
(1923) 08 CAL CK 0038
In the Calcutta High Court

Bhuban Mohini Dasi and Others

APPELLANT

Vs

Kumud Bala Dasi and Others

RESPONDENT

Date of Decision : 28-08-1923

Acts Referred:

Citation : AIR 1924 Cal 467

Judgement

1. This is an appeal by the third, fourth and fifth defendants in a suit for partition of joint family properties. The relationship of the parties may be gathered from the following genealogical table:

Digamber Kasyapi | ----- | | Nabin D. 21-11-1899. Rasik
w. Bhuban Mohini, Deft. 1. w. Jnanada Mayi. d. 24-12-1922. |
----- | | | | Behari Hira Lal
Amrita Nani Mani Makhan | Deft. 2 Deft. 3. Deft. 4 Deft. 5. d. 20-9-1918
----- w. Kumud Bala. | | Rajani Sajani Deft. 6. Deft. 7

2. The founder of the family, Digambar Kasyapi, left two sons, Nabin and Rasik. Nabin amassed a considerable fortune and died on the 21st November, 1899. He left a widow Bhuban Mohini and six sons. One of them Behari died leaving two sons, Rajani and Sajani. Another son, Makhan, died on the 20th September, 1918, leaving a widow Kumud Bala who had been married to him for thirty years. It is common ground that the sons of Nabin formed a joint Hindu family governed by the Dayabhaga Law. On the 31st March, 1919, Kumud Bala, the widow of Makhan, instituted the present suit for partition of the joint family estate. Her mother-in-law Bhuban Mohini was joined as the first defendant; her surviving brothers-in-law were the next four defendants; and the sons of her deceased brother-in-law were two other defendants. The Subordinate Judge decreed the suit on the 16th February, 1922, and made a preliminary decree, awarding the plaintiff a share of specified properties and giving various incidental directions the present appeal was lodged in this Court by three of the defendants on the 7th June, 1922. During the pendency of the appeal, the first defendant Bhuban Mohini died on the 24th December, 1922. We have heard the appeal on

the record and without a printed paper book, because the parties found themselves in a position of considerable embarrassment, owing to the inability of the Receiver in charge of the estate to collect sufficient fund for the conduct of the litigation. The facts have been placed before us in detail by Mr. Sarbadbikari who has argued the case on behalf of the appellants very fully, and we have also looked into the record for ourselves.

3. The preliminary decree made by the Subordinate Judge has been assailed substantially on three grounds, namely, first that the properties which stand in the name of Bhuban Mohini should have been regarded as her self-acquisition and not as part of the family estate liable to be partitioned; secondly, that if the properties which stand in the name of Bhuban Mohini are found to have been acquired, not from her own funds but with the money of her husband, they should have been regarded as given to her in absolute right; and, thirdly, that the Subordinate Judge should not have made an order on the defendants for recovery of joint properties other than those included in the suit.

4. As regards the first point, reference has been made to eight conveyances, dated Mr. January, 1873, for Rs. 50, 1st May, 1887, for Rs. 400, 5th November, 1888, for Rs. 150, 15th September, 1891, for Rs. 300, 9th November, 1892, for Rs. 475, 15th July, 1898, for Rs. 112, 14th August 1898, for Rs. 16 and 1st October, 1898, for Rs. 200. The properties acquired under these documents are claimed by the plaintiff as included in the family estate though they all stand in the name of Bhuban Mohini. Bhuban Mohini, on the other hand, maintained that the consideration in each instance was paid by her and the properties formed her exclusive stridhan. In this, she was supported by three of her sons, the present appellants. Another son, however, the second defendant and the two grandsons, the sixth and seventh defendants, disputed her allegation, and supported the plaintiff. It may be observed in passing that originally one written statement was filed on behalf of all the defendants jointly; but, later on, the second, sixth and seventh defendants stated that they had no knowledge of the written statement and took up a position hostile to that maintained by the third, fourth and fifth defendants. This dissension among the defendants has undoubtedly tended to weaken their opposition to the claim put forward by the plaintiff.

5. Before the evidence is examined, we may usefully recall that, as pointed out by the Judicial Committee more than once, there is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her stridhan property; *Dewan Rai Bijoy v. Indrapal* (1899) 26 Cal. 871, *Dkarani Kant v. Krishna Kumari* (1886) 13 Cal. 181, reversing *Chowdrani v. Tarini* (1882) 8 Cal. 545 which had disapproved of *Bindoo v. Pearee* 6 W.R. 312, *Thakro v. Ganga Prosad* (1888) 10 All. 197. The same principle will be found recognised and applied in *Narayana v. Krishna* (1885) 8 Mad. 214. *Narasin v. Srinivos* (1910) 33 Mad. 112, *Bai Matibahu v. Purushottam* (1905) 29 Bom. 306, *Durga Prosad v. Pran Krishna* (1917) 33 Mad. 112 and *Protap Chandra Gope and Others Vs. Sarat Chandra*

Gangopadhyaya, . The rule thus enunciated must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Manick Lal v. Bijoy Singh* AIR 1921 P.C. 69, the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreeman v. Gopaul* (1866) 11 M.I.A. 28, and by Sir Lawrence Jenkins in *Minakumari v. Bijoy Singh* AIR 1916. P.C. 238/. But we are not unmindful that, in the words of Lord Hobhousa in *Uman Prosad v. Gandharp Singh* (1887) 15 Cal. 20, and of Lord Shaw in *Mohammad Mahbub v. Bharatindu* AIR 1918 P.C. 137, as benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely however solely on probabilities, as Lord Buckmaster observed in *Irshad Ali v. Kariman* AIR 1917 P.C. 169. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things : *Azimut v. Hurdwaree* (1870) 13 M.I.A. 395, *Faez Buksh v. Fukeerooden* (1871) 14 M.I.A. 234, *Suleiman v. Mehndi Begam* (1897) 25 Cal. 473, *Nirmal v. Mahomed* (1898) 26 Cal. 11, *Moti Lal v. Kundan Lal* AIR 1917 P.C. 1. The most important test to be applied in these cases is as observed by Mr. Ameer Ali in *Nrityamoni v. Lakshman Chandra* AIR 1916 P.C. 96, the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Koer v. Deoraj* A.I.R. 1915 P.C. 96, that where it is asserted that an "assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase-money. To the same effect is the decision of the Judicial Committee in *Parbati v. Baikuntha* (1913) 19 C.L.J. 129, which recalls the earlier pronouncements by Lord Campbell in *Dhurum Das v. Shama Soondri* (1843) 3 M.I.A. 229 and by Knight Bruce, L.J., in *Gopeekrist v. Gunga Persad* (1854) 6 M.I.A. 53. Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalib Singh v. Chaudhrain Nawal Kunwar* (1908) 30 All. 258; that, if the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase-money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property; see *Upendra v. Purendra* 21 C.W.N. 280. We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L.J., calls in

Hunooman v. Mt. Babooee Munraj (1855) 6 M.I.A. 393 the form of expression, the literal sense, nor by what Lord Macnaghten describes in Lal Achal Ram v. Raja Kazim (1905) 27 All. 271 as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument: Promode Kumar Roy and Others Vs. Kali Mohan Saha Pramanick and Others, , Lalit Mohan Sen Vs. Manoranjan Ghosh Chaudhuri and Others, , Jasoda v. Balaram AIR 1922 Cal. 488. The same view was recently emphasised by Lord Atkinson in Arab Ali v. Mahmud Ali AIR 1922 P.C. 84 and by Lord Phillimore in Rai Radha Krishna v. Biseswar Sahay AIR 1922 P.C. 336. In the case before us, it was asserted by Bhuban Mohini that she had her own private funds which enabled her to purchase the disputed and other properties. She alleged that she had received Rs. 100, from her father and Rs. 500 from her maternal grandmother and that she used to carry on a money-lending business. She was eighty years old when her definition was taken in 1921. She could give no indication as to the time or occasion of the alleged gifts; nor were any accounts produced of the alleged money-lending business. No independent witness was brought forward to corroborate her story. On the other hand, witnesses for the plaintiff asserted that neither the paternal nor the maternal relations of Bhuban Mohini were well-to-do people who were likely to have made gifts of money to her, this much is plain that those families and their properties, if any, have completely disappeared. As against this, we have the undisputed fact that Nabin, the husband of Bhuban Mohini prospered in life and acquired considerable sums of money; and there is no question that, during the period of acquisition of the disputed properties in the name of Bhuban Mohini, the requisite funds could have been provided by her husband. On this state of the evidence, the Subordinate Judge declined to believe the story that Bhuban Mohini possessed any stridhan obtained from her paternal and maternal relations and provided the requisite sum from such separate fund. The Subordinate Judge has also pointed out that, on the 8th March, 1910, and 2nd May, 1917, the third defendant, Amrita, who now supports the story of his mother, executed mortgages of the disputed properties on the allegation that they belonged to his father. This defendant, at any rate, has not treated the property as the stridhan of his mother; although it is not clear that she was aware of these transactions. We may add that, upon the question of possession, the evidence is ambiguous. The properties were managed by Nabin and after his death by his sons. This however would not necessarily militate against the theory that they belonged to Bhuban Mohini, for in the case of a pardanashin lady her estate might, in the normal course of events, be looked after by her husband or her sons. But it is important to bear in mind that there is no reliable evidence to show that the income was actually enjoyed by Bhuban Mohini. On the whole, we are of opinion that the evidence as to the source of the consideration money and the treatment and possession of the disputed properties amply justifies the conclusion of the Subordinate Judge that they were not the self-acquisitions of Bhuban Mohini. In this connection we may re-call the observations of Lord Buckmaster in Naba Kissor Mandal v. Upendra Kissor Mandal AIR 1922 P.C. 39 : "In appeals, the

burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced, calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded." It is not necessary to invoke this doctrine against the appellant, because, for reasons that have already been stated, the case set up by them fails; nevertheless, the fact that the trial Judge has disbelieved the story narrated by the first defendant, is a factor which cannot altogether be ignored. The first point urged by the appellant must consequently fail.

6. As regards the second point, the plaintiff-respondent has urged that the theory of advancement was not put forward in the trial Court and should not be entertained here. It cannot be seriously disputed that the alternative position taken up by the appellants contradicts the case attempted to be established by evidence before the Subordinate Judge. The contesting defendants have hitherto maintained that the disputed properties were purchased by the lady with her own money. They now turn round and contend that the properties were acquired by her husband with his own money but in her name, because he intended to make an absolute gift of them in her favour, It may be conceded that the CPC does not prohibit inconsistent pleadings, and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so a defendant may raise, by his statement of defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper. This is fully established by the decision of the Full Bench in *Narendra v. Abhay Charan* (1907) 34 Cal. 51 and illustrations of the application of this doctrine to inconsistent claims by the plaintiff may be found in *Mati Lal v. Judisthir* (1915) 22 C.L.J. 254 and *Official Assignee v. Bidyasundar* (1919) 30 C.L.J. 428 and to conflicting defences by the defendant may be gathered from *Purnendu v. Dwijendra* (1908) 8 C.L.J. 289 and *Bank Behari v. Rachialal* (1912) 15 C.L.J. 439. But as was emphasised in *jfoi.no* of these cases, the litigant who avails himself of the right to press inconsistent Cases before the Court and endeavours to establish both the alternatives I by contradictory oral testimony, plainly, places himself in peril and may find himself entangled in inextricable difficulty; for evidence adduced in support of two absolutely inconsistent cases, which are mutually destructive, can hardly be expected to secure confidence. Apart from this, there is no valid answer to the objection of the plaintiff-respondent that she cannot now be called upon to meet a case which was not put forward in the trial Court. Whether the husband of the first defendant intended to make a gift of the properties to her or took the conveyances in her name so as to make her only the ostensible owner, is largely a question of intention. The facts relevant for the determination of this question of intention have not been explored. We cannot overlook that there are numerous instances of cases in the reports where purchases in the name of female members have led to controversies, whether the acquisition was for the benefit of the lady or of the person who found the money; see *Ramnarain v.*

Muhammad Hadi (1899) 26 Cal. 227, Muhammad Mahbub v. Bharat Indu AIR 1918 P.C. 137, Baser Khan v. Leakat Hossain 23 C.W.N. 841, Nriyamani v. Lakshman Chandra AIR 1916 P.C. 96. In this connection, it is important to bear in mind that, as emphasised by Sir George Par well in Bilas Koer v. Deoraj Ranjit Singh AIR 1915 P.c. 96 the doctrine of advancement in favour of wife or child does not apply in India Gopikrishna v. Ganga Prasad (1854) 6 M.I.A. 53 but the relationship, is a circumstance which is taken into consideration in. India in determining whether the transaction is benami or not. This was apparently overlooked in Abdul Rahim v. Mirathayar 1 Mad. L.W. 451. But, the true position was clearly recapitulated by Lord Atkinson in Kerwick v. Kerwick AIR 1921 P.C. 56 where ho observed as follows:

It has been established by the decisions in the case of Gopeekrist Gosain v. Gunga Persod Gosain (1854) 6 M.I.A. 229 and Uzhur Ali v. Ultaf Fatima (1969) 13 M.I.A. 232 that, owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it benami for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which, have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in favour of the person providing the purchase-money such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case, there is, under the general law in India, no presumption of an intended advancement as there is in England.

7. We are consequently of opinion that the appellants cannot possibly succeed on the second point, which was not urged in the trial Court and which the plaintiff hither, to had no opportunity to controvert.

8. As regards the third point, there can be no doubt that the Subordinate Judge has properly, madean order for discovery. All the joint properties, which belong to the family, must be included in the suit. The contesting defendants can gain no permanent advantage by the exclusion of any of the Joint properties from this litigation. It is well established that although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided and although the entire property must be included in the partition, yet if, by mistake fraud or like reason, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is rip, reason why the Court should not subsequently grant a division of the remainder, at the instance of one or more of the co-owners. The substance of the matter is, that the effect of a decree in a partition suit, leaves untouched the joint title and possession of the parties in the remainder; Jogendra Nath Roy v. Baldeo Das (1908) 25 Cal. 961. Consequently,

it is to the interest of all parties concerned that all the joint properties should be ascertained and included in this suit, and any controversy as to whether a particular property alleged to be joint really possesses that character or not, must be determined before the preliminary decree is made. As was pointed out in *Upendra Nath v. Umes Chandra* 15 C.W.N. 375, *Satya Kumar v. Satya Kripal* (1909) 10 C.L.J. 503 and *Tincouri v. Satya Dayal* (1907) 6 C.L.J. 105, all questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court, such determination to be made ordinarily by the Court and incorporated in the interlocutory decree before any partition is made or directed. From this standpoint, the order for discovery made by the Subordinate Judge may be open to the criticism that it should have been made and carried out before the preliminary decree was passed. Such an objection, if taken, must be deemed unsubstantial; because, as explained in *Annapurna Debya Vs. Amiyanath Banerjee and Others*, , the Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. There is thus no reason why we should not confirm the preliminary decree as made by the Subordinate Judge, and leave it open to him to make a supplemental preliminary decree in respect of such additional joint properties as the defendants maybe compelled to discover on oath in pursuance of his order. The third point, like the first and the second, must consequently fail.

9. The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at fifteen gold mohurs.

10. The Receiver now in charge of the estate will continue (until otherwise directed by the Subordinate Judge) till the final decree for partition has been made.

11. The question of distribution of money in the hands of the Receiver will be dealt with by the Subordinate Judge.