
(1929) 12 CAL CK 0013
In the Calcutta High Court

Amrita Lal Baisya and Others

APPELLANT

Vs

Pratap Chand Chakrabarty and Others

RESPONDENT

Date of Decision : 11-12-1929

Acts Referred:

Evidence Act, 1872 — Section 32, 35
Transfer of Property Act, 1882 — Section 41
Trusts Act, 1882 — Section 88

Citation : AIR 1931 Cal 144

Judgement

1. So much of the pleadings as is necessary to be set out for the purpose of this appeal is given below,

2. Fourteen annas share of village Chand-goan appertaining to estate No. 107 of the Collectorate of Mymensingh belonged to one Bilashi Debya, and on her death devolved on her two sons Parbati Sankar and Kali Sankar in equal shares. In batwara proceedings between the two brothers, a part of the said village was allotted to Kali Sankar as Taluk No. 13164 and the part that was allotted to Parbati Sankar became Taluk No. 13165. The two brothers got possession of their respective sahams on 28th March 1907. So far the parties are not in dispute as to the facts.

3. The plaintiffs' case is that Kali Sankar while in separate possession of Taluk No. 13164 died in Jaistha 1316 B. S. (May 1909) leaving his widow the plain" tiff 1, Jagatrani, and . a minor son and also a daughter; that shortly thereafter the minor son died leaving plaintiff 1 as his heir; that plaintiff 1 lived a long way off from Mymensingh, that is to say, at Fyzabad, and entrusted Parbati Sankar with the management of the taluk and was thus in possession. Shortly before the suit plaintiff 1 learnt that Parbati Sankar had, on the allegation that he had got the property by survivorship on Kali Sankar's death, got his name recorded under the Land Registration Act and also in the Record-of-Rights and transferred the estate to certain persons who for the sake of brevity may be called the Baisyas. On 3rd September 1926 plaintiff 1 gave a miras taluk (permanent) lease to plaintiffs 2 to 6 in the name of plaintiff 2, the last mentioned five plaintiffs being

brothers. On 7th September 1920 the six plaintiffs jointly instituted the present suit against Parbati Sankar as defendant 1 and the Baisyas as defendants 2 to 5. for declaration of the taluki right of plaintiff 1 and miras taluki right of plaintiffs 2 to 6 under plaintiff 1 and for confirmation of possession or in the alternative for recovery of possession and mesne profits.

4. Defendant 1 did not appear in the suit. Defendants 2 to 5 (of whom No. 4 having died his heirs were brought on the record) contested the suit. Their defence was that notwithstanding the partition of the estate into two sahamas as alleged on behalf of the plaintiffs the two brothers remained joint in all other respects and as regards all other properties and they constituted a Mitakshara joint family; that Kali Sankar died in Jaisth 1315 B. S. (May 1908) and without leaving a male issue, so that Parbati Sankar got the property by survivorship and remained in possession till he sold it to the contesting defendants on 4th Sravan 1327 B.S. (20th July 1920). They challenged the title of plaintiff 1, alleged that she had no possession at any time or within 12 years of the suit, impugned the lease of plaintiff 1 in favour of plaintiffs 2 to 6 as champertous and against public policy, contended that they were bona fide purchasers for value entitled to the benefit of Section 41, T. P. Act, and also urged that the plaintiffs 2 to 6 were not entitled to set up the lease as against them because plaintiffs 2, 4 and 5 obtained it by using the knowledge they had derived in their capacity as pleaders for these defendants. There were other defences also which however have no relevancy at the present stage.

5. The Subordinate Judge decreed the suit declaring the plaintiffs' title to the property and ordering that they would be entitled to recover possession with mesne profits as against defendant 1 from three years before suit till the date of his sale to defendants 2 to 5 and as against defendants 2 to 5 from the date of their purchase till the plaintiffs recover possession.

6. Defendants 2, 3 and 5 and the heirs of defendant 4 have then preferred this appeal. Their contentions are several, which will be dealt with now.

7. The first ground urged is that the suit should have been held as barred by limitation as plaintiff 1, and for the matter of that, the other plaintiffs as well, have never been in possession within 12 years before the institution of the suit. Now the evidence such as it is of Jagatrani is the only evidence on the point and it does not satisfy us that she was ever in possession. We believe, as the Subordinate Judge has done, that on her husband's death she wrote to Parbati Sankar to manage the property on her behalf but we are not satisfied that the latter accepted the position and indeed it is admitted that she never received any usufructs out of the property at any time. The question therefore is as to when her husband Kali Sankar died. On this point as already stated the plaintiffs' case was that Kali Sankar died in Jaistha ,1316 B. S. (May 1909) and the defendants' case was that he died in Jaistha 1315 B. S. (May 1908). The plaint was filed at the residence of the Subordinate Judge after Court hours and with insufficient court-fees at 7-30 p. m. on 7th September 1920 evidently under the impression

that the suit would be barred on the next day. This only shows that the plaintiffs were not sure of their position, and were anxious to file it as early as possible after 4th September 1920, the date of the lease by plaintiff 1 in favour of plaintiffs 2 to 6. It is no wonder that it was so, as the death had taken place long ago, but from this fact no sinister inference need be drawn as against the plaintiffs as to the bona fides of the suit. The position seems to be that, while Jagatrani and her uncle Mahadeo Prosad have given a true-version of the circumstances and of the order in which Kali Sankar and his son died it is impossible to hold that Kali Sankar lived till Jaistha 1316 B. S. About a week before she was examined in the present suit, Jagatrani herself had deposed in a proceeding (vide Ex. 4) that she did not remember that her husband had died some 12 years before. The allegation of death in Jaistha 1316 B.S. may therefore be brushed aside as unfounded.

8. On the other hand the evidence given by the defendants to establish that the death took place in Jaisth 1315 is wholly untrustworthy. The witnesses relied on this point are D. W. 5 Hara Lal Misra, D. W. 7 Ram Sanker and D. W. 12 Peari Mohan. These witnesses are discredited on amongst others, the ground that they seek to establish that Kali Sankar's son predeceased his father, a story which is in conflict with that given by Jagatrani and Mohadeb Missir, both of whom strike us as entirely truthful witnesses. The documentary evidence, however such as there is on the record, throws some light on this question. Some arguments on this question were addressed to us on behalf of the respondents on the basis of the verification made by Kali Sankar in the plaints Ex. Z and Z-I which were filed on 14th April 1908 = 1st Baisakh 1315 B. S.; but we do not think that the materials contained therein can safely lead us to any very definite conclusion. "The other relevant documents of importance in this connexion are Ex. 17, Ex. 12 and Ex. 13. Ex. 17 is the return of service of a notice under Act 10 of 1880 served on 3rd July 1908. The peon in submitting his return of service of this notice made a statement on solemn affirmation that he saw Kali Sankar, and on Kali Sankar's refusal to accept, service was effected by posting the notice upon "the wall of the house. A question has "been raised as regards the admissibility of the statements contained in this return.

9. It may be conceded that the requirements of Section 32, Evidence Act, have not been established, but there is some authority for the view that the statements are admissible u/s 35, Evidence Act, notwithstanding that the peon was not examined as a witness: Abdul Khadir v. Ajiyar Ahammad [1911] 35 Mad. 670. Whether this view is correct does not very much matter, because even if the statements are admissible they will only show that Kali Sankar was alive after 22nd June 1908, the date on which the notice was made over to the peon for service, a date beyond 12 years prior to the institution of the suit, and will only disprove what was sought to be proved by oral evidence on behalf of the evidence, namely that he died on Jaistha 1315, a fact which, as already stated, has not been established to our satisfaction. It will not help the plaintiff in any other way. As regards Ex. 12, the cess return which is said to contain the

signature of Kali Sankar made on 22nd Bhadra 1315, the return having been filed on 30th Bhadra 1315 (=15th September 1908) the difficulty in the plaintiff's way is that the signature that there was on the original document was attempted to be proved through the witness Mohadeb Prosad, but that attempt failed and thereafter the original was removed from the Court leaving a certified copy, and though in that copy the signature has been reproduced as that of Kali Sankar, it has not been proved that it was really his signature. Along with the cess return however was filed- a mukhtear-nama, Ex. 13, purporting to have been executed by Kali Sankar on 22nd Bhadra 1315 B. S., and accepted by the mukhtear on 15th September 1908, the day the return was filed. The signature of Kali Sankar on this document has been proved by the witness Mohadeb Prosad. Moreover it is exceedingly unlikely that if Kali Sankar was not alive and his signature was forged on the document, the mukhtear whose duty it is to satisfy himself that his client for whom he is acting is alive, would accept the mukhtearnama, and on the strength of it file the return with the petition Ex. 16 and act in connexion with it. This mukhtearnama purports to have been executed jointly by Kali Sankar and Parbati Sankar, and no attempt has been made by the defendants to explain it in the evidence they adduced. We must therefore accept it as a genuine document, representing a true state of facts and on it we must hold that Kali Sankar was alive on the day it was executed. This date was just 12 years before the suit. Some light on this matter is also thrown by Ex. 9 (a), Parbati Sankar's petition for registration of his name in respect of Estate No. 13164, filed on 28th June 1909 in which he alleged that Kali Sankar having died he came into possession from 1st Aswin 1315. This document suggests that Kali Sankar was alive till the end of Bhadra 1315 B. S.; and in any event, if it is suggested that after Kali Sankar's death and before 1st Aswin 1315 somebody else than Parbati Sankar was in possession, or Parbati Sankar's possession was deferred for some reason or other it was the clear duty of the defendants to offer some explanation on the point, which they have never attempted to do. It may be mentioned here that among the kabuliyats and rent receipts or other documents that are in the record there is no document showing Parbati Sankar's possession of Taluk 13161 before 1st Aswin 1315. In the circumstances we must hold that Kali Sankar died within 12 years before the date of the suit and that the suit was therefore not barred by limitation.

10. The second ground taken on behalf of the appellant is that the two brothers had a sister named Kamal Kamini and therefore Kali Sankar's title to a 7 annas share was not made out. On behalf of the respondents, on the other hand, it is said that the 14 annas share of the village, i.e. Estate No. 107 descended to the two brothers through female's and so it is not to be regarded as coparcenary property under the Mitakshara law. These contentions are foreign to the pleadings and cannot be entertained.

11. Nextly, it has been contended on behalf of the appellants that there was no partition between the two brothers and consequently Kali Sankar's share passed by survivorship to Parbati and that therefore Jagatrani had no right to it. As

stated by their Lordships of the Judicial Committee in the case of *Appovier v. Rama Subba Aiyar* [1866] 11 M.I.A. 75 the true test is the intention of the members of the family to become separate owners. By a series of decisions of the Judicial Committee, to which no specific reference is necessary, it has been settled that when the members of an undivided [family agree among themselves with [regard to a particular property that it shall thenceforth be the subject of ownership in certain defined shares then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with. It is also well settled that once (there is evidence sufficient to satisfy the Court that the parties intended to sever, the joint family status is put an "end to, and with regard to any portion of the property which remained undivided the presumption would be that the members of the family would hold it as tenants in common unless and (until a special agreement to hold as [joint tenants is proved. The real question therefore is the question of intention. The evidence of the witnesses, i.e. some tenants, a salaried Pujari or Parbati Sankar, a servant in the employ of the Local Bar Library, etc., who have been examined on behalf of the defence to prove that the brothers remained joint in mess is not of a trustworthy character, and agreeing with the Subordinate Judge we hold that separation in mess between the two brothers has been amply proved in the case.

12. It is true that Mohadeb had. no personal knowledge of this matter but Jagatrani's evidence on the point cannot be lightly discarded. She also gave the same account of separation in her previous deposition in the other case to which reference has already been made and it is amply supported by the probabilities which may be inferred from the conduct of Parbati Sankar towards her after Kali Sankar's death. Separation in mess goes a long way to establish the intention to sever. We find that Bilashi Debya, the mother, having died in 1305 B. S., the two brothers applied in 1899 for mutation of their names in respect of their properties left by her, alleging that they had equal shares (Ex. 10 and Ex. 11); and when added to it we find that each of the brothers was applying to the Collector [Exs. 48 (a) and 48] for partition of his 7 annas out of the 14 annas share in Estate No. 107 by metes and bounds, there remains very little to doubt that the brothers intended to sever.. It has been said that the partition proceedings in respect of Estate No. 107 commenced at the instance of the superior maliks, That in our opinion makes no difference. Since then the brothers appear to have dealt separately with the shares allotted to them by mortgaging their 7 annas shares [Ex. 1 and Ex. 1 (a)] in 1905 and stating therein that they were "owner in possession " each

of a 7 annas share which is a half of 14 annas share of the Chandgaon property after causing mutation of name.

13. That the two brothers got separate shares of which they were respectively put in possession is clear from Ex. 14 and other documents. It has been said that the partition that was effected was only a partial partition in so far as their properties are concerned; but this argument has no weight in view of the fact

that what was left joint was some: debuttar property which could not very well be divided and some very inconsiderable properties in Fyzabad of which the brothers may not have thought much. This jointness does not, in our opinion, militate against the theory of the brothers having put an end to their joint status as members of a Mitakshara. joint family. The appellant's contention on this head, in our opinion, fails.

14. The appellants then contend that they are bona fide purchasers entitled to the benefit of Section 41, T. P. Act. All that has been established upon the facts so far as this point is concerned is that Jagatrani never possessed or took any interest in the property and that on the other hand Parbati Sankar was in possession of it, having got his names registered as malik of the taluk in the Collectorate in 1909 (Ex. 9-A) and also in the Settlement records in 1916 (Ex. 23), dealing with it as his own, paying the Government revenue and other dues and taking steps to recover " it when it was lost. These facts however are not enough to establish that there was either express or implied consent on the part of Jagatrani, that Parbati Sankar was the owner. On the other hand, so far as Jagatrani is concerned, she wrote to Parbati Sankar to manage the property for her though the latter would not and did not accept that position. There was no question of her having held out Parbati Sankar as the owner to the world or to anybody. Jagatrani was living at a place far away during all these years and there is nothing to indicate that she was aware of what Parbati Sankar was doing. Her silence or quiescence was not under circumstances which would warrant an inference of acquiescence. Moreover a little search on the part of the appellants would have brought to their notice the fact--even if it be assumed in their favour that they were not aware of it - that there was partition between the two brothers under which they obtained separate sahams and of the fact of Jagatrani's title to the estate in suit. Casual enquiries made of irresponsible persons, such as the tenants or neighbours of Parbati Sankar, who have deposed in the suit as to such enquiries, are not what the law contemplates. It is admitted that no enquiry was made of Jagatrani or of anybody conversant with her or her affairs. The circumstances under which the defendants made the purchase are deposed to by D. W. 1 Nilkamal Baisya defendant 3, himself, in these words:

I purchased the property under the bona fide belief that Parbati had title to it. I believed that he had title because he got his name registered under Land Registration Act, his name was entered in the Record-of-Rights; he took kabuliyats from the tenants and realized rents from them, he caused an execution sale of this property to be set aside; he alone possessed the entire house; he built two new houses: he mortgaged the property and certain sale proceeds which stood in the name of Parbati and Jagatrani was got (sic) by Bepin Rai creditor of Parbati by a declaratory suit; and also because Parbati and Kali Sankar were joint in mess and property, Parbati being the karta. Both of them possessed both the Taluk Nos. 13164 and 13165 jointly. They were the owners of Beni Madhab Pandey Brahmottors. We purchased it in auction in 1905. Beni Madhab Pandey was their father. I believed that Jagatrani had no interest as the

entire surplus sale proceeds referred to above were taken by Parbati's creditors

15. This in our opinion does not go anywhere near the reasonable care which the law protects. We are accordingly of opinion that this contention should be overruled.

16. The last contention is of a twofold character. In the first place it is said that the suit is not the suit of plaintiff 1, but that it is only plaintiffs 2 to 6 who, having obtained a champertous lease and made a speculative bargain, instituted this suit and that therefore the suit should be dismissed. In the next place it is urged that as some of the plaintiffs, namely, those amongst them that are pleaders used the information that they had derived in their professional capacity from defendants 2 to 5 in securing the lease to the prejudice of the said defendants, they are debarred from setting it up against the latter. Now as regards the first of these contentions, although plaintiff 1, in answer to questions put to her, expressed her inability to give any particulars as regards the property, and has said that she does not remember whether she has seen the plaint of this suit or whether she has seen any paper in connexion with it or whether she has authorized anybody to file it; yet far from repudiating the plaint she has distinctly said that she has filed the suit. She has stuck to the suit and has supported it by her evidence and therefore must be given such reliefs as she has succeeded in showing that she is entitled to.

17. The lease shows that plaintiffs 2 to 6 undertook to conduct litigation at their own costs for recovering the property for plaintiff 1, but in this country the ground on which such a transaction should be held to be invalid is that it is opposed to public policy. The general rule, founded on broad principles of equity, to be observed in such transactions, is to enquire whether the transaction is merely the acquisition of an interest in the subject of litigation bona fide entered into, or whether it is an unfair or illegitimate transaction got up for the purpose of mere spoil or of litigation disturbing the peace of families and carried on from a corrupt or improper motive: *Chedambara v. Renja* [1874] 13 Beng. L.R. 509 *Ram Coomar v. Chunder Canto* [1876] 2 Cal. 233. We are unable to read into the transaction of this lease anything opposed to public policy and must hold that the first of these contentions fails. As regards the second contention it appears that plaintiffs 2, 4 and 5 are pleaders. Of these plaintiff 2 was not a pleader for the defendants in recent times and his connexion with the defendants as pleader ceased long ago and there is nothing to show that he gave any advice to the defendants or was consulted by them with reference to this property. Plaintiff 5 does not appear to have been ever a legal adviser of the defendants.

18. As regards plaintiff 4 the Subordinate Judge has gone very fully into the allegations made against him and has come to his conclusions made on them with which we are generally in agreement. The appellants' allegation that plaintiff 4 encouraged defendants 2 to 5 to purchase "the properties from defendant 1 so that the plaintiff may have a weak party to fight against has not been proved and is hardly credible. We are unable to hold that plaintiff 4

encouraged defendant 3 to make the purchase or that he negotiated the transaction for the latter or settled the price. At the same time we think it has been amply established that plaintiff 4 was consulted as regards the purchase more often than once, that the draft was shown to him and that he never gave his clients to understand that Jagatrani had title, a matter about which he was fairly sure. He never dissuaded or warned them as he should have done. It appears to be more or less clear that the plaintiff began to act as pleader for those defendants since September 1916 though in respect of a case in which this particular property was not concerned Exs. (F, F-I) and was one of the pleaders for Parbati Sankar appointed in June 1918 to bid for this property at a sale in which this property was involved : Ex. CC We may say that we are not satisfied that in that sale this property was not in jeopardy as we have been asked to hold on behalf of the respondents : Ex. P (2), Ex. G G-I, Ex. EE-1, Ex. JJ. Ex. BB-1, Ex. MM-1 and Ex. 27 and other documents show clearly that the employment of plaintiff 4 was not a casual one, but that right down to 1920 he was acting for the defendants in connexion with this particular property or Taluk No. 13165 as also in the other matters. Ex. H shows his relations with the defendants as pleader so recently as 26th August 1920. On the fact we think it has been proved that plaintiff 4 had an eye on this property from the time when his relations with the defendants commenced, if not from before as he himself has stated. He perhaps got the address of Jagatrani from the papers which the defendants supplied him for the cases he was engaged in, though on this point we are somewhat doubtful. That he got material information about Jagatrani and her title from his connexion with the defendants' cases is more than possible, though he may have had information from other sources as well. That he was consulted about the purchase from defendant 1 by the other defendants and was shown a draft kabala and the price was settled in his presence is also proved.

19. At the same time however it must be held that there was no encouragement or inducement offered by him to these defendants, nor has it been proved that he corrected the draft. No case of estoppel as against plaintiff 4 has therefore been made out. Nor again has it been shown that there was any question of the defendants making a purchase from Jagatrani or of plaintiff 4 having been engaged as an agent for that purpose or having been consulted in the matter of such a purchase or that any unfair advantage has been gained by plaintiff 4 from information received by him in the course of his employment as pleader for these defendants. Unless something of this sort is proved the case falls short of the requirements of the dictum of the House of Lords in the case of *Garter v. Palmer* [1841] 8 C. & F 657 that although the confidential employment may cease, the disability continues as long as the reasons on which it is founded continue to operate. In our opinion it is not apparent in this case that the confidential position held by plaintiff 4 was used by him to secure an advantage over his clients, there having been no question at any time of any negotiation on their behalf with Jagatrani. Were such a case established, even if no unfair dealing was established, the transaction might be condemned : *Nagendrabala v. Dinanath*

AIR 1924 P.C. 34. The requirements of S. 88, Trust Act, for constituting plaintiff 4 trustee for these defendants are also not fulfilled for no advantage was obtained by him over his clients by using his confidential position. While this is the legal position--for there are many acts which are condemned by a code of ethics but not near enough for the law to touch -- we are decidedly of opinion that a more honest pleader or a more honest man would have thought it proper to dissuade the defendants or at least advised them to enquire about Jagatrani's title before they made the purchase. It is sufficient to say that plaintiff 4 did nothing of the sort.

20. In the result we must dismiss the appeal, but as it is highly improbable that the defendants would have gone in for the purchase if plaintiff 4 had done his duty, and it is he who is responsible for the troubles of the contesting defendants in this litigation, we order that the costs of this litigation throughout will be borne by the parties themselves.