THE CONTROLLER OF ESTATE DUTY, LUCKNOW

v.

ALOKE MITRA

October 10, 1980

[A. P. SEN AND E. S. VENKATARAMIAH, JJ.]

The Estate Duty Act, 1953-*S.* 5 *sub-s.* (1) *and s.* 6—*Inter relation of—Whether property held by a benamidar passes upon the death of the real owner and should be brought to charge under sub-s.* (1) *of s.* 6 *of the Act or is deemed to pass under s.* 6.

Words & Phrases—Benami—Benamidar—Meaning of.

One M carried on the business of printer and publisher. In 1953 his brother-in-law alongwith some other persons floated two companies a publishing firm and a printing press. Under an agreement dated May 29, 1953 M agreed to transfer his business to the newly floated companies, and on January 24, 1954 he wrote letters intimating that the shares in the companies be allotted to his wife, his 3 sons, his brother-in-law and an ex-employee. The companies allotted the shares accordingly. 502 shares were allotted to M in his own name in the publishing firm and 225 shares in the printing press. Of the remaining, 2002 shares in the publishing firm and 1602 shares in the printing press were allotted to M and his nominees. M died on February 11, 1957. On his death the respondent, the accountable person filed a return of estate duty in which he included the value of the 502 shares in the publishing firm and 225 shares in the printing press.

The Assistant Controller of Estate Duty did not accept this part of the return and included the 2002 shares in the publishing firm and 1602 shares in the printing press standing in the name of the wife of the deceased, his 3 sons, brother-in-law and the ex-employee, since they were holding these shares *benami,* and included the value of these shares in the principal value of the estate of the deceased.

In appeal, the Central Board of Direct Taxes, the Appellate Tribunal affirmed this order. It observed that the mere fact that the subject-matter was the shares in the two companies would not throw any more onus of proof on the Assistant Controller than would be thrown if the subject-matter was some other property. When money was paid by the deceased, it was for the accountable person to prove the gift. The deceased had clearly mentioned in his letters dated January 24, 1954 to the two companies that the shares should be issued and allotted in the names of the persons nominated by him. If the deceased intended to make an outright gift of the shares, he would have very

well said so in the letters. There being no presumption of advancement, the mere fact that the shares were got issued in their names without making any indication of gift, would not make the nominees recipients of any gift.

The High Court answered the reference against the appellant and in favour of the accountable person. Following the decisions of the Andhra Pradesh High Court in *Shantabai Jadhav* v. *Controller of Estate Duty* (1957) 31 ITR 28 and *Smt. Denabai Bomab Shah* v. *Controller of Estate Duty* (1964) 51 ITR (ED) 1 it observed that since the shares stood in the name of the wife and sons etc., *benami* for the deceased, the deceased had no power to transfer since he had not obtained a release from the *benamidars* or a declaration from an appropriate court. As the deceased, remained incompetent to transfer the shares till his death, the property in them would not be deemed to pass upon his death by reason of section 6 and therefore, they would not be included in the estate of the deceased under section 5(1) of the Act.

Allowing the appeal, to this Court

HELD: 1. The liability to pay estate duty under section 5(1) of the Act arises upon the death of the real owner and not of the *benamidar,* who is merely an ostensible owner. The test lies in whether upon the death of the *benamidar,* there would be incidence of liability to estate duty. [961B]

2. The finding being that the shares were purchased by the deceased *benami* in the name of his wife and sons, the real ownership of the property was vested in the deceased who was entitled to deal with the same as if it were his own and the *benamidars* held it in trust under section 82 of the Trust Act, 1882 for the benefit of the deceased. The estate, therefore, belonged to the deceased who died possessed of the same and under section 5(1) of the Act the entire value of the shares was includible in the principal value of the estate of the deceased on his death. [961C-E]

3. (i) The Estate Duty Act, 1953 imposes a tax upon the principal value of all properties, settled or not settled passing on death or deemed to pass on death. Estate duty is chargeable at percentage rates rising with the value of the estate on all property passing on death, including property of which the deceased was competent to dispose and gifts made within limited period before death. Primary liability falls on the deceased's estate. [950H; 951A]

(ii) The scheme of the Act is two fold. Firstly there are properties which pass on the death of a person. Section 5(1) imposes duty on their value. Secondly, there are properties in which the deceased had an interest or power of appointment and which really do not pass on his death. The scheme of the Act is to impose duty on the value of such properties also. In the second class will fall provisions like sections 6, 7, 8, 9 and 10. The Act creates a fiction of law to declare that the properties mentioned in those sections will be deemed to pass on the death of a person, though they do not 'pass' in fact. [957D-E]

(iii) The object of section 6 is to catch properties in the net of section 5(1) which do not really pass on the death of a person. For instance, property comprised in a revocable gifts is property which the donor is competent to dispose of whether the gift is revoked or not and will be covered by section 6. Similarly, property in respect of which the deceased had the power of appointment will also fall within section 6. [957H; 958A]

O. S. Chawla v. *Controller of Estate Duty* (1973) 90 ITR approved.

4. In applying the Act to any particular transaction, regard must be had to its substance, that is, its true legal effect, rather to the form in which it is carried out. [958B]

5. By no rule of construction can the operation of sub-section (1) of section 5 of the Act be curtailed by the operation of section 6. It is in addition to or supplemental of the provisions of sub-section (1) of section 5, which is the charging section. [951E]

In the instant case, it has been established that the deceased was the real owner of the shares. The ownership which the deceased had in the shares passed on his death and must be brought to charge under sub-section (1) of section 5. [958C]

Smt. Denabai Bomab Shah v. *Controller of Estate Duty* (1967) 66 ITR 385 and *Smt. Shantabai Jadhav* v. *Controller of Estate Duty* (1964) 51 ITR (ED) 1 disapproved.

6. (i) The provisions of sections 5 and 6 of the Act are somewhat similar to those of sections 1 and 2 of the Finance Act, 1894 in England. [955F]

(ii) The precise relationship between sections 1 and 2, before the law was amended in 1969, was a question on which judicial opinion fluctuated widely. For over sixty years they were regarded as mutually exclusive and having independent fields of operation, the view was that property could not be liable to duty concurrently. In a situation where both sections 1 and 2 might apply, section 1 took priority and excluded liability. [952D-E]

Earl Cowley v. *Inland Revenue Commissioners,* L. R. [1899] A. C. 198, *Attorney General* v. *Milne,* L.R. [1914] A.C. 765, *Nevill* v. *Inland Revenue Commissioners,* L.R. [1924] A.C. 385 referred to.

(iii) In *Public Trustee* v. *Inland Revenue Commissioners* (Re Ambody) LR [1960] AC 398 the House of Lords struck the discordant note, holding that section 1 imposed the charge in general terms and section 2 by exclusion and inclusion, defined area of that charge. In *Weir's Settlement Trusts, Re Mc Pherson* v. *Inland Revenue Commissioners* LR [1971] Ch.D. 145 the Court of Appeal resolved the doubts as to the relationship of these two sections. [954C; G, 955A]

7. When a property is purchased by a husband in the name of his wife or by a father in the name of his son, it must be presumed that they are *benamidars,* and if they claim it as their own by by alleging that the husband or the father intended to make a gift of the property to them, the onus rests upon them to establish such a gift. When the *benamidar* is in possession of the property, standing in his name, he is in a sense the trustee for the real owner; he is only a name-lender or an alias for the real owner. [1958F; 959A]

Gopeekrist Gosain v. *Gungapersaud Gosain* (1854) 6 MIA 53, *Sura Lakshmiah Chetty* v. *Kothandarama Pillai* L.R. [1924-25] 52 IA 286, *Shree Meenakshi Mills Ltd.* v. *C.I.T.* (1957) 31 ITR 28 referred to.

A 8. A *benamidar* has no interest at all in the property standing in his name. A *benamidar* is an ostensible owner and if a person purchases from a *benamidar*, the real owner cannot recover unless he shows that the purchaser had actual or constructive notice of the real title. But from this it does not follow that the *benamidar* has real title to the property, he is merely an ostensible owner thereof. [960E]

B Mayne Hindu Law 11th Edn. p. 953 referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1712 of 1973.

From the Judgment and Order dated 20-5-1971 of the Allahabad High Court in Estate Duty Reference No. 95/66 connected with
C Estate Duty Reference No. 78/69.

S. C. Manchanda, K. C. Dua and *Miss A. Subhashini* for the Appellant.

P. K. Mukherjee and *Pramod Swarup* for the Respondent.

D The Judgement of the Court was delivered by

SEN J.—This appeal on certificate under s. 65(1) of the Estate Duty Act, 1953 (hereinafter referred to as 'the Act') arises from a judgment of the Allahabad High Court delivered on a case stated under s. 64 of the Act by which the High Court answered two of
E the questions against the accountable person and in favour of the Controller of Estate Duty but the third in the negative, against the Controller of Estate Duty and in favour of the accountable person. We are not concerned with the first two questions, but only the third, which reads :

> F "Assuming that the shares in dispute really belonged to Sri K. M. Mitra deceased, whether those shares in the circumstances of the case constituted property which passed on the death of Sri K. M. Mitra for the purposes of section 5 of the Estate Duty Act."

The facts giving rise to the reference are these : The late Sri K.
G M. Mitra died on February 11, 1957 leaving a large and extensive estate. On his death his son Aloke Mitra, the accountable person, filed a return of estate duty valuing the estate of deceased at Rs. 3,75,235. This included 502 shares of Rs. 100/- each in Mitra Prakashan Pvt. Ltd. and 225 shares of Rs. 100/- in Māya Press Pvt. Ltd. held by the deceased. The Assistant Controller of Estate
H Duty did not accept this part of the return and included 2002 shares in Mitra Prakashan Pvt. Ltd. and 1602 shares in Maya Press Pvt. Ltd. standing in the name of Smt. N. Mitra, wife of the deceased,

and his three sons, Aloke Mitra, Ashoke Mitra and Deepak Mitra, brother-in-law B. N. Ghosh and an ex-employee, R. N. Misra since they were holding these shares benami. He accordingly included the value of these shares in the principal value of the estate of the deceased. His order was affirmed in appeal by the Central Board of Direct Taxes, that is, the Appellate Tribunal. Under s. 64(1) of the Act the Appellate Tribunal referred the question whether the shares allotted to the wife of the deceased as his nominee or as benamidar, were, as from the commencement of the Hindu Succession Act, 1956 held by her as a full owner thereof by virtue of provisions of s. 14 of that Act.

According to the High Court, the said question did not at all arise. On the finding that the transaction was benami and that the deceased was the real owner of the shares, the wife must be held to have no interest or title to the shares. She was merely a benamidar or name-lender. Since she had no interest at all, the provisions of s. 14 of the Hindu Succession Act were not attracted as she was not possessed of any right or title.

The material facts of the case may now be stated. The deceased carried on the business of printer and publisher under the name and style of Maya Press. In 1953, his brother-in-law, B. N. Ghosh alongwith some other persons floated two companies, Mitra Prakashan Pvt. Ltd. and Maya Press Pvt. Ltd. Under an agreement dated May 29, 1953 the deceased agreed to transfer his publishing business to Mitra Prakashan Pvt. Ltd. for a consideration of Rs. 2,07,500 and the printing business to Maya Press Pvt. Ltd. for Rs. 1,64,800. It was agreed that the consideration would be paid by Mitra Prakashan Pvt. Ltd. in the form of cash to the extent of Rs. 7,500/- and the balance by allotting 2000 fully paid up shares of the value of Rs. 100/- each to the deceased or his nominees. The other company, namely Maya Press Pvt. Ltd. agreed to pay Rs. 4,800/- in cash and the balance of Rs. 1,60,000 in the form of 1600 fully paid up shares of the value of Rs. 100/- each to be allotted in the name of the deceased or his nominees. In pursuance of this agreement, the business of Maya Press was transferred by the deceased on July 1, 1953 to the two companies. On January 24, 1954 the deceased wrote to the two companies letters intimating that the shares be allotted to his wife Smt. N. Mitra, three sons Aloke Mitra, Ashoke Mitra, Deepak Mitra, brother-in-law B. N. Ghosh and an ex-employee, R. N. Misra. The companies allotted the shares accordingly. They in addition allotted two more shares to the deceased. Thus, 502 shares were held by the deceased in his own name in Mitra Prakashan Pvt. Ltd. and 225 shares in Maya Press

A Pvt. Ltd. The rest were held by his wife, sons, brother-in-law and an ex-employee. It has been found that the total number of shares issued by the two companies was 2006 by the Mitra Prakashan Pvt. Ltd. and 1605 by Maya Press Pvt. Ltd. Out of these 2002 and 1602 shares respectively were held by the deceased and his nominees. The deceased by transferring his personal printing and publishing business to the two new companies had thus become through himself or his nominees practically the exclusive owner of these two companies. It is an admitted fact that the deceased supplied the entire consideration for the purchase of these 2002 and 1602 shares and that his wife, sons, brother-in-law or the ex-employee did not make any contribution for their acquisition.

On these facts, both the Assistant Controller of Estate Duty as well as the Appellate Tribunal held that the share scrips standing in the name of the wife of the deceased and his sons, brother-in-law and the ex-employee really belonged to the deceased as they were mere *benamidars* and, therefore, included the value of the shares held by the deceased in the name of his wife and sons etc. in the principal value of the estate passing on his death. The true legal effect of the finding of the Appellate Tribunal is this : Smt. N. Mitra, wife of the deceased, his three sons, brother-in-law and the ex-employee held the shares *benami* for the benefit of the deceased. They were, therefore, the *benamidars* of the deceased.

While upholding the order of the Assistant Controller, the Central Board of Direct Taxes observed that the mere fact that the subject-matter was the shares in the two companies would not throw any more onus of proof on the Assistant Controller than would be thrown if the subject-matter was some other property. When money was paid by the deceased, it was for the accountable person to prove the gift. The deceased had clearly mentioned in the letters dated January 24, 1954 to the two companies that the shares should be issued and allotted in the names of the persons nominated by him. If the deceased intended to make an outright gift of these shares, he would have very well said so in the letters. There being no presumption of advancement, the mere fact that the shares were got issued in their names without making any indication of gift, would not make the nominees recipients of any gift. Using of names of *benamidars* for holding of shares in companies was as common as for any other type of property. As regards the enjoyment of the income of these shares, it observed that there was no clear evidence to show that the money was actually used by the nominees. It appeared that the dividends were only credited by book entry to the

personal accounts of the deceased, Aloke Mitra and the deceased's wife the account of the deceased's wife was also credited with dividends in the names of others than Aloke Mitra. There was nothing to show that before the death of the deceased these amounts were actually withdrawn and utilised by the persons to whom they were supposed to belong. Whatever was done after the death of the deceased may, by agreement between the heirs, have been adjusted in the allocation of other assets, and obviously could not be of any legal effect in determining the question whether the shares belonged to the deceased.

As already stated, the only question of law in the opinion of the Appellate Tribunal which could be referred under s. 64(1) of the Act, was whether the shares allotted to the wife of the deceased as his nominee or as *benamidar* were, as from the commencement of the Hindu Succession Act, 1956 held by her as full owner thereof by virtue of the provisions of s. 14 of that Act. But it declined to make a reference on the other questions, holding that the finding that the shares were held by the deceased in the name of his wife and sons etc. *benami,* was a finding of fact and it did not give rise to any question of law. The accountable person being dissatisfied moved the High Court under s. 64(3) and it directed the Tribunal to draw up a supplementary statement of the case and refer two other questions of law said to arise from its order. When the reference came up before the High Court, it declined to answer questions other than those which were questions of law. It refused to be drawn into the question of *benami,* which was purely one of fact, and not one of mixed law and fact and, therefore, following the decision of this Court in *Shree Meenakshi Mills Ltd.* v. *C.I.T.*(1) held that the finding was not open to review under s. 64(1) of the Act.

In answering the reference in the negative and against the Controller of Estate Duty, and in favour of the accountable person, the High Court merely observed 'As at present advised' and preferred to follow the two decisions of the Andhra Pradesh High Court in *Smt. Shantabai Jadhav* v. *Controller of Estate Duty*(2) and *Smt. Denabai Bomab Shah* v. *Controller of Estate Duty*(3) taking a view to the contrary. There is no discussion in the judgment at all and it seems that its attention was not drawn to s. 5(1) of the Act. Following the view in *Smt. Shantabai Jadhav's case* and *Smt. Denabai Bomab Shah's case,* the High Court observed that since the shares

(1) [1957] 31 ITR 28.

(2) [1964] 51 ITR (ED) 1.

(3) [1967] 66 ITR 385.

A stood in the name of the wife and sons etc. *benami* for the deceased, the deceased had no power to transfer since he had not obtained a release from the *benamidars* or a declaration from an appropriate court. On this wrongful assumption, the High Court held that the deceased remained incompetent to transfer the shares till his death, and so, the property in them would not be deemed to pass upon his B death by reason of s. 6 and, therefore, they were not includible in the estate of the deceased under s. 5(1) of the Act.

In *Controller of Estate Duty, U.P.* v. *T. N. Kochhar*(1) the High Court following the judgment under appeal, observed :

C "It is well-settled that the property which stands *benami* in the name of another is one in respect of which the beneficial owner has no competency to dispose of. Before he can dispose of such a property he has to acquire a declaration from the appropriate court of law releasing the property in his favour."

D The High Court seems to assume that there is some inter-relation between ss. 5 and 6. It has held that though the shares in question really belonged to the deceased, they would not, on the facts and in the circumstances of the case, constitute property which 'passed' on the death of the deceased for the purpose of s. 5(1) of the Act since the shares stood in the name of wife and sons etc. E *benami* for the deceased, but he had only beneficial interest therein inasmuch as the deceased was at the time of his death not competent to dispose of the shares and they could not be 'deemed to pass' under s. 6 of the Act.

The main question involved in the appeal is whether in the case F of a *benami* transaction, the value of the property held by a *benamidar* passes upon the death of the real owner and is includible in the estate of the deceased under s. 5 of the Act, or being so held by the *benamidar,* it cannot be deemed to pass on his death because of s. 6 of the Act and, therefore, the value of such property cannot be included in the principal value of the estate of the deceased. That G depends upon the precise effect of s. 5(1) and s. 6 and their relationship to one another namely, whether the chargeability of estate duty under s. 5(1) of the Act, is limited and controlled by s. 6.

The Estate Duty Act, 1953 imposes a tax upon the principal value of all properties, settled or not settled, passing on death or H deemed to pass on death. Estate duty is chargeable at percentage rates rising with the value of the estate on all property passing on

(1) [1973] 89 ITR 216.

death, including property of which the deceased was competent to dispose and gifts made within limited period before death. Primary liability falls on the deceased's estate. A

The charging section is sub-s. (1) of s. 5 which provides that in case of a person dying after the commencement of the Act, estate duty is leviable on the capital value of all property, settled or not settled which 'passes' on death at the rates fixed in accordance with s. 35. That is followed by a group of sections, ss. 6 to 15, which relate to the levy of estate duty on properties which by the Act are 'deemed to pass' on death. For the avoidance of doubt, it is provided by sub-s. (3) of s. 3 that references in the Act to property passing on death of a person shall be construed as including references to property deemed to pass on the death of such person. The expression 'property passing on death' is defined in s. 2(16) to include property passing immediately on death. In general, the word 'passes' may be taken as meaning 'changing hands on death' regardless of its destination. B C

Section 6 of the Act, upon which the controversy turns, provides: D

> "6. Property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death."

By no rule of construction can the operation of sub-s. (1) of s. 5 of the Act be curtailed by the operation of s. 6. It is in addition to or supplemental of, the provisions of sub-s. (1) of s. 5, which is the charging section. E

As a matter of construction, two views are possible. One view is that the two sections are mutually exclusive and they have independent fields of operation. Whenever property changes hands on death, the State is entitled to step in and take a toll of the property as it passed without regard to its destination or to the degree of relationship, if any, that may have subsisted between the deceased and the person or persons succeeding. Section 5(1) gives effect to that principle and it imposes a duty called estate duty upon the principal value of all property, settled or not settled, which passes on death. Section 6 does not apply to property of which the deceased was competent to dispose of and which passes on his death; it applies only to property which does not pass on his death but of which he was competent to dispose. Sections 5(1) and 6 being mutually exclusive, the application of s. 5 accordingly precludes recourse to s. 6. The other and the better view appears to be that s. 5(1) alone F G H

A is capable of imposing a charge of duty and where both s. 5(1) and s. 6 apply, the property would still be dutiable under both concurrently. Section 6 is merely subsidiary and supplementary and it declares that the expression 'property passing on the death of the deceased' shall be 'deemed to include property which the deceased was competent to dispose of'. When s. 6 has brought property B within the charge of duty 'either alone' as in the case of competency to dispose of under s. 6, which could not be supposed to 'pass on death' or concurrently with s. 5, its function is at an end.

In England, the Finance Act, 1894 (57 & 58 Vict. c. 30) imposed by s. 1 estate duty 'upon the principal value ascertained as C hereafter provided of all property, real or personal, settled or not settled which passed on the death' of a person dying after the commencement of the Act. By s. 2, sub-s. (1) 'property passing on the death of the deceased' shall be deemed to include categories of properties specified therein. The precise relationship between ss. 1 and 2, before the law was amended in 1969, was a question on which D judicial opinion fluctuated widely. For over 60 years, they were regarded as mutually exclusive and having independent fields of operation; the view was that property could not be liable to duty concurrently. In a situation where both ss. 1 and 2 might apply, section 1 took priority and excluded s. 2 liability. It was laid down by the House of Lords, in a series of cases, that section 2(1) was not E a definition section, explanatory of s. 1, but an independent section operating outside the field of s. 1 : *Earl Cowley* v. *Inland Revenue Commissioners*(1), *Attorney-General* v. *Milne*(2), *Nevill* v. *Inland Revenue Commissioners*(3). In *Earl Cowley's case* the House of Lords reversing the decision of the Court of Appeal, held that if the case fell within s. 1, it went out of the purview of s. 2. Lord F Macnaghten after observing that s. 1 contained the pith and substance of the enactment, stated :

> "It is comprehensive, broad and clear. . . The first question as it seems to me the question that lies at the very threshold of our inquiry is simply this : Under which section of the Finance G Act 1894 does the present case fall ? Is it the ordinary and normal case of property passing on death, or is it one of those exceptional cases in which property is deemed to pass, though there is no passing of property in fact? Does it come under s. 1 or under s. 2 ?"

H (1) L.R. [1899] A.C. 198, *per* Lord Macnaghten at pp. 212-213.

(2) L.R. [1914] A.C. 765, *per* Lord Haldane L.C. at p. 769.

(3) L.R. [1924] A.C. 385, *per* Lord Haldane at p. 389.

After differing from the Court of Appeal, he went on to say: A

> "What the Act has in view for the purpose of taxation is property passing on death, ... *Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive.*
>
> *In my opinion the two sections are quite distinct, and s. 2 throws no light on s. 1. ....But s. 2 does not apply to an interest in property which passes on the death of the deceased. That is already dealt with in the earlier section* .... That is s. 1. You do not want s. 2 for that. You cannot resort to s. 2. For that would be giving the duty twice over. The Crown cannot have it both ways. Double duty is forbidden by the Act." B C

(Emphasis supplied)

The *ratio decidendi* in Earl Cowley's case was that if a case fell within s. 1 without the aid of s. 2(1), one is not concerned with s. 2(1). D

Lord Macnaghten's exposition of the inter-relation of ss. 1 and 2 in *Earl Cowley's case* contained the essential characteristics of a statement of legal principle; it was expressed in very precise language, and with a confidence that excluded the possibility of any alternative view. E

In *Attorney-General* v. *Milne* (supra) Lord Haldane, after referring to *Earl Cowley's case,* said :

> "Section 2 is thus not a definition section, but an independent section operating outside the field of section 1." F

Lord Atkinson, however, adopted Lord Haldane's earlier view, treating section 2 as merely supplementary to section 1, and as designed to make liable to estate duty certain dispositions of property which were outside the scope and beyond the reach of section 1. "This section", he said, "is not a definition section". He did not, however, say (and that is significant) that the two sections were mutually exclusive. Lord Dunedin took a different view. Having said that whether Lord Macnaghten was strictly correct or not in saying that whether the two sections were mutually exclusive or not seemed to him to matter little, he added: G

> "It seems to me that that is as much as to say that the words, 'property passing on the death', in the first section, are to be read as if the words, 'including the property following, H

A 'that is to say'=(and then all the sub-sections) had been there inserted."

In *Nevill* v. *Inland Revenue Commissioners* (supra) Lord Haldane said :

B " 'Passes' may be taken as meaning 'changes hands'. The principle is contained in section 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in section 1 to certain cases which are not in reality cases of changing hands on death at all.".

C In *Public Trustee* v. *Inland Revenue Commissioners*(1) (*Re. Arnholz*) the House of Lords after a lapse of over 60 years, however, struck a discordant note. The theory of 'mutual exclusiveness' of ss. 1 and 2 enunciated by Lord Macnaghten was not accepted. It was held s.1 imposed the charge in general terms and s.2, by exclusion and inclusion, defined area of that charge.

D No clear exposition was given or required to be given on the facts of the case of what was the precise effect of the two sections or their relationship to one another. There followed a period of uncertainty as to the precise relationship between the two sections, although subsequent to Arnholz's case section 1 alone was held to E be still capable of imposing a charge of duty, and where both sections 1 and 2 applied, the property was held to be dutiable under both concurrently. If the property which passed was identical with the property which would otherwise be deemed to pass, the question under which head it shall be taxed was purely academic. Estate duty is not leviable more than once on the same death in respect of any F property, even if it is chargeable under more than one head.

In *Weir's Settlement Trusts.* Re. *Mc Pherson* v. *Inland Revenue Commissioners*(2), the contention on behalf of the tax-payer was that the decision in *Public Trustee* v. *Inland Revenue Commissioners* (*Re. Arnholz*) established the complete reverse of the view expressed G by Lord Macnaghten in *Earl Cowley's case,* that is, established that section 2 exhaustively laid down the only circumstances in which estate duty was leviable, and that if the circumstance could not be brought within s. 1, as being circumstances set out in s. 2, that was the end of the matter, the phrase in s. 1 'property—which passes on the death' having no content independent of s. 2. H

(1) L.R. [1960] A.C. 398.

(2) L.R. [1971] Ch.D. 145.

Russell L.J., in delivering the judgment of the Court of Appeal, resolved the doubts as to the relationship of ss.1 and 2 of the Act, and rejected the contention of the tax-payer, observing:

> "It was certainly not decided by the majority in *Arnholz's case* that, as a matter of construction, the entire content of 'property....which passes on death' in s. 1 was to be found in s.2."

As regards the relationship of sections 1 and 2, he stated:

> "Our view of the relationship of the two sections is as follows. It is s. 1 that imposes the charge of estate duty on the value of property described as 'property....which passes on the death'. Section 2(1) does not describe a different category of property, being property deemed to pass on a death. Section 2(1) states certain situations in relation to property which involve that property in s. 1 as property which passes on a death. We see no reason to hold that s. 2(1) was intended exhaustively to define and limit the situations in relation to property which thus involve that property. The language is not apt for that purpose; and the fact that the situations envisaged embrace occasions when without guidance from s. 2 (1) the property would be manifestly 'property....which passes on the death' does not mean that they embrace all such occasions."

The question is a difficult one on which there may well be divergence of opinion, as reflected in these English decisions which largely turn on the construction of ss. 1 and 2 of the Finance Act, 1894, the provisions of which are somewhat similar to those of ss. 5 and 6 of the Act. The simultaneous existence of a right to tax under ss. 1 and 2 was inconsistent with the well-known statement of Lord Macnaghten in *Earl Cowley's case* and could not, therefore, be sustained. Nevertheless, the trend of judicial opinion in England rightly changed, as we think that Lord Macnaghten's opinion ought not to be regarded as subject to such refinement.

The Andhra Pradesh High Court in *Smt. Shantabai Jadhav's case* (supra) held that notwithstanding the fact that the property was purchased in the name of the wife, and had been included by

A the deceased as his own property in the wealth tax returns filed by him, it could not be held to be the property of the deceased, for the purpose of its inclusion in the estate of the deceased. It was observed :

> "Even assuming that the money for the purchase was
B found by her husband, it does not mean that he had beneficial interest in the property. Normally, a husband takes a sale in the name of his wife either to make a provision for her or to screen the property from creditors, i.e., to keep it beyond the reach of the creditors. Whatever may be the motive, so long as the deed stands in the name of another person, it could not
C be said that it was competent for the deceased to dispose of the property. Section 6 of the Estate Duty Act enacts that property which the deceased was at the time of his death competent to dispose of shall be deemed to pass on his death. It is thus manifest from the section that Estate duty could be levied in respect of the properties which could be disposed of
D by the deceased at the time of his death."

Repelling the contention that the wife could not have alienated the properties by herself and that any disposition by her would not pass the title to such purchaser, having regard to the fact that it was
E open to the husband to impeach the sale sometime later, on the ground that the beneficial interest always vested in him, consideration having been paid by him, the Court relied upon the provisions of s. 41 of the Transfer of Property Act and further observed :

> "Be that as it may, so long as the documents stand in the
F name of his wife, he could not dispose of the property. It is true that it was open to him to have obtained the declaration that he was the beneficial owner thereof notwithstanding the fact that his wife was the ostensible owner. But, so long as the husband does not have any recourse to these proceedings for obtaining such a relief, he could not have been in a position
G to dispose of the property standing in the name of the third person as his own. This proposition was not contested on behalf of the Central Board of Revenue."

In *Smt. Denaabi Boman Shah's case* (supra) following its earlier decision in *Smt. Shantabai Jadhav's case* while dealing with a similar
H *benami* transaction, the High Court held that the value of property held by a *benamidar* could not be included in the value of the property left by the deceased.

In *Controller of Estate Duty* v. *M. L. Manchanda*(1), the Punjab and Haryana High Court following these decisions had held that property which stood in the name of wife and of which the husband was the real owner, was upon the wife's death chargeable to estate duty under s. 5(1) of the Act, observing: A

> "Irrespective of the fact that the husband was the true owner of the property, there was nothing to prevent the wife a minute before her death to transfer the property. The legal title against the entire world excepting the true owner, vested in her and she had thus the right to dispose of that right, and once that right is conceded, the property shall be deemed to pass on her death and would, therefore, be liable to the levy of estate duty under section 5 of the Act." B C

In delivering the judgment of the Full Bench in *O. S. Chawla* v. *Controller of Estate Duty*(2), Dwivedi J. observes :

> "The scheme of the Act is two-fold. Firstly, there are properties which pass on the death of a person. Section 5(1) imposes duty on their value. Secondly, there are properties in which the deceased had an interest or power of appointment and which really do not pass on his death. The scheme of the Act is to impose duty on the value of such properties also. In the second class will fall provisions like sections 6, 7, 8, 9 and 10. The Act creates a fiction of law to declare that the properties mentioned in those sections will be deemed to pass on the death of a person, though they do not 'pass' in fact." D E
>
> This two-fold scheme is made plain by the definition in section 2(16) and section 3(3). Section 2(16) defines the phrase 'property passing on death'. Section 3(3) declares that references in the Act to 'property passing on the death' of a person shall be construed as including references to 'property deemed to pass on the death' of such person. The statement of objects and reasons of the Bill which ripened into the Act also emphasises the two-fold scheme. It states that the 'object of the Bill is to impose an estate duty on property passing or deemed to pass on the death of a person'. F G
>
> The object of section 6 is to catch properties in the net of section 5(1) which do not really pass on the death of a person. For instance, property comprised in a revocable gift is property which the donor is competent to dispose of whether the gift is H

(1) [1974] 93 ITR 173.

(2) [1973] 90 ITR 68.

A revoked or not and will be covered by section 6. Similarly, property in respect of which the deceased had the power of appointment will also fall within section 6."

We are in agreement with the observations made by the learned Judge on the relative scope of s. 5 and s. 6 of the Act, which bring out the true legislative intent.

In applying the Act to any particular transaction, regard must be had to its substance, that is, its true legal effect, rather to the form in which it is carried out. On the facts found, it has been established beyond doubt that the deceased was the real owner of the shares. The ownership which the deceased had in the shares passed on his death and must be brought to charge under sub-s. (1) of s. 5.

All that has been said above is sufficient to dispose of the appeal. It, however, becomes necessary to deal with the law relating to *benami* transactions as there is some misconception as to the nature of the rights of a *benamidar*. What follows is purely elementary.

The law in this matter is not in doubt and is authoritatively stated by a long line of decisions of the Privy Council starting from the well known case of *Gopeekrist Gosain* v. *Gungapersaud Gosain*(1) to *Sura Lakshmiah Chetty* v. *Kothandarama Pillai*(2) and of this Court in *Shree Meenakshi Mills Ltd.* v. *C.I.T.*(3). As observed by Knight Bruce L.J. in *Gopeekrist Gosain's case,* the doctrine of advancement is not applicable in India, so as to raise the question of a resulting trust. When a property is purchased by a husband in the name of his wife, or by a father in the name of his son, it must be presumed that they are *benamidars,* and if they claim it as their own by alleging that the husband or the father intended to make a gift of the property to them, the onus rests upon them to establish such a gift. In *Sura Lakshmiah Chetty's case,* the law was stated with clarity by Sir John Edge in these words :

"There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife."

(1) [1854] 6 MIA 53.
(2) L.R. [1924-25] 52 IA 286.
(3) [1957] 31 ITR 28.

It is but axiomatic that a *benami* transaction does not vest any title in the benamidar but vests it in the real owner. When the *benamidar* is in possession of the property standing in his name, he is in a sense the trustee for the real owner; he is only a name-lender or an alias for the real owner. In *Petheperumal Chetty* v. *Muniandy Servai*(1), the Judicial Committee quoted with approval the following passage from Mayne's Hindu Law 7th ed., para 446:

> "Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested."

The cardinal distinction between a trustee known to English law and a *benamidar* lies in the fact that a trustee is the legal owner of the property standing in his name and *cestui que* trust is only a beneficial owner, whereas in the case of a benami transaction the real owner has got the legal title though the property is in the name of the *benamidar*. It is well settled that the real owner can deal with the property without reference to the latter. In *Gur Narayan* v. *Sheo Lal Singh*(2), the Judicial Committee referred to the judgment of Sir George Farwell in *Mst. Bilas Kunwar* v. *Dasraj Ranjit Singh*(2), where it was observed that a benami transaction had a curious resemblance to the doctrine of English law that the trust of the legal estate results to the man who pays the purchase-money, and went on to say:

> "..the benamidar has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him."

In *Guran Ditta* v. *Ram Ditta*(4) the Judicial Committee reiterated the principle laid down in *Gopeekrist Gosain's case* and observed that in case of a *benami* transaction, there is a resulting trust in favour of the person providing the purchase money.

A *benamidar* has no interest at all in the property standing in his name. Where the transaction is once made out to be *benami*, the Court must give effect to the real and not to the nominal title subject to certain exceptions. In Mulla's Hindu Law, 14th edn., p. 638, four exceptions to the normal rule are brought out. But these exceptions are not material in this case. One of the exceptions

(1) [1907-08] 35 I.A. 98.
(2) [1918-19] 46 IA 1.
(3) L.R. [1915] 42 IA 202.
(4) L.R. [1927] 55 IA 235.

A enumerated therein is that where a *benamidar* sells, mortagages or otherwise transfers for value property held by him without the knowledge of the real owner, the real owner is not entitled to have the transfer set aside unless the transferee had notice, actual or constructive that the transferor was merely a *benamidar.* The principle is embodied in s. 41 of the Transfer of Property Act. The section B makes an exception to the rule that a person cannot confer a better title than he has. The section is based on the well-known passage from the judgment of the Judicial Committee in *Ramcoomar Koondoo* v. *Macqueen*(1) :

> "It is a principle of natural equity, which must be universally applicable, that where one man allows another to hold C himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title unless he can otherthrow that of the purchaser by showing, D either that he had direct notice, or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an inquiry that, if prosecuted, would have led to a discovery of it."

A *benamidar* is an ostensible owner and if a person purchases from a *benamidar,* the real owner cannot recover unless he shows that the E purchaser had actual or constructive notice of the real title. But from this it does not follow that the *benamidar* has real title to the property, he is merely an ostensible owner thereof.

The law is succinctly stated by Mayne in his Treatise on Hindu Law, 11th edn., at p. 953, in the following terms :

F

> "A benami transaction is one where one buys property in the name of another or gratuitously transfers his property to another, without indicating an intention to benefit the other. The *benamidar,* therefore, has no beneficial interest in the property or business that stands in his name; he represents in fact the real owner and so far as their relative legal position is G concerned, he is a mere trustee for him. In other words, a benami purchase or conveyance leads to a resulting trust in India, just as a purchase or transfer under similar circumstances leads to a resulting trust in England. The general rule and principle of the Indian law as to resulting trusts differs but little if at all, from the general rule of English law upon the same H subject."

(1) [1872] I.A. Sup. 40, 43.

(See also : *Shree Meenakshi Mills Ltd.* v. *C.I.T.* (1957) 31 ITR 28. *per* Venkatarama Ayyar J., and *Thakur Bhim Singh* v. *Thakur Kan Singh* [1980] 3 SCC 72, *per* Venkataramiah J.) A

In the light of these settled principles the liability to pay estate duty under s. 5(1) of the Act arises upon the death of the real owner and not of the *benamidar,* who is merely an ostensible owner. The test lies in whether upon the death of the *benamidar,* there would be incidence of liability to estate duty. If the view of the High Court were to be accepted, the estate left by the deceased would escape the duty altogether. We do not see how s. 6 of the Act comes into play at all in this case. B C

In view of the finding that the shares were purchased by the deceased *benami* in the name of his wife and sons etc., the real ownership of the property was vested in the deceased was entitled to deal with the same as if it were his own and the *benamidars* held it in trust under s. 82 of the Trusts Act, 1882 for the benefit of the deceased. The *benamidars,* subject to the equities flowing from s. 41 of the Transfer of Property Act, could not deal with the shares in any way. Accordingly, the estate belonged to the deceased who died possessed of the same, and under s. 5(1) of the Act the entire value of the shares was includible in the principle value of the estate of the deceased on his death. D E

For these reasons, the judgment of the High Court is set aside and the question is answered in the affirmative and in favour of the Controller of Estate Duty. There shall be no order as to costs.

N.V.K. *Appeal allowed.*