with the application for recovery of wages is competent to determine whether the order imposing punishment of stoppage of increment has been made by competent Court or the authority and strengthens the conclusion to which we have already arrived at.

(12) We accordingly find that none of the impugned orders of the Authority appointed under section 15(2) of the Act suffers from any infirmity. Both the petitions, thus, fail and are dismissed with costs.

B. S. G.

APPELLATE CIVIL

Before H. R. Sodhi and Rajinder Nath Mittal, JJ.

UNION OF INDIA,—*Appellant.*

versus

NAND LAL, ETC.,—*Respondents.*

Regular First Appeal No. 84 of 1961

May 1, 1972.

Evidence Act (1 *of* 1872)—*Sections* 101 *to* 104—*Code of Civil Procedure* (*Act V of* 1908)—*Order* 21 *Rule* 63—*Assertion of a transaction being* benami—*Burden of proof of*—*On whom lies*—*Such burden*—*Whether shifts in a suit under Order* 21 *Rule* 63 *of the Code*—*Benami nature of a transaction*—*Factors for the determination of*—*Stated.*

Held, that a purchase is to be assumed for the benefit of the person whose name appears as a purchaser in the document of sale unless subsequent dealing with the property and other proved or admitted facts show that the transaction is sham or *benami.* The burden of proof must, under the law as stated in sections 101 to 104 of the Indian Evidence Act, lie on the person who wishes the Court to believe in the existence of any fact and the averments as to *benami* transactions do not form an exception to the rule. The burden of proving *benami* is, therefore, always on the person who alleges it. It is only when a plaintiff wants to go behind the judgment of the executing Court and asserts the same claim which has once been rejected on merits by that Court under Order 21, Rule 61, Code of Civil Procedure, though in a summary manner, that a presumption arises in favour of the successful party in those proceedings and the burden of proof shifts to the plaintiff to establish contrary to what has been held by the executing Court. Where the executing Court has adjudicated on merits upon the nature of the claim and found the same to be

benami, it is for the plaintiff under Order 21, rule 63, to establish that he is the real beneficial owner and not an ostensible one or a *benamidar*. This onus on the plaintiff is necessitated because of the findings of the executing Court and not that the rule of burden of proof is in any way departed from. (Para 9)

Held, that the practice of acquiring or holding property *benami* is quite often prevalent. The question whether a transaction is *benami* in nature depends on the facts and circumstances of each case and there are well-recognised principles which have to be borne in mind when such an issue is to be resolved. A transaction is *benami* if a person purchases property in the name of another for his own benefit with no intention of giving any benefit under the transaction to the ostensible owner. The source of money for acquiring property generally furnishes a good and valuable test though not a conclusive one. The decision of a Court has to be based on legal evidence and not on mere surmises and suspicions howsoever strong they may be. One of the other factors to be considered is close relationship of the ostensible owner with the allegedly real owner but such relation is again not by itself sufficient to show whether the transaction is *benami*. (Para 6)

Regular First Appeal from the decree of the Court of Shri Harish Chandra Gaur, Sub-Judge, 1st Class, Amritsar, dated the 31st day of October, 1960, granting the plaintiff a decree of the suit with costs holding that the plaintiffs are the owners in possession of the properties in dispute and the disputed properties are not liable for attachment and saleable in realisation of the dues of the defendant No. 2 by defendant No. 1.

D. N. Awasthy and B. S. Gupta, Advocates, *for the appellants.*

B. K. Jhingan, and Bhagirath Dass, Advocates, *for the respondents.*

JUDGMENT

Judgment of the Court was delivered by:—

SODHI, J.—This is an appeal by the Union of India against the decree of the trial Court, whereby it has been held that the plaintiff-respondents are proved to be owners in possession of the properties in dispute and the same are, therefore, not liable to attachment and sale in realisation of the dues of the appellant.

(2) The Income-Tax Officer, Amritsar, passed assessment orders, Exhibits D. 1, D. 2 and D. 3, for the assessment years 1949-50, 1948-49 and 1947-48, on 29th June, 1951, and in pursuance thereof served demand notices on M/s. Moti Ram, Madan Lal, Katra Ahluwalia, Amritsar, through Moti Ram. The amount not having been realised, the demand was sent under section 46 of the Income-Tax Act to the Collector, Amritsar, for realisation. The suit property

which consists of two shops, Nos. 1016-17/XI-13, and 177/II-I, situate at Bazar Ghantaghar and Guru Bazar, Amritsar, respectively, were sought to be attached and sold for the recovery of the amount of income-tax. The plaintiff-respondents, Nand Lal and others, sons of Moti Ram preferred objections under Order 21, rule 58, Civil Procedure Code, it being alleged that these two shops were owned and possessed by them and were not liable to attachment and sale for realisation of the amount claimed to be due from Moti Ram, their father. The objections were disallowed on 15th July, 1959. Hence the suit under Order 21, rule 63, out of which the present appeal has arisen.

(3) The averments of the plaintiffs are that they purchased these properties by registered sale-deeds, Exhibits, P. 2 and P. 3, executed on 2nd April, 1949, and 5th March, 1949, respectively. It is pleaded that a notice under section 80 of the Code of Civil Procedure, was not necessary, but the same had been served on the Secretary to the Central Government. The appellant resisted the suit mainly on the ground that it was Moti Ram defendant-respondent, who was in actual use and occupation of the properties as a real owner thereof and that sales in favour of the plaintiff-respondents were only *benami* intended to screen the properties from being proceeded against for recovery of the Government dues. The factum and validity of the alleged notice under section 80 of the Code of Civil Procedure were denied. The parties consequently went to trial on the following issues:—

(1) Whether the plaintiffs are the owners of the property in dispute?

(2) Whether defendant No. 2, purchased the property in dispute *benami* in his own name ? If so, to what effect ?

(3) Whether any notice under section 80, Civil Procedure Code, was necessary to defendant No. 1?

(4) If issue No. 3 is proved in the affirmative, whether the plaintiffs served a valid notice upon defendant No. 1?

(4) The trial Court found issue No. 1 in favour of the plaintiffs and issue No. 2 against the defendant-appellant. It is held under issues Nos. 3 and 4 that a valid notice under section 80 of the Code had been served though no such notice was necessary under the law.

(5) The pleas taken up by the defendant in the course of trial of the suit have been re-agitated before us in appeal. The foremost question to be determined is whether the plaintiff-respondents are the owners of the properties in dispute or mere *benamidars*, the real owner being their father Moti Ram.

(6) We have been taken through evidence on the record by Mr. D. N. Awasthy, learned counsel for the appellant, but in spite of his vehemence he could not persuade us to appreciate evidence differently from that of the trial Court. The practice of acquiring or holding property *benami* is quite often prevalent. The question whether a transaction is *benami* in nature depends on the facts and circumstances of each case and there are well-recognised principles which have to be borne in mind when such an issue is to be resolved. A transaction is *benami* if a person purchases property in the name of another for his own benefit with no intention of giving any benefit under the transaction to the ostensible owner. Since it is not usual to purchase property with one's own money for the benefit of another, the source of money for acquiring property generally furnishes a good and valuable test though not a conclusive one. To ascertain the true nature for the transaction, the other attending circumstances are equally quite relevant, but it is not to be forgotten that decision of a Court has to be based on legal evidence and not on mere surmises and suspicions howsoever strong they may be. Suspicion cannot indeed take the place of proof. One of such circumstances is close relationship of the ostensible owner with the allegedly real owner but such relation is again not by itself sufficient to show whether the transaction is *benami*.

(7) The conduct of the parties in regard to the subject matter of the transaction is of great assistance in considering circumstances. In the instant case, the circumstances relied upon in regard to the sale-deed Exhibit P. 2 are that;—

(1) At the time of execution as well as registration of the sale-deed, none of the vendees was present and their father Moti Ram, acted on their behalf in getting the transaction completed.

(2) Out of the sales consideration, Rs. 4,000 were received by the vendor as earnest money from Moti Ram, who paid the balance of Rs. 36,000 before the Sub-Registrar.

(3) The sale is in favour of Nand Lal and Madan Lal (majors) and their minor brothers. It is urged that major brothers purchasing property for the minor brothers is an unusual course of conduct.

(4) The assessing authorities acting under the Income-Tax Act treated the property in dispute as that of the assessee Moti Ram.

(8) In regard to the sale represented by the document, Exhibit P. 3, there is no dispute that it was Nand Lal, one of the plaintiffs, who paid Rs. 2,500 as earnest money to the vendor and also the balance of Rs. 32,000 at the time of registration of the sale-deed before the Sub-Registrar, Amritsar. Nand Lal was himself present at the time of registration and his father Moti Ram did not figure anywhere in this transaction. The only suspicious circumstances, in respect of this sale according to the learned counsel for the appellant, thus left are that (1) Nand Lal, Madan Lal majors purchased property for the benefit of their minor brothers Jawahar Lal, Joginder Lal, Jagdish Kumar, Ramesh Kumar and Mohinder Kumar, through the latter under the guardianship of their father Moti Ram, and (2) the findings of assessing authority treating the property in dispute as that of the assessee Moti Ram. Mr. Awasthy strenuously contends that the objections of the plaintiff-respondents under Order 21, rule 58, Code of Civil Procedure, having failed, the onus lay on them to prove that the two transactions of sale referred to above are not sham or *benami*, but confer ownership rights on them. The contention is that the plaintiffs have failed to discharge this onus. On the matter of onus, Mr. Awasthy relies on *Sura Lakshmiah Chetty and others* v. *Kothandarama Pillai* (1), *Sm. Khabirannessa Bibi* v. *Sudhamoy Bose, and another* (2) *Mt. Mahadei* v. *Sahu Lachmi Narain and others* (3) and *Radhakishun and others* v. *Keola Prasad and others* (4). *Sura Lakshmiah Chetty's case* (1) was that of purchase in the name of a wife. On evidence the learned Single Judge of the Madras High Court came to the conclusion that no doubt the sale-deed purported to convey property by the vendors to Lakshmi wife of Chockalingam, she held it only as *benamidar* without holding any beneficial interest therein. The purchase money was not

(1) A.I.R. 1925 P.C. 181.
(2) A.I.R. 1958 Cal. 733.
(3) A.I.R. (34) 1947 All. 399.
(4) A.I.R. 1937 Patna 76.

shown to be that of Lakshmi. She had set up the plea that the property had been given to her by her husband in pursuance of antenuptial agreement but any such agreement was held not to have been proved. It was in these circumstances that decision of the learned Single Judge was upheld by the Privy Council and an observation made that a purchase in India of property in the name of wife unexplained by any other proved or admitted facts is to be regarded as a *benami* transaction. *Sm. Khabirannessa Bibi's case* (2), decided by the Calcutta High Court enunciates the rule that the onus to prove *benami* lies on the person, who advances a plea to that effect. It was a suit under Order 21, rule 63, Code of Civil Procedure, by the Official Liquidator on the allegations that the property attached about which objections had been filed by Sm. Khabirannessa Bibi, wife of the judgment-debtor was held by her as *benamidar* of her husband to whom the suit property really belonged. The executing Court did not go into the question of *benami* transaction and proceeded to decide the point by taking into consideration the document of title as produced by Sm. Khabirannessa Bibi and treating the same to be representing the true state of affairs. This decision is of no assistance to Mr. Awasthy. *Mt. Mahadei's case* (3), decided by Sarpru J., if I may say so with all respect, seems to have gone too far in shifting the burden of proof by laying the same on the plaintiff when it was defendant, who was asserting that the plaintiff was holding the property *benami*. No doubt, the plaintiff had originally preferred an objection under Order 21, rule 58, but it had been dismissed in default and it was then that she brought a suit under Order 21, rule 63, Code of Civil Procedure, seeking declaration that the property belonged to her and was not liable to attachment and sale in execution of the decree against her husband. The document of sale was in her name and there had been no judgment of the executing Court on merits behind which the plaintiff wanted to go. A dismissal in default could not be treated as decision on merits. In *Radhakishun's case* (4), the executing Court dismissed on merits the claim of the plaintiff under Order 21, rule 61, that he was the owner of the attached property. He asserted the same right again in a suit instituted under Order 21, rule 63, and it was in this situation that the learned Judges held that since an objection to attachment was rejected by the Executing Court on the ground that the claimant was mere *benamidar* of the judgment-debtor, it was for the claimant to establish his right in a suit under Order 21, rule 63. In other words, the onus to prove that the transaction was not a *benami* was placed on the plaintiff.

(9) In our opinion, the principles deducible from the decided cases are that a purchase is to be assumed for the benefit of the person whose name appears as a purchaser in the document of sale unless subsequent dealing with the property and other proved or admitted facts show that the transaction is sham or *benami*. The burden of proof must, under the law as stated in sections 101 to 104 of the Indian Evidence Act, lie on the person, who wishes the Court to believe in the existence of any fact and the averments as to *benami* transactions do not form an exception to the rule. The burden of proving *benami* is, therefore, always on the person, who alleges it. It is only when a plaintiff wants to go behind the judgment of the executing Court and asserts the same claim which has once been rejected on merits by that Court under Order 21, rule 61, Code of Civil Procedure, though in a summary manner, that a presumption arises in favour of the successful party in those proceedings and the burden of proof shifts to the plaintiff to establish contrary to what has been held by the executing Court. To put it differently, and more precisely, where the executing Court has adjudicated on merits upon the nature of the claim and found the same to be *benami*, it is for the plaintiff under Order 21, rule 63, to establish that he is the real beneficial owner and not an ostensible one or a *benamidar*. This onus on the plaintiff is necessitated because of the findings of the executing Court and not that the rule of burden of proof is in any way departed from. Again, beyond doubt the placement of onus is important in civil proceedings, but when evidence has been led by both the parties and the point in issue is present to their mind, an overall assessment of the entire evidence available on the record has to be made and the question of discharge of onus is hardly material. We have in the instant case the evidence led by both the parties and on a consideration of which the trial Court has come to the conclusion and, in our opinion, rightly that the transactions have not been proved to be *benami*. Nand Lal plaintiff made a statement in Court as P.W. 10, that he had been paying income tax in 1939 and that his father was not doing any business those days. He claims to be the sole proprietor of the firm Moti Ram, Nand Lal. It is further deposed by him that he paid the entire consideration money from his business and that he got Rs. 40,000 from his maternal grandfather which was invested in the purchase of these shops. There has been no attempt on the part of the defendants to cross-examine this witness to show how his statement was not correct. The documents of sales appear in the names of the plaintiffs and no evidence has been led by the

defendants to show from which source, other than that as stated by Nand Lal, money for the purchase of shops came. Rent notes with regard to these shops have been produced and got proved by Nand Lal. The tenants to whom the shops had been leased out appeared as P.W. 1 and P.W. 4. Possession of the property is, therefore, proved to be with the plaintiffs. The mere fact that at the time of execution of the sale-deed, Exhibit P. 2, none of the plaintiffs was present and Moti Ram, their father acted as their attorney cannot by itself lead to the conclusion that the property too must have been purchased by the latter with his own money and for his own benefit. As a matter of fact, there is no rebuttal to the evidence of the plaintiffs and in these circumstances the trial Court was justified in believing the rebutted statement of Nand Lal, who gave full explanation with regard to the source of the money. There is hardly any improbability in the elder brothers purchasing property jointly for themselves and their minor brothers. As already stated, in the transaction of sale covered by the document, Exhibit P. 3, the earnest money and the balance of the price were paid by Nand Lal, alone. Nand Lal was carrying on business in Srinagar and was the sole proprietor of the firm Moti Ram, Nand Lal. Mr. Awasthy had indeed to concede that the case was not properly conducted in the trial Court and much of the evidence which could have been produced has not been produced. A son may carry on his business in the joint name of himself and his father. From the mere circumstance that Moti Ram's name appears in the firm, it does not necessarily follow that he must be having any commercial interest in that firm without further probe. An attempt was made by the defendants to prove from the property tax register that the shops belong to Moti Ram and for this purpose copies of the entries in that register were produced as Exhibits D. 5, D. 6 and D. 7. Reliance was placed also on the statement of Moti Ram made before the assessing authority marked Exhibit D. 4. We fail to see how these entries can help the defendants. The registered numbers of the shops as given in the plaint are different from those given in Exhibits D. 5, D. 6 and D. 7. The plaintiffs have sought declarations with regard to shops Nos. 1016-17/XI-13, and 177/II-I, situate in Bazar Ghantaghar and Guru Bazar, respectively. In Exhibit D. 5, the number of the shop is B II-43—172, and in Exhibits D. 6 and D. 7 it is shown as BII-45—172. It was for the defendants to prove the identity of the shops when entries in the property tax register were being relied upon, but they have miserably failed to do so. The statement Exhibit D. 4 made by Moti Ram before the assessing authority is of no assistance. He states that he carried on the business of cloth

in Srinagar in the name of M/s. Jawahar Lal, Joginder Lal and that he wound up that business somewhere in 1954. It is further stated by him that he did business at Amritsar in the name of M/s. Moti Ram Madan Lal, but that was also wound up after one and a half years.

(10) The trial Court beyond doubt was in error in holding that no notice under section 80, Code of Civil Procedure, was necessary, but the finding to that effect does not affect the result of this suit as it has also been held that a notice was in fact served under the said provision of law. In view of the authoritative pronouncement of their Lordships of the Supreme Court in *Sawai Singhai Nirmal Chand* v. *The Union of India* (5), *Ram Sundri alias Sham Sundri* v. *The Collector, Ludhiana, and others* (6), cannot any more be held to have laid down good law. As observed in *Sawai Singhai Nirmal Chand's case* (5) provisions of section 80 are attracted to a suit filed under Order 21, rule 63, Code of Civil Procedure. Mr. Awasthy did not challenge the factum of service of notice.

(11) For the foregoing reasons, we uphold the findings of the trial Court and consequently the decree passed by it. The appeal is dismissed. In the peculiar circumstances of the case, the parties are left to bear their own costs.

K. S. K.

CIVIL MISCELLANEOUS.

Before R. S. Narula and Rajendra Nath Mittal, JJ.

MANGE RAM ETC.,—*Petitioners.*

versus

THE STATE OF HARYANA ETC..—*Respondents.*

Civil Writ No. 259 of 1972

May 4, 1972.

Punjab Gram Panchayat Act (IV of 1953) as amended by Haryana First Amendment Act (XIX of 1971)—Sections 3(1), 5(2), 6(1), 13A, 13B—Haryana Gram Panchayat Election Rules (1971)—Rules 38(2) and (3),

(5) A.I.R 1966 S.C. 1068.
(6) 1959 P.L.R. 455.