

(1954) 01 CAL CK 0038
In the Calcutta High Court
Case No : A.F.O.D. No. 25 of 1949

Bejoy Krishna

APPELLANT

Vs

Sree Sree Iswar Damodar Jew
 Sree Sree Iswar
Damodar Jew Vs Bejoy Krishna

RESPONDENT

Date of Decision : 08-01-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 60
Transfer of Property Act, 1882 — Section 11

Citation : AIR 1954 Cal 400

Hon'ble Judges : Renupada Mukherjee, J; R.P. Mookerjee, J

Bench : Division Bench

Advocate : Abinas Chandra Ghose, Biraj Mohan Roy, Syamadas Bhattacharjyya and Purnendu Sekhar Basu, for the Appellant;

Final Decision : Allowed

Judgement

Renupada Mukherjee, J.—This is an appeal by the defendant and it arises out of a suit instituted by one Ram Rakhal Ghosh as "sebait" of three Deities for a declaration that the two items of properties described in schedules Ka and Kha of the plaint are "debottar" properties and are not liable to be attached or sold in execution of a personal decree against the above "sebait".

2. The Trial Court decreed the plaintiff's suit in so far as it related to the property of Kha schedule of the plaint, but dismissed the claim in respect of the property of schedule Ka. The defendant has preferred this appeal from the above judgment and decree of the Trial Court. No cross objection has been filed by the plaintiffs in respect of the portion of the claim dismissed by the Trial Court.

3. The facts which have given rise to the present suit are almost undisputed and the decision of the suit turns mainly on a question of law.

The defendant appellant obtained a personal decree against Ram Rakhal Ghose, the "sebait" of the respondent Deities in Title Suit No. 45 of 1935 of the third

court of the Subordinate Judge of Alipur. The decree was put to execution, and the interest of Ram Rakhal Ghose in a property described in Schedule Kha of the plaint was attached. This property goes by the name of Barabagan and it comprises a homestead with a "pucca" building, a tank and adjoining lands. A claim case which was registered as claim case No. 43 of 1946 was filed on behalf of the Deities, but it was disallowed on 20-12-1947. Upon it the present title suit was instituted on behalf of the Deities according to the provisions of Order 21, Rule 63, Civil P. C.

4. The contention of the defendant appellant in the Trial Court was that the plaintiffs Deities and their "sebait" Ram Rakhal Ghose held two separate and distinct interests in the property in question, and what was attached in execution of the decree against the "sebait" was not the superior interest of the Deities but a subordinate leasehold interest, which Ram Rakhal Ghose held under the Deities.

This contention of the appellant was negated in the Trial Court on the ground that this leasehold interest was not created by any registered document, and as such it had no existence in the eye of law which might make it liable to attachment or sale. This finding of the Trial Court is, however, a result of confusion between Ka schedule and Kha schedule properties of the plaint. The existence of a subordinate leasehold interest of Ram Rakhal Ghose under the Deities was also a matter for consideration with regard to the Ka " schedule property. Admittedly, there is no registered document evidencing such an interest of the "sabait" under the Ka schedule property. The claim of the plaintiffs has been disallowed in respect of that property. In the absence of any cross objection on the part of the plaintiffs, it would not be necessary for the purpose of this appeal to find out on what exact ground or grounds this dismissal is based.

But it is certain that so far as the Kha schedule property is concerned, there does exist a registered document purporting to show that Ram Rakhal Ghose took a subordinate Jama interest under the Deities, and so the Trial Court's finding that there was no registered document with regard to the alleged interest of Ram Rakhal Ghose in the Kha schedule property must be held to be incorrect on the face of it. The document in respect of the Kha schedule property is a registered deed of conveyance executed by Ram Rakhal Ghose in favour of the Deities on 30-7-1930 (exhibit 1).

5. I shall have to consider the nature, import and validity of the above "kobala" in some detail. It will appear from this document as also from certain collateral evidence to which reference need not be made here, that some properties of the Deities were acquired by Government in land acquisition proceedings, and a sum of Rs. 1843/4/3 pies was awarded as compensation in favour of the "debottar" estate. The question of investment of this sum in a manner profitable to the Deities came up before the Land Acquisition Judge, and with his permission Ram Rakhal Ghose sold his personal property known as Barabagan to the Deities, reserving for himself a subordinate Jama interest bearing an annual rent of Rs. 576/-. This subordinate Jama interest was attached by the appellant in

execution of the personal decree against Ram Rakhal Ghose.

6. On behalf of the respondents it was contended that such a reservation amounts to a restriction of proper enjoyment of the property within the meaning of Section 11, Transfer of Property Act, and so it must be held that what was conveyed by the "kobala" of 1930 was the entire interest of Ram Rakhal Ghose in Barabagan property unrestricted by any right of Ram Rakhal Ghose to possess or enjoy the same.

7. The relevant portion of Section 11. Transfer of Property Act may be quoted here,

"Where, on a transfer of property, an interest therein is created absolutely in favour of any person but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there was no such direction."

8. In support of the contention put forth on behalf of the respondents, reliance was placed on some cases which I shall discuss here.

The first case cited by Mr. Bhattacharjya on behalf of the respondents is reported in "Mah-ram Das v. Ajudhia", 8 All 452 (A). In this case the restriction put upon the alienee to whom a share in a property was conveyed by a cosharer by an "ikrar-namah" contemporaneous with the deed. of sale was that he would not collect the rents of the share of the property transferred to him, and he would never demand partition or alienate or mortgage it or otherwise exercise proprietary rights over it. It was held on a construction of the deed of conveyance and the "ikrar-namah" that the conditions imposed upon the vendee were repugnant to the provisions of Sections 10 and 11, Transfer of Property Act.

It is to be noticed that in the above case full proprietary right in the property purported to have been conveyed by the "kobala", but by a simultaneous agreement conditions were imposed upon the transferee which would substantially interfere with and restrict the enjoyment of such proprietary rights.

9. The next case referred to by the learned Advocate for the respondents is reported in --"Chamaru Shaha v. Sona Koer" 14 Cal LJ 303 (B), In that case it was held that a clause for restraint upon alienation by the reversioners in a deed of family settlement between two Hindu widows and the reversionary heirs, who were two brothers of their husbands, was bad in view of the principle recognised in Section 11, Transfer of Property Act.

The following passage may be usefully quoted. from page 308 of the report,

"We have next to examine the provisions of Section 11, Transfer of Property Act. This section recognises the elementary principle that a transferee of property who takes an absolute interest, as for instance a donee or purchaser, cannot be restrained in his enjoyment or disposition of it by any condition inserted in the transfer. Such a condition deprives the property of its legal incidents and is

inconsistent with or repugnant to the main purpose of the transfer. It is consequently arbitrary and not enforceable in a Court of law."

10. The learned Advocate for the respondents also cited the case of -- AIR 1931 179 (Privy Council) , in support of his contention that once an absolute interest in property is conveyed in favour of a transferee conditions restricting the enjoyment of such property in a manner repugnant to the main object of the transfer cannot be imposed upon the transferee, and if imposed they would be void and inoperative in the eye of law.

11. Coming now to the "kobala" of 1930 let me see how far the principles laid down in the above cases are applicable to that document.

Reliance was placed by the learned Advocate for the respondents on the following operative part of the document, exhibit 1,

"Now, on receipt of the said money to my satisfaction from the said Land Acquisition Collector, I have sold the property known as "Bara-bagan" as per Schedule and boundaries mentioned below, owned and held by me in 16 annas to the Debattar Estate of the aforesaid Thakurs, and by writing and executing this deed of sale divesting my right, title and interest, I agree and promise that by selling this day the rent free property known as Barabagan described in the Schedule below to the Debatter Estate I have become completely divested therefrom. The proprietary interest which I had to the same having been extinguished has instead vested in the said Debattar Estate and it has been included within the Debattar Estate. Except as a Sebait I snail not be entitled to exercise any proprietary right in respect thereof in my own personal right."

12. From the above recitals in the "kobala" it is patent that Ram Rakhal Ghose sold his entire proprietary interest in Barabaeran property without any limitation or reservation.

But the following passage in the "kobala",

".....and for this reason I shall retain Subordinate Jama interest for the said Jama of Rs. 576/- under the said Debattar Estate. Besides the same I shall not be entitled to claim any other interest in respect thereof....."

makes it clear that a subordinate Jama interest bearing an annual rent of Rs. 576/- was created and retained for himself by Ram Rakhal Ghose. This interest was kept distinct from the proprietary right which was conveyed to the Deities.

The right virtually sold to the Deities was the? right to receive rent at Rs. 576/- per annum from. Ram Rakhal Ghose, the executant of the "kobala" That right was not made subject to any such restriction or limitation as would contravene the terms of Section 11. Transfer of Property Act.

13. In my judgment, where a person owning a property conveys such property to another person, and at the same time reserves for himself a sub-ordinate or tenancy right under the transferee the reservation should not be regarded as a

restriction repugnant to the interest transferred by the document. Such a transfer should be regarded not as a transfer of the entire interest of the owner, but only of a portion -- actual possession of the property remaining with the transferor on his undertaking to pay rent to the transferee. The right which is transferred, namely, the right to receive rent not being fettered by any condition or limitation, there is no infringement of the provisions of Section 11, Transfer of Property Act. In my judgment, there is nothing in that section or in any other law which would invalidate such reservation in favour of the transferor.

14. Next it was urged on behalf of the respondents that the reservation of the subordinate interest being repugnant to the earlier clauses of the "kobala" by which the entire and absolute interest in Barabagan property was conveyed to the Deities, the earlier clauses should prevail and the subsequent clauses to the contrary should be rejected.

In support of this contention reliance was placed by Mr. Bhattacharjya on some observations of Mukerjee, J. in -- "Midnapur Zamindari Co. Ltd. v. Jogendra Kumar" AIR 1921 Cal 750 (D).

The short answer to the above argument is that the reservation of a subordinate interest in favour of the vendor of a property is in no way inconsistent with or repugnant to the transfer of the proprietary interest entitling the vendee to receive rent only from the vendor.

Reading the document as a whole there is no escape from the conclusion that Ram Rakhal Ghose sold his superior interest in Barabagan property to the Deities reserving for himself a subordinate Jama interest under them which was more or less of the nature of a tenancy interest. Such a reservation being effected by a registered document is valid and operative. The defendant appellant admittedly attached only the subordinate Jama interest of Ram Rakhal Ghose which was somewhat loosely described as leasehold interest, and not the superior interest of the Deities. The interest of the Deities being unaffected by such attachment, they have no right to maintain this suit and in my judgment the suit should have been dismissed with regard to the Kha schedule property as well.

15. In the result, the appeal must succeed. It is allowed and the judgment and decree of the Trial Court are set aside and the entire suit of the plaintiffs in the Trial Court stands dismissed. The defendant appellant will get his costs of this appeal as well as of the Trial Court from Ram Rakhal Ghose personally. Hearing fee is assessed at 10 Gold Mohurs.

R.P. Mookerjee, J.

16. I agree.