffs' suit was decreed. As would appear from the judgment in the first appeal, the claim of the plaintiffs about benami settlement in the name of Jageshwar Kumar was accepted. It was further held that the properties of Schedule II were still joint. In view of such a finding, the claim of defendant Nos. 1 and 2 regarding exclusive possession on the basis of self, acquisition was rejected and consequent thereto cross-appeals of defendant No. 1 was also dismissed. But the cross-appeal of respondent No. 24 was allowed in part.

11. At the outset, it would be appropriate to mention that this appeal has been confined only to the Schedule II lands which was admittedly settled by the Darbhanga Raj in the name of Jageshwar Kumar. The claim of the plaintiffs was that Shri Jageshwar Kumar was in fact not a real settlee rather a benamidar of the joint family and total money for the settlement was paid out of the joint family fund. Whereas, as noticed above, the case of the defendants 1st party is that even from the averments made in the plaint and other relevant materials on record, it would appear that Jageshwar Kumar was a very rich man and, therefore, there was no occasion for him to take money from the plaintiffs to take benami settlement of the land from the ex-landlord. Their further case is that even the plaintiffs had also admitted in their plaint that at the relevant time in the year 1932 to 34, since all the properties of Ramlal Thakur were auctioned or mortgaged for payment of debt, etc. hence the family had become pauper. Therefore, in absence of any averments in the plaint or evidence on record, about nucleus of the joint family to get benami settlement In the name of Jageshwar Kumar, it was not proper to allow the claim of the plaintiffs. It was further contended even the sons of Jageshwar Kumar who had executed sale deed in favour of the defendant Nos. 1 and 2, accepted in their evidence that it was the self-acquired properties of their father and not as benamidar.

12. In the background of the facts stated above, question that may be relevant for consideration are whether after the death of Ramlal Thakur, his sons continued to be in the joint possession of all the properties described in Schedule II and whether Jageshwar Kumar was the benamidar of the joint family with regard to Schedule II properties or it was a self-acquired property of defendant Nos. 1 and 2. Their story with regard to transfer of Schedule II lands through registered sale deed executed by the sons of Jageshwar Kumar in favour of defendant Nos. 1 and 2 is not in dispute. Therefore, I am not required to examine the question.

13. According to the Trial Court, the plaintiffs had failed to produce any relevant evidence to show that the settlement of Schedule II lands were taken in the benami name of Jageshwar Kumar. It further held that a bare perusal of different documents, Exhibits A5, A5/1, A5/2 and A5/3, the sale-deeds it would appear that defendant Nos. 1 and 2 purchased the Schedule II lands in the year 1959 from the heirs of late Jageshwar Kumar out of their own fund and, therefore, undisputedly, the properties were self-acquired. The finding of the appellate Court on the other hand, is that Jageshwar Kumar was benamidar of the joint family of the plaintiffs and defendants 1st to 3rd parties in respect of the lands and the parties always remained in possession of the same.

14. Before entering into the discussion as to whether Jageshwar Kumar was the benamidar of the joint family with regard to Schedule II properties, I think it would be pertinent to examine whether the plaintiffs and defendants 1st to 3rd party are joint as claimed by the plaintiffs. It is admitted that Ramlal Thakur was the common ancestor of the plaintiffs and defendants 1st to 4th parties. It is also admitted that Ramlal had six sons Satya Narayan, Rit Narayan, Jog Narayan and Bhagwat Narayan from one wife and Sheo Narayan and Bharat Narayan from another wife, and that he died in 1929. The case of the plaintiffs is that Sarb Narayan Pre-deceased Ramlal leaving behind two widows Sandhyawati and Kalawati and in 1930 there was a partition in the family in such a way that the surviving sons of Ramlal from his first wife remained joint, and they separated from the two sons of the second wife who remained joint with one another. Their case also is that Bhagwat Narayan Thakur died in state of jointness in 1936. Rit Narayan who was karta died in 1943 and Jog Narayan died in 1944. After the

death of Jog Narayan. Sobha Kant (defendant No. 1) became the karta of the joint family of the plaintiffs and defendant 1st to 3rd parties, who are still joint. According to the contesting defendants Sarb Narayan Thakur died after the death of their father Ramlal, and that soon after the death of Ramlal, there was partition in which all the six sons of Ramlal separated from each other. As already mentioned, the Trial Court has held that after the death of Ramlal his three sons from first wife, namely, Rit Narayan. Jog Narayan and Bharat remained joint while Sheo Narayan and Bhagwat Narayan sons of second wife constituted another joint family. It further held that Sobha Kant Thakur, defendant No. 1 is karta of the joint family comprising of the sons of the first wife, and the joint family still continuing. The appellate Court has confirmed the above finding of the Trial Court.

15. Both sides have adduced oral and documentary evidence in support of their cases on this issue. The defendants have examined D.W. 6. D.W. 12, D.W. 13 and D.W. 23, who have deposed that Sarb Narayan died after the death of Ramlal. But the plaintiffs have filed Ext. 3, a registered Sudbharana Bond of the year 1926 executed by Ramlal himself, in which 'there is a clear recital that money was required also for the Shradh of his son Sarb Narayan Thakur. There can be no reason to disbelieve this document, hence in view of this document, there cannot be any doubt that Sarb Narayan predeceased his father. The plaintiffs have also filed Sudbharna Bond (Ext. 2/A), Paribarik Pustika (Ext. 5) of village-Shahpur maintained by the Gram Panchayat and Voter list (Ext. 13) of village-Sahapur. Ext. 2/A is a Sudbharna Bond relating to Malarh lands. Ext. 2 is endorsement of redemption on the said bond. It is admitted that Ramlal had mortgaged the lands of Malarh. The above endorsement shows that the mortgage was redeemed by Sheo Narayan and Sobha Kant on 24.4.1955. The contention of the plaintiffs is that Sobha Kant (defendant No. 1) as Karta of joint family of the plaintiffs and defendants 1st to 3rd parties and Sheo Narayan representing the other branch had redeemed the mortgage. There is a great force in this contention, otherwise there is no reason why only Sobha Kant Thakur and Sheo Narayan would have redeemed the mortgage. The Paribarik Pustika (Ext. 5) shows that Sobha Kant is Karta of the family consisting of Sobha Kant, Kamla Kant, Vidya Narayan, Dristi Narayan (plaintiff No. 1) and others. This document, therefore, also supports the case of the plaintiffs. The voter list (Ext. 13) also shows that the plaintiffs and the

contesting defendants reside in the same house. This document also supports the case of the plaintiffs. Besides these documents, the Postcards (Ext. 1 to 1/E) show that Rit Narayan, the father of plaintiff No. 1 who according to the plaintiffs was then karta, during 1926-28, had sent money to Bhagwat (father of defendant No. 1) who was then a student of Engineering College at Patna. Ext. 1/G is another Post-card of the year 1932 written by Bhagwat to Rit Narayan containing references about the domestic affairs. Ext. 1/N is a letter written by Vidya Narayan, son of Rit, Narayan in 1949, who was student then, to Kamla Kant (defendant No. 2) in which he has asked for blanket on account of winter. Ext. 1/P is another Post-card written by defendant No. 1 in 1954 to Vidya Narayan showing that money was being arranged and send to Vidya Narayan for his education by defendant No. 1. Ext. 1/H is a letter dated 25.1.1935 written by Bhagwati Narayan Thakur to Rit Narayan Thakur suggesting mode of disposal of usufruct of lands. The Trial Court considering the above correspondences has come to this conclusion that they clearly suggest that there was no separation among Bhagwat, Rit Narayan and Jog Narayan. There is no reason to disagree with him on this score. The plaintiffs have also examined P.Ws. 1 to 8 and 11 in support of their case of this issue. Their evidence finds support from the above documentary evidence. As against the above evidence of the plaintiffs, the contesting defendants have also filed a number of documents in support of their case which have been fully discussed in the judgment of the Trial Court as well as the appellate Court. The defendants have mainly relied on two sale-deeds, namely, Ext. A/17 dated 5.11.1952 executed by plaintiff No. 1 in favour of Sheo Narayan Thakur and Ext. A/18 executed on 18.12.1952 by Mostt. Sandhyawati widow of Sarb Narayan Thakur in favour of Sheo Narayan Thakur. In these two documents of course, it has been mentioned that after the death of Ramlal Thakur there was separation in business, mess, residents and worship, but according to these documents Ramlal died leaving behind his six sons including Sarb Narayan Thakur whereas the statement of Ramlal himself contained in Ext. 3 which is an unimpeachable document is that Sarb Narayan had died during his life time. P.W. 11, the plaintiff No. 1 has also stated that he had executed the deed at the instance of Sobha Kant and the contents were not read over to him. The alleged purchaser, Sheo Narayan (P.W. 7) in his evidence, has also stated that he did not take any sale deed.

Therefore, I agree with the view of the Trial Court that on the basis of the recital in the above sale-deeds, it cannot be held that actually there was a separation in the Joint as propounded by the defendants. Ext. A filed by the defendants is a sale-deed executed on 17.9.1959 by Sheo Narayan Thakur in favour of plaintiff No. 1 for Malarh land. In this deed, it is simply mentioned that the vendor has sold his share. This document, therefore, does not disprove the case of the plaintiffs that three sons of Ramlal Thakur from his first wife remained joint. Ext. A/1 is sale-deed dated 17.9.1957 executed by plaintiff No. 1 to Sheo Narayan Thakur defendant No. 11. It is mentioned in this deed that the plaintiff No. 1 was selling his share in the property. The deed shows that the land stood in the name of plaintiff No. 1 in the revenue records. Therefore, if plaintiff No. 1 executed the sale-deed, from this it cannot be inferred that the family was not joint. The defendants have also filed several other sale deeds, but as has been observed by the appellate Court they do not disprove the case of the plaintiffs on this issue. The defendants have also filed the registered power of attorney dated 11.7.1956 (Ext. F) executed by Vidya Narayan Thakur (defendant No. 8) son of Rit Narayan Thakur and Kamla Kant Thakur (defendant No. 2) in favour of defendant No. 1 for transferring their shares in the lands of village-Shahpur and Malarh. But from this document also, it cannot be inferred that Vidya Narayan Thakur and Kamla Kant Thakur were separate from Sobha Kant Thakur. The defendant No. 1, Sobha Kant (D.W. 22), in his cross-examination, has admitted that Kamla Kant is his own brother and he is joint with him, and he (D.W. 22) is the Karta of the family. This document, hence, also does not help the defendants. The defendants have also examined D.Ws. 4, 11 and 22 in support of their case on this point. But as their evidence does not find support from the documentary evidence adduced, I do not think that their evidence on separation should be accepted. It may be also mentioned here that according to the plaintiffs, after the death of Jog Narayan Thakur in 1944 Sobha Kant Thakur became Karta. The case of the defendants is that Sobha Kant was minor at that time and so he could not be the Karta. The defendants have filed Ext. P which is a petition dated 11.5.1937 filed before the District Judge, Muzaffarpur in Guardian Case No. 37 of 1937 to show that Deo Maya Thakurine, the mother of Sobha Kant Thakur had filed application for being appointed as guardian of the minors Sobha Kant and Kamla Kant. But from this document it cannot be held that actually in

1944 also defendant No. 1 was minor. The sale certificate of Rent Execution Case No. 2926 of 1944 of the Court of Munsif, Madhepura (Ext. 9) on the other hand, shows that Sobha Kant in 1945 has been described therein as major. This document, hence, also lends support to the case of the plaintiffs.

16. Thus, on examination of the evidence adduced by the parties, it is held in agreement with the findings of the Trial Court and the appellate Court, that the plaintiff and the defendants 1st to 3rd parties are joint and there was no partition among them.

17. Now, coming to the question as to whether Jageshwar Kumar was the Benamidar of the joint family with regard to Schedule II properties, it is established by judicial decisions that for determining the benami character of a transaction, a variety of circumstances are relevant, namely (a) the source of consideration for acquisition of the property, (b) possession of the property, (c) the conduct of the parties or their predecessor in relation to it, (d) motive for the benami transaction, (e) relation between the parties, (f) custody of the title deed and so on.

18. It is not disputed that the properties were acquired in the year 1934-36 in the name of Jagdish Kumar in two installments for a total consideration of Rs. 3,604/15. The evidence, as discussed by the appellate Court, is also clear that in 1934, 100 bighas of land of village Shahpur was settled in the name of Jagdish Kumar, which was subsequently reduced to 98 bighas, 8 kathas 7 dhurs, and on 7.11.1934 a sum of Rs. 1,000/- was deposited in the name of Jagdish Kumar towards Salami, and the balance amount of Rs. 968/8/- was deposited on 18.10.1935. It is also clear that on 28.11.1935, 81 bighas, 17 kathas, 6 dhurs of land was settled in the name of Jagdish Kumar for which Rs. 410 /- was deposited as Salami on the same date, and the balance amount of Rs. 1,226/7/- was deposited on 1.8.1936. Ext. J shows that in the first settlement case, there was direction that after making payment of the Salami amount of Rs. 1,000/- the settlee will be entitled to have the produce of the land. The appellate Court, thus, has held that it was quite probable that the sum of Rs. 968/8/- was deposited out of the sale proceeds of paddy of these lands. The appellate Court considering some other documents, has further held that joint family was possessed of 13 bighas of land

and out of the usufructs of those 13 bighas, the Salami of Rs. 10,000/- could have been paid and, therefore, the joint family had means to deposit the initial amount of Rs. 1,000/-also. But in our view, these findings of the appellate Court cannot be accepted. According to the averments in the plaint, the joint family was not possessed of any land at that time except the lands of Malarh which were also under mortgage. Therefore, in face of such averments, It cannot be said that the joint family of the plaintiffs had 13 bighas of land, which formed the nucleus, out of which Salami amount of Rs. 1,000/- was paid. Consequently, it cannot also be held that the joint family came in possession of the land, and out of the sale proceeds of paddy the balance sum was paid. There is no other evidence to prove that the joint family had means to pay the consideration or that the consideration was actually paid by the joint family. P.W. 11 (plaintiff No. 1), of course, has stated that the Salami money was paid out of the joint family funds; but this witness was aged 35 years on 28.1.1966, when he deposed in Court in this case. He was, thus, a small child on the date of settlement and cannot be a competent witness to speak in this regard. On other hand, the application for settlement (Ext.-H) signed by Jagdishwar Kumar himself, and the bid lists (Ext. G to G/2) challans (Exts. to T/5) go to show that Jagdishwar Kumar had applied for settlement, and the lands were settled with him as the highest bidder in auction sale, and the money was deposited by him. It is also an admitted position that Jagdishwar Kumar was a man of means at that time. Therefore, there is sufficient evidence that the consideration for settlement of the properties in the name of Jagdishwar Kumar was paid by Jagdishwar Kumar and not out of joint family fund.

19. As regards the possession of the properties, the appellate Court has relied mainly on a letter (Ext. 1/H) and a Loan Bond (Ext. A/3) and come to the conclusion that the joint family is coming in possession of the property. The letter which is dated 25.1.1935 shows that Bhagwat Narayan (father of defendant Nos. 1 and 2) had written, to his brother regarding disposal of about 500 maunds of paddy. The appellate Court has held that as the joint family was possessing in their name only 13 bighas of land at that time, the above produce could not be the produce of those lands, and must be the produce of 98 bighas of land taken in settlement in the name of Jagdishwar Kumar. But a perusal of this document shows that there is nothing therein to indicate that the produce related to the lands

in question. It has already been shown that the joint family was not in a position to pay the Salami of Rs. 1,000/-, and could not come in possession of the land. Hence on the basis of this document, it cannot be inferred that the joint family was in possession of the land in question. The Loan Bond (Ext. A/3) shows that the Sub-Divisional Officer had granted a loan of Rs. 2,000/- in the year 1952-53 to Jagdishwar Kumar, Sobha Kant Thakur (defendant No. 1 j, Kamal Kant Thakur (defendant No. 2), Dristi Narayan Thakur (plaintiff No. 1), Vidya Narayan Thakur (defendant No. 8) in equal shares and 40 bighas of land of village Chithi Hanuman Nagar which was covered by the settlement in question was given in security. The appellate Court has held that as the above land was given in security, it can safely be deduced that the joint family was, at least, in possession of 40 bighas of land covered by the settlement. But this finding of the appellate Court also cannot be accepted. The land admittedly was recorded in the name of Jagdishwar Kumar. Therefore, simply because some of the members of the joint family had given the land in security for loan taken by them, it cannot be deduced that the joint family was in possession of the land given insecurity specially when Jagdishwar Kumar himself is as a loanee. As against the above evidence of the plaintiffs, the Chowkidari Receipts (Exts. O to O/10) shows that Jagdishwar Kumar, who admittedly was man of different village, was assessed to Chowkidari Tax for the Kamat. House in Shahpur where these lands are situated. The rent receipts (Exts. 1 to 1/20) also show that Jagdishwar Kumar who paid rent and receipts were granted in the name of Jagdishwar Kumar. There is nothing in the rent receipts to show that rent was ever paid through any member of the joint family. The plaintiffs have also examined P.Ws. 5, 6, 7 and 11 on point of possession of the joint family, but in the absence of any documentary evidence in support of their evidence, no reliance can be placed on the oral evidence of the witnesses. The contesting defendants have also examined D.Ws. 5, 6, 7, 17, 19, 20, 21 and 22 in support of their case on this point. According to the evidence of these D.Ws. Jagdishwar Kumar and after his death, his sons Balanand and others were coming in possession of the land, till they were transferred by Balanand and his brothers in favour of defendant Nos. 1 and 2 on the strength of Ext. A/15 executed in 1959. Their evidence also shows that the lands were being cultivated through Bataidars among these D.Ws., D.W. 16 is Balanand himself and D.Ws. 20 and 21 are the

Bataidars, and as such are competent witnesses. The evidence of the D.Ws. on point of possession also finds support from the documentary evidence, hence there is no reason to disbelieve them on this point. Besides these, D.W. 16 has deposed that his father Pachu Miyan purchased land from Balanand, and the consideration was received by Balanand, and he is in possession of the land purchased. The evidence of this witness hence also supports the possession of Jagdishwar Kumar and thereafter of Balanand. Thus, on a consideration of the evidence on record it also appears that Jagdishwar Kumar and thereafter his son, Balanand was in possession of the lands taken in settlement in the name of Jagdishwar Kumar.

20. So far the conduct of the parties in relation to the lands taken on settlement, it is admitted in the plaint itself that after settlement Jagdishwar Kumar disposed of some lands by sale. The case of the plaintiffs, however, is that at the instance of the joint family those lands were sold by Jagdishwar Kumar and the consideration money was appropriate by the joint family of the plaintiffs. But, there is no cogent evidence adduced by the plaintiffs to prove that actually the consideration money was received by the plaintiffs. D.W. 16 on the other hand, has deposed that his father had purchased land from Balanand the son of Jagdishwar Kumar in his presence, and Balanand had received the consideration money. Thus, it is also proved that Jagdishwar Kumar and after his death his son Balanand had been dealing with the lands.

21. So far the motive for the benami purchase, the case of the plaintiffs is that in order to save properties from creditors, the joint family took settlement of the land in the Benami name of Jagdishwar Kumar. P.W. 7 alone has stated in his evidence that to save the properties from creditors the properties were taken in the name of Jagdishwar. But he could not name any of the creditors. There is no other evidence to prove this motive. The Trial Court as well as the appellate Court, therefore, have held that there was no motive for the joint family to take the settlement in the benami name. In the absence of any reliable evidence on this point, we are also in agreement with the above findings, that there was no motive for the joint family to take settlement of the land in the name of Jagdishwar Kumar. Turning to the question of relationship between the parties, Jagdishwar Kumar

was admittedly brother-in-law (sala) of Rit Narayan's brother Bhagwat Narayan. The appellate Court has held that the relationship between the parties was such that Rit Narayan could have reposed confidence in Jagdishwar Kumar to take the property in his benami name. There is no reason to reject this finding. But the mere fact of relationship between Jagdishwar and Rit Narayan will not make the transaction a benami one. So far the custody of the title deeds, admittedly the deeds have been filed by the defendants. The evidence of D.W. 24, Balanand Kumar, son of Jagdishwar Kumar also is that he had filed the challans (Exts. T to T/3) under which some of the consideration money was paid at the time of settlement of the lands. It is, therefore, also clear that the joint family was not in possession of the title deeds. s

22. Hence, though there was such a relationship between the members of joint family of the plaintiffs and Jagdishwar Kumar that the joint family could take lands in the name of Jagdishwar Kumar, as there is no reliable evidence to show that the joint family had any source to pay the consideration amount or that the joint family was in possession of the lands, and there was also no motive for taking the settlements in benami, and Jagdishwar Kumar and after his death his son, was dealing with the land as their own and the plaintiffs were not in custody of the title deeds, it cannot be held that the lands of Schedule II properties, which were settled in the name of Jagdishwar Kumar, were joint family properties.

23. In view of the above facts, though it is proved that the plaintiffs and the defendants 1st to 3rd parties are joint and there has been no partition amongst themselves, it is not established that the joint family was in possession of land of Schedule II, which were taken in settlement in the name of Jagdishwar Kumar. The sale-deed (Ext. A/5) shows that defendant Nos. 1 and 2 had purchased these lands from Balanand and others. There is nothing to show that the purchase was made out of the joint family fund. These lands, therefore, are self-acquired land of defendants 1 and 2 and not liable for partition.

24. For the reasons stated above, the impugned judgment and decree in F.A. No. 117 of 1966 is set aside so far with regard to the Schedule II lands of T.S. No. 48/60/1/66 and this appeal is allowed. But, there shall be no order as to costs.

D.P.S. Chaudhary, J.

25. I agree,

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