

**IN THE HIGH COURT OF MADHYA PRADESH  
AT JABALPUR  
BEFORE  
HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL**

**SECOND APPEAL NO.385 of 1995**

**Between:-**

- 1. SOW PUSHPA GOYAL W/O LAXMINARYAN**
- 2. KAMAL KISHORE S/O BHAGCHAND (DEAD)  
THROUGH LRS:  
(1) SMT. RUKHMANI BAI, AGE 64 YEARS  
WIDOW KAMAL KISHORE AGARWAL,  
  
(2) SMT. KAVITA, AGE 40 YEARS,  
D/O KAMAL KISHORE AGARWAL, WIDOW OF  
KAILASH CHANDRA AGRAWAL,  
  
(3) MANISH, AGE 28 YEARS, SON OF KAM KISHORE  
AGARWAL.  
R/O GOL GAZAR, KHANDWA DISTRICT KHANDWA  
  
(4) SMT. BABITA, AGED 38 YEARS,  
DAUGHTER OF KAMAL KISHORE AGARWAL,  
HUSBAND RAJESH AGARWAL,  
RESIDENT OF TIRUPATI COLONY, ITARSI,  
DISTRICT HOSHANGABAD  
  
(5) SMT. SONALI, AGE 35 YEARS,  
DAUGHTER OF KAMAL KISHORE  
HUSBAND KRITI AGARWAL,  
R/O NEAR NAGAR PALIKA BHAVAN,  
BAYVARA DISTRICT RAJGAD**
- 3. MAHESH KUMAR S/O BHAGCHAND**

4. **UMESH KUMAR S/O BHAGCHAND  
R/O GOLBAZAR, KHANDWA (M.P.)**

.....APPELLANTS

*(BY SHRI ASHISH SHROTI - ADVOCATE)*

**AND**

1. **DAYA RAM, DEAD THROUGH LRS:**
- (a) **DHARAMPAL S/O DAYARAM ARYA,  
AGED 60 YEARS**
  - (b) **RAJENDRA S/O DAYARAM ARYA,  
AGED 55 YEARS**
  - (c) **RAJKUMAR S/O DAYARAM ARYA,  
AGED 50 YEARS**
  - (d) **SUNIL S/O DAYARAM ARYA,  
AGED 45 YEARS**
  - (e) **BALKRISHNA S/O DAYARAM ARYA,  
AGED 40 YEARS**
  - (f) **SMT. NIRMALA D/O DAYARAM ARYA**
  - (g) **SMT. SHAKUN D/O DAYARAM ARYA**
  - (h) **SMT. URMILA D/O DAYARAM ARYA**
  - (I) **SMT. SARLA D/O DAYARAM ARYA**
  - (j) **SMT. SHEELA D/O DAYARAM ARYA**
2. **MANGILAL S/O HEERLAL AGRAWAL  
(DEAD)**
- (A) **SMT. MUNNI BAI. (DEAD)**

**(B) VINOD S/O MANGILAL (DEAD)  
THROUGH LEGAL LRS :**

**(i) SUHIL KUMAR, AGED 50 YEARS, SON OF VINOD AGRAWAL, R/O PRIDE PLAZA, VRANDAWAN DHAM, FLT. NO.B-3 STATION ROAD MIDC ROAD, VEDANT NAGAR, AURANGABAD MAHARASHTRA**

**(ii) KAPIL, AGED 45 YEARS, SON OF VINOD AGRAWAL. R/O PRIDE PLAZA, VRANDAWAN DHAM, FLT. NO.B-3 STATION ROAD MIDC ROAD, VEDANT NAGAR, AURANGABAD MAHARASHTRA**

**(iii) SMT. SAPNA, AGED 55 YEARS DAUGHTER OF VINOD AGRAWAL, WIFE OF NITIN AGARWAL, R/O SHIVAJI CHOWK, HINGOLI, MAHARASHTRA**

**(C) ASHOK S/O MANGILAL (DEAD)  
THROUGH LRS:**

**(1) SMT. USHA WIDOW OF SHRI ASHOK AGRAWAL, AGED 62 YEARS, R/O RAMKRISHNA GANJ, BEHIND ANAZ MANDI, KHANDWA (M.P.)**

**(2) SMT. ASHWITA, DAUGHTER OF LATE SHRI ASHOK AGRAWAL, WIFE OF SHRI RITESH AGRAWAL, AGED ABOUT 40 YEARS, R/O 70, BHARUKA BROTHERS, KASERA BAZAR, INDORE (M.P.)**

**(3) SHRI ASHWIN SON OF LATE SHRI ASHOK AGRAWAL, AGED ABOUT 35 YEARS, BUSINESSMAN, RESIDENT OF**

**RAMKRISHNA GANJ, BEHIND ANAZ  
MANDI, KHANDWA (M.P.)**

**(D) SMT. BINA BAI, W/O SHRI VIJAYA KUMAR  
AGRAWAL, CARE OF RAMESHWARDAS  
CHHAGA LAL AGRAWAL, KASTOORI  
PALACE, ATHAWAI BAZAR, BHUSAWAL.**

**(E) SANJAY S/O MANGILAL (DEAD)  
THROUGH LRS:**

**(1) SMT. SAPNA WIFE OF LATE SHRI  
SANJAY AGARWAL, AGED ABOUT 45  
YEARS, R/O D-10, BRIJNAYANI COLONY,  
KHANDWA ROAD, INDORE (M.P.)**

**(2) MS. PAYAL, DAUGHTER OF LATE SHRI  
SANJAY AGARWAL, AGED ABOUT 20  
YEARS, R/O D-10, BRIJNAYANI COLONY,  
KHANDWA ROAD, INDORE (M.P.)**

**(3) RAM SON OF LATE SHRI SANJAY  
AGARWAL, MINOR THROUGH NATURAL  
GUARDIAN SMT. SAPNA, AGED ABOUT 12  
YEARS, R/O D-10,**

***(BY SHRI ATULAND AWASTHY, SENIOR  
ADVOCATE ASSISTED BY SHRI ABHAY  
TIWARI - ADVOCATE)***

**....RESPONDENTS**

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Reserved on : 25.08.2022

Delivered on : 02.09.2022

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## **J U D G M E N T**

This second appeal has been filed by plaintiffs challenging the judgment and decree dated 23.01.1995 passed by District Judge, East Nimar Khandwa in Civil Appeal no.11-A/90, reversing the judgment and decree dated 20.09.1990 passed by I Civil Judge Class-I, Khandwa in Civil Suit no.11-A/1964.

2. In short the facts are that, original plaintiff Bhagchand (the appellants are his descendants) instituted a suit for declaration of title and permanent injunction mainly against the original defendant 1-Seth Champalal (due to his death and there being no LR, his name was deleted vide order dtd. 9.2.1983) and defendant 2-Dayaram (the respondents 1(a) to (j) are his descendants) with regard to a house situated in Mohalla Gol Bazar, Khandwa as mentioned in schedule-A to the plaint. Later on Mangilal (the respondents 2(A) to (E) are his descendants) and Chhotibai (since deceased) were also made party to the suit as defendants 3-4. It is alleged that Tularam (father of plaintiff-Bhagchand) was owner of the house and in the year 1928 he was declared insolvent and in the insolvency proceedings, the suit house was sold in auction on 22.01.1932 which was finalized in the name of defendant 1-Seth Champalal for Rs.235/-, who was maternal uncle (mama) of the plaintiff-Bhagchand. In pursuance thereof sale certificate was issued on 09.08.1941 (Ex.D-2/1) in the name of Seth Champalal and it was agreed between Seth Champalal

and Tularam that he would try to pay consideration amount of auction sale and as such he was permitted to continue in occupation of the house and thereafter, plaintiff's mother paid amount to Seth Champalal and in turn he never took possession of the house. The plaintiff in para 5 of the plaint also took plea of adverse possession over the suit house. It is alleged that the defendant 2-Dayaram claiming himself to be owner and landlord of the house on the basis of sale deed dated 17.03.1962 (Ex.D-3/4), allegedly executed by defendants 3-4 Mangilal and Chhotibai (who were LRs of Seth Heeralal) filed suit for eviction (C.S no.85-A/63 and 86-A/1963) against the plaintiff and his tenant in the Court of II Civil Judge Class-II, Khandwa, and in turn the plaintiff instituted the present suit on 03.04.1964 for declaration of title and permanent injunction restraining the defendant 2-Dayaram from proceeding with the suits for eviction with regard to suit house. On inter alia allegations the suit was filed.

3. The defendant 1-Seth Champalal appeared and filed written statement denying the plaint allegations and contended that Tularam mortgaged the house in question vide mortgage deed dated 02.12.1922 in favour of Smt. Gangabai for consideration of Rs.2,500/-. Later on Gangabai and her son Radhakishan assigned the said mortgage to Seth Heeralal and Seth Madholal (both sons of Seth Laxminarayan Agrawal) for consideration of Rs.4,000/- by registered deed dated 17.07.1931 and original mortgage deed was handed over to Seth Heeralal-Madholal. It is

contended that he (Seth Champalal) made bid in auction sale on behalf of Seth Heeralal- Madholal for Rs.325/- in which he was benamidar and Seth Heeralal-Madholal were real purchasers and they obtained possession of house upon confirmation of sale and became full owner thereof. It is further contended that from the date of confirmation of sale i.e. from the year 1932, Seth Heeralal-Madholal were in possession of the house and plaintiff's father Tularam went to live in rented house and died there. It is alleged that upon partition on 10.09.1950 amongst Seth Heeralal and heirs of Seth Madholal, the suit house fell in the share of Heeralal vide registered partition deed, resultantly the plaintiff and one tenant-Gopikishan became his tenants on ground floor and first floor. Seth Heeralal expired in the year 1953 leaving behind his son Seth Mangilal and widow Smt. Chhotibai. It is further contended that on 17.03.1962 Seth Mangilal and Chhotibai sold the house to defendant 2-Dayaram vide registered sale deed dtd. 17.3.1962 (Ex.D-3/4) for Rs.8,000/- and delivered possession to him which was also consented by defendant 1-Seth Champalal without any consideration. With the aforesaid contentions, the suit was prayed to be dismissed.

4. The defendant 2-Dayaram also filed his separate written statement and reiterated the same contentions in defence already taken by defendant 1-Seth Champalal in his written statement and on the basis of sale deed dtd. 17.3.1962 claimed himself to be owner of the house in question and prayed for dismissal of the suit.

5. The defendants 3-4 Mangilal and Chhotibai also filed written statement and being vendors of sale deed dtd. 17.3.1962 allegedly executed in favour of the defendant 2-Dayaram, supported the claim of the defendant 2 and prayed for dismissal of the suit.

6. On the basis of pleadings, learned trial Court framed as many as 17 issues and recorded evidence of the parties and after having considered the entire material available on record, decreed the suit vide its judgment and decree dated 20.09.1990 and held that the alleged mortgage by Tularam in favour of Gangabai and then its assignment by Gangabai in favour of Seth Heeralal-Madholal is not proved. The plea of benami taken by defendants is not permissible in view of Section 66 CPC and on that basis no rights accrued in favour of Seth Heeralal-Madholal. It was clearly held that plaintiff's father Tularam remained in continuous possession of the house and Seth Heeralal-Madholal never came in possession and Tularam was never dispossessed. The learned trial Court also decided the question of relationship of landlord and tenant in negative and further held that Tularam and after him, the plaintiff being in continuous possession of the house, has perfected title by adverse possession.

7. Upon civil appeal filed by defendant 2-Dayaram, first appellate Court vide judgment and decree dated 23.01.1995 allowed the appeal and reversed the judgment and decree of trial Court, and held that Section 66

CPC is not attracted in the present case. It is also held that Tularam and after him the plaintiff being in permissive possession did not acquire any title on the basis of adverse possession. As Seth Champalal purchased the house benami for and on behalf of Seth Heeralal-Madholal and in partition the property fell in share of Seth Heeralal, therefore, Seth Mangilal and Chhotibai being successors of Seth Heeralal were competent to sell the house to defendant 2-Dayaram and on that basis presumed the plaintiff to be tenant of defendant 2-Dayaram in the suit house. As such dismissed the suit in toto.

8. Against the judgment and decree dated 23.1.1995, this second appeal has been filed by the plaintiffs, which was admitted on 19.08.1996 on the following substantial questions of law:

“(1) Whether in view of section 66 of the Code of Civil Prodecure, the other side was entitled to raise a dispute ?

(2) Whether on the facts and in the circumstances of the case, the finding recorded by the Courts below are perverse and contrary to record ?”

Thereafter, on 18.07.2022, this Court framed following additional substantial questions of law:

“3. Whether the lower appellate Court was justified in reversing the finding of the trial Court regarding appellants’ adverse possession over the suit property ?

4. Whether in absence of any documentary evidence, the lower appellate Court was justified in holding Hiralal to be the owner of the suit property ?

5. Whether after the death of Seth Champalal, the appellants are entitled to a decree of permanent injunction against the present defendants ?”

9. Learned counsel for the appellants/plaintiffs submits that in the auction proceedings the bid of Seth Champalal was accepted and he himself paid the amount of bid and sale certificate was also issued in his favour. He submits that for want of documentary evidence with regard to alleged mortgage of the house in favour of Gangabai and thereafter its assignment by her in favour of Seth Heeralal-Madholal, learned courts below have concurrently negatived the case of mortgage and in spite of concurrent finding of Courts below with regard to mortgage, learned first appellate Court has erred in holding that Seth Champalal purchased the property benami for Seth Heeralal-Madholal, as such he submits that in absence of any transaction of mortgage with Gangabai or with Seth Heeralal-Madholal, there was no question to purchase the property benami by Seth Champalal for Seth Heeralal-Madholal. He submits that Seth Heeralal-Madholal and thereafter, legal heirs of Heeralal namely Mangilal and Chhotibai had no right in the property to sell it to defendant 2-Dayaram. He further submits that in the light of Section 66 CPC, the plea of benami was not available even in defence to the defendants 1-2. In

support of which, learned counsel for the appellants placed reliance on decision in the case of *Shivnarayan Vs. Daulal 1988 MPLJ 281* and *Duvuru Jaya Mohana Reddy and anr. Vs. Alluru Nagi Reddy and ors. AIR 1994 SC 1647*. He also submits that Seth Champalal (DW-1) has in para 1 (last 8 lines) admitted that he himself made bid and paid the entire amount of auction and sale certificate was also issued in his favour. Learned counsel for the appellant further submits that learned first appellate Court has considered the oral testimony of Babulal s/o Madholal (DW-1) (for defendants 3-4) whereas, his testimony could not have been considered in absence of cross examination due to his own fault. In this support he placed reliance on the decision in the case of *Vidhyadhar Vs. Manikrao and anr. (1999)3 SCC 573*. Learned counsel submits that only on the basis of oral testimony of witness Babulal, learned first appellate Court has recorded finding with regard to relationship of landlord and tenant in between the defendant 2- Dayaram and plaintiff so also with tenant Gopikishan, who was originally inducted by the plaintiff himself. He further submits that learned first appellate Court has just contrary to law laid down by Supreme Court in the case of *Santosh Hazari Vs. Purushottam Tiwari (Dead) by LRs. (2001)3 SCC 179* reversed the judgment and decree of trial Court. By placing reliance on the decision of Supreme Court in the case of *Ratan Babu Patil (Dead) by LRs and ors. Vs. Dodhu and ors. AIR 2005 SC 1500* learned counsel submits that after completion of auction sale, the limitation for obtaining possession was one year, but the defendant 1-Seth Champalal

never initiated any proceeding to dispossess the plaintiff, therefore, the suit is barred by the law of Limitation. With these submissions, he prayed for allowing the second appeal.

**10.** Learned senior counsel on behalf of the respondents supported the impugned judgement and decree passed by learned first appellate Court and submits that though the learned Courts have not found the case of mortgage of the house proved, but Seth Champalal purchased the house in auction, benami for and on behalf of Seth Heeralal-Madholal and they remained in possession of the house as owner and subsequently being LRs of Seth Heeralal, the defendants 3-4 Seth Mangilal and Chhotibai sold the house on 17.3.1962 to the defendant 2-Dayaram who is owner and landlord of the plaintiff. He submits that at the relevant point of time plea of benami was available and the section 66 CPC did not come in their way. Being owner and landlord the defendant 2-Dayaram instituted suit for eviction of tenants, which was decreed and is pending in appeal due to stay under section 10 CPC in the light of pendency of instant Second Appeal. Learned senior counsel submits that the plaintiff has no right in the property after auction sale in favour of defendant 1-Seth Champalal and even as per plaint allegations, the plaintiff remained in occupation of the suit house as tenant, as such the plaintiff being in permissive possession, cannot claim title on the basis of adverse possession, in support of which he placed reliance on the decision of Supreme Court in the case of *Uttamchand (dead) through LRs. Vs.*

*Natthuram (dead) through LRs and ors. (2020) 11 SCC 263*. He also submits that in absence of title, the plaintiff is not entitled for decree of permanent injunction and for want of substitution of LRs of defendant 1- Seth Champalal, the case had abated. With the said submissions he supports the judgment and decree of first appellate Court.

11. Heard learned counsel for the parties and perused the record.

***Substantial question of law no. 1 :***

12. Undisputedly the house in question originally belonged to Tularam, (father of plaintiff-Bhagchand) which had been in occupation of Tularam, his wife Sarjibai and the plaintiff and is still in occupation/possession of the appellants (who are LRs of plaintiff-Bhagchand). In defence it is stated that the house in question was mortgaged by Tularam in favour of Gangabai and then she assigned the same mortgage on 17.7.1931 to Seth Heeralal-Madholal for consideration of Rs. 4,000/-. It is further stated that in such circumstances the house was purchased in auction sale on 22.1.1932 by Seth Champalal for and on behalf of Seth Heeralal-Madholal.

13. It is undisputed fact available on record that both the alleged deeds dtd. 2.12.1922 (relating to Gangabai) and 17.7.1931 (relating to Seth Heeralal-Madholal) have not been produced on record and with regard to plea of mortgage, there is oral evidence only available on record. It is

pertinent to mention here that while deciding issue no. 7(a) and (b) learned trial Court has categorically held that alleged transaction of mortgage is not proved and vide para 46, learned first appellate Court has affirmed the findings of learned trial Court, which have not been challenged on behalf of the respondents. In the light of unchallenged concurrent findings recorded by learned both the Courts below with regard to plea of mortgage, this Court has no option but to accept the same.

14. In the case of *Shivnarayan Vs. Daulal 1988 MPLJ 281* this Court has considered the old provision of section 66 CPC, as under :

“5. Section 66(1) of the Civil P. C. which is relevant for our purpose, is as under :-

(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of the someone through whom the plaintiff claims and in any suit by a person claiming title under a purchase so certified, the defendant shall not be allowed to plead that the purchase was made on his behalf or on behalf of someone through whom the defendant claims.

(2) \* \* \* \* \*

A plain reading of this provision indicates that it intends to give effect to the title of the purchaser in a

court's sale and prohibits challenge on the ground that it was benami.

6. Not only the weight of legal authority but also the objective behind the provision compels this Court to hold that the suit was not maintainable under S.66 of the Civil P.C. The intention of the legislature was to permit real purchaser to bid in the court auction. This purpose would be frustrated not only by permitting benami transactions but also by permitting joint purchases. A person not entitled to bid in the court auction may like to join the person able to bid and thereby by-pass the legal provisions, if S.66 Civil P.C. was not to be applied. This would then defeat the very objective behind the provision. It, therefore, appears that Allahabad and Madras views decide the controversy on the realistic basis and give full effect to the intention of the legislature.”

15. Their Lordships of Supreme Court in the case of *Girijanandini Devi and others Versus Bijendra Narain Choudhary AIR 1967 SC 1124* considered the scope of section 66 CPC and stated in para 13 of the judgement which is summarised in placitum (D) as under :

"Where a person alleges that a property purchased at a Court auction was purchased on his behalf or on behalf of some one through whom he claims, the suit is clearly barred. But where the, claim is that the properties belonged to the joint family, because they were purchased with the aid of joint family funds in the name of the benamidar such a claim does not fall within the terms of Section 66(1)."

16. In the light of decision in the case of *Shivnarayan* (supra) and *Girijanandini Devi* (supra) there is no cavil of doubt that in case of auction purchase, it was not open to the defendants to take plea of benami in defence and the plea of benami was not available to them. It is also undisputed that the defendant 1-Seth Champalal and Seth Heeralal-Madholal were not member of joint hindu family. As such there was no question to purchase the suit house benami by defendant 1-Seth Champalal in favour of Seth Heeralal-Madholal.

***Substantial question of law no. 4:***

17. Only plea which has been taken in support of title of defendant 2-Dayaram is the plea of benami transaction in between the defendant 1-Seth Champalal and Seth Heeralal-Madholal with the support of admissions of Seth Champalal in the written statement in favour of Seth Heeralal-Madholal and then in favour of defendant 2-Dayaram, in whose favour a sale deed is said to have been executed on 17.3.1962 by defendants 3-4 Mangilal and Chhotibai (being LRs of Heeralal) which was also consented by defendant 1-Seth Champalal. The senior counsel strongly placed reliance on the admissions of defendant 1-Seth Champalal and the consent given in the sale deed dtd. 17.3.1962.

18. Now it is required to be seen as to whether there is any documentary evidence available on record with regard to transfer of title by defendant 1-Seth Champalal (auction purchaser) in favour of Seth Heeralal-Madholal. Undisputedly, answer is in negative. It is well settled that in absence of any regd. deed of transfer, title cannot be presumed to have been passed because it passes only upon valid execution and registration of sale deed. In the case of *Suraj Lamp & Industries Pvt. Ltd. Vs. State of Haryana & anr. (2012)1 SCC 656* and *Har Narain (Dead) by LRs. Vs. Mam Chand (Dead) by LRs. (2010)13 SCC 128* it has been held that the sale cannot be termed as complete until its registration and it becomes effective only once it stands registered and that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

19. As such there is no documentary evidence available on record to prove title of the defendant 2-Dayaram but there is only an admission of defendant 1-Seth Champalal in favour of the defendant 2-Dayaram. In the case of *Ambika Prasad Thakur Vs. Ram Ekbal Rai AIR 1966 SC 605*, Supreme Court has considered inter alia the effect of admission by a party in respect of title and it has been held that title cannot pass by a mere admission. Hence, on the basis of admissions of defendant 1-Seth Champalal, it cannot be presumed that Seth Heeralal-Madholal or

thereafter the defendant 2-Dayaram became owner of the suit property.

20. In view of the aforesaid discussion there is no cavil of doubt that in view of auction sale, the defendant 1-Seth Champalal became owner of the suit house. As nothing is there on record to assume ownership of Seth Heeralal- Madholal and thereafter of defendant 2-Dayaram, therefore, it is held that neither Seth Heeralal-Madholal acquired ownership rights on the basis of alleged benami purchase nor the defendant 2-Dayaram acquired any right on the basis of sale deed dtd.17.3.1962.

***Substantial question of law no.3:***

21. At the same time it is pertinent to mention here that the defendant 1-Seth Champalal never came in possession of the house and never tried to recover possession from the plaintiff or his father Tularam. But in the present case the plaintiff has not sought any relief against the defendant 1-Seth Champalal, and the present suit was filed only on the basis of cause of action accrued to the plaintiff due to filing of suit for eviction by defendant 2-Dayaram, therefore, the plaintiff is not entitled for any relief, including the relief of acquisition of title by adverse possession against the defendant 1-Seth Champalal. Similarly the defendants 2-4 having not acquired any right in the suit property on the basis of benami purchase or on the basis of sale deed dt. 17.3.1962, there is no question of acquiring title by plaintiff against the defendants 2-4 on the basis of adverse possession.

***Substantial question of law no.5:***

22. In view of the aforesaid discussion it is clear that the defendant 1- Seth Champalal acquired ownership on the basis of auction sale and the defendants 2-4 have not acquired any right in the suit house, therefore, they have no right to dispossess the plaintiffs from the suit house either forcibly or by way of filing any suit. In the case of ***K.Kallappa Setty Vs. M.V. Lakshminarayana AIR 1972 SC 2299*** their Lordships held that “the plaintiff can on the strength of his possession resist interference from persons who have no better title than himself to the suit property. Once it is accepted, as the trial court and the first appellate court have done, that the plaintiff was in possession of the property ever since 1947 then his possession has to be protected as against interference by someone who is not proved to have a better title than himself to the suit property.” As such in the light of law laid down by Supreme Court in the case of ***K.Kallappa Setty (supra)*** the plaintiff is entitled to decree of permanent against the defendants 2-4/respondents.

***Substantial question of law no.2:***

23. In view of the discussion made with regard to the aforesaid four substantial questions of law, it is clear that the findings recorded by learned first appellate are perverse and not sustainable in the eyes of law. Further in the light of answer to the substantial question of law no. 1,3,4 & 5, this court does not deem fit to consider each and every aspect of the

case, because the original owner i.e. the defendant 1-Seth Champalal or his successors have not taken any action against the plaintiffs so far.

**24.** In view of the aforesaid, this Court is of the opinion that the defence of benami taken by the defendants was not available to them because of S.66 of the Civil P.C., resultantly the defendant 2-Dayaram does not get any right in the suit house and he (now the respondents) having no right in the suit house is/are hereby restrained from taking possession of the suit house from the appellants/plaintiffs forcibly or by way of eviction suits.

**25.** In this view of the matter, the impugned judgment and decree cannot be allowed to stand and this second appeal succeeds and is **allowed**. The impugned judgment and decree of first appellate Court are set aside and that of learned trial Court are restored and the suit filed by the appellants-plaintiffs stands decreed with the aforesaid modification.

**26.** Parties, however, shall bear their own costs.

**(DWARKA DHISH BANSAL)**  
**JUDGE**