
(1931) 02 CAL CK 0023
In the Calcutta High Court

Bindubashinee Debi and Others

APPELLANT

Vs

Kashinath Bhattacharya and Others

RESPONDENT

Date of Decision : 23-02-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66(2)

Citation : AIR 1932 Cal 167

Hon'ble Judges : Mitter, J

Bench : Division Bench

Judgement

Mitter, J.—The lands in dispute in the suit in which the appeal arises are situate within a sadar mirash ijara which belonged to defendants 6 to 18 and one Baikunthanath Chakrabarti in the shares of 11 annas and 5 annas, respectively. The 5 annas share of Chakrabarti was sold at an execution sale and was purchased by Amulya in the benami of Jogesh Chakladar. Plaintiffs (now appellants) rest their title to the 5 annas share of the lands described in the plaint on the basis of (1) their purchase of 3 annas from Jogesh and Amulya, and (2) on the basis of a lease for ten years regarding the other 2 annas from the same persons. Under the mirash ijara there was karsha tenant, Bhanga Baidya, who abandoned the holding. When the plaintiffs went to take possession they were resisted by defendants 1 to 5. Hence the present suit for declaration of plaintiffs' title to the 5 annas share of the lands mentioned in the plaint and for recovery of joint possession to the extent of that share with the defendants.

2. The defences of defendant 1, which it is necessary to notice, are (1) that they have a settlement from defendants 6 to 18 in respect of their 11 annas share and also to a settlement from Jogesh Chakladar and Baikuntha Mukherji, whom the former stated to be the beneficial owner, and this settlement is binding on the plaintiffs and their vendor and that plaintiffs were not entitled to khas possession; (2) that the suit is barred by Section 66, Civil P.C.

3. The Munsif negatived the defence based on Section 66 and, accepting the other defence, dismissed plaintiff's prayer for joint possession after declaring

plaintiff's" title to the disputed 5 annas share of the plaintiff lands.

4. On appeal, the Subordinate Judge has modified the decision of the Munsif to this extent: that he has awarded joint possession of plot 3 to the plaintiff", in respect of which plot also the Munsif refused to decree joint possession.

5. The present appeal has been brought by the plaintiff's against the decree of the Subordinate Judge in so far as it has refused them joint possession in all plots except plot 3 and there is a cross-objection by defendant with reference to plot 3.

6. The question of law which falls for determination in this appeal is whether the tenancy evidenced by the kabuliyat executed in favour of Jogesh and Baikuntha Mukherji by defendants 1 to 5 is binding on the plaintiff's, who are purchasers from the real owner Amulya. Both Courts have held in favour of the defendants and the question in this appeal is whether the decisions are right.

7. The plaintiff's have got title from both the beneficial owner and the benamidar of the disputed 5 annas share and their title is perfect. The question is whether the plaintiffs are bound by the fraud of the benamidar. If, in taking the settlement from Jogesh and Baikuntha Mukherji, the defendants had colluded with one and acted to the prejudice of the real owner, there can be no question that plaintiff's would not have been bound by the kabuliyat. If any authority be needed for this proposition, reference may be made to the decision of their Lordships of the Judicial Committee in the case of *Annada Pershad. Panja v. Prasannamoyi Dasi* [1907] 34 Cal. 711. In that case, a patnidar obtained, by fraudulent collusion with a benami darpatnidhar, a decree for sale of the darpatni tenure and himself became the purchaser and dispossessed the true owner and it was held that the defendant could acquire no title from the benamidar. Lord Collins, in this state of facts observed as follows:

On the facts, as now admitted, Dhankrishna Mandal was the true owner of the interest in the land which was sold by Jogendranath Singh and nothing that happened between Saratchandra Mandal and Raghunath Panja could affect his title unless he was estopped from denying the authority of the benamidar to deal with it. Or. the facts of the case, no such estoppel could exist and therefore Raghunath Panja could not acquire from Saratchandra Mandal more than the latter had to give.

8. These observations are pertinent to the present controversy, as they direct prominent attention to the rule that it is estoppel alone which can prevent the true owner from disputing the acts of his benamidar. In this case, it is true that, it has not been found that there was any fraud on the part of defendants 1 to 5, but; that the benamidar was acting fraudulently there can be no question. It is argued for the appellant that it is a significant circumstance that the benamidar had disclosed to defendants 1 to 5 that title was not in him, but was in somebody else as soon as he was so told, the defendant should have been put on inquiry and should have investigated into the question of possession. The respondents

made a point founded on the law of estoppel which appears to me to deserve a very careful consideration. It has been said that a benamidar is a trustee for the beneficial owner. The question is: Is the real owner bound by the fraudulent conduct of his benamidar, where third parties are not privy to the fraud ? The sale certificate was not produced in Court by Baikuntha Mukherji. The question is whether circumstances did exist which ought to have put the defendants on an inquiry that, if prosecuted, would have led to the discovery of the true title.

9. The true rule is laid down in the case of *Ramcoomar Koondoo v. John and Maria McQueen* [1872] Ind.Ap. 40 where their Lordships point out that the title of a purchaser may be overthrown by showing either that he had direct notice, or something amounting to constructive notice of the real title. Or that circumstances exist which ought to have put him upon an inquiry, which, if prosecuted, would have led to a discovery of it. These circumstances must be of a specific character so that the Court can lay its finger on them. The finding is that defendants have acted bona fide throughout, they spent a good sum over it and, although the abandonment by the tenant was in 1325 B. S., the present suit was not brought till 1926, nearly eight years after. Here there is no evidence that defendants 1 to 5 were cognizant of the fact that the real title lay in Amulya. They were told by the ostensible purchaser that the real title was in Baikuntha Mukherji who had joined in the lease. The learned advocate for the respondents contends rightly that the principle applicable to the present case is one laid down in the case of *Henderson & Co. v. Williams* [1895] 1 Q.B. 521 that when one of two innocent persons should suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud. This principle has been held to be generally good although some exceptions have been engrafted on it: see *Farquharson Brothers & Co. v. King & Co.* [1902] A.C. 325 and *R.E. Jones, Ltd. v. Waring and Gillow, Ltd.* [1926] A. C. 670. The learned advocate for the appellant has sought to distinguish the cases on the ground that they refer to sale of goods by a fraudulent vendor who has sold the goods to a bona fide purchaser who has given value for the same. I do not think that does really make any difference in the application of the principle. The distinction sought to be made by the appellant seems to be an unreal one.

10. In the case of *Gur Narayan v. Sheolal Singh* AIR 1918 P.C. 140 their Lordships of the Judicial Committee say that a benamidar is a trustee for the beneficial owner. Looking at the matter from this point of view, what is the real position ? The trustee connives at a breach of trust, of which the third party is entirely ignorant, and passes good value for a transaction. What! is the remedy of the beneficial owner ? The beneficial owner might make the trustee personally liable, but the transaction with the third party should stand. If of course the lessee had colluded with the benamidar in getting the lease, knowing that neither he nor Baikuntha Mukherji had real title and that the real title was in Amulya, the lease could not be upheld. The case of *Chandler v. Bradley* [1897] 1 Ch. 315 was a case of this type. In that case, a tenant for life of a freehold house granted a lease to the defendant in consideration of a certain yearly rent. As an

inducement to execute the lease, the defendant had paid to the tenant for life the sum of ₹21 which the tenant for life applied to his own use. It was held that the lease was void and was not binding on the beneficiaries.

11. I think therefore having regard to the concurrent finding of both Courts, that the defendants made all the inquiry that it was possible to make and that they acted bona fide throughout. The lease in favour of the defendants must stand.

12. It has been argued by Mr. Chatterji for the appellants that there is no finding by the lower appellate Court that the payment of Rs. 150 was made and the matter should be remanded to the lower appellate Court for a distinct finding on the question of payment. I do not think it necessary to do so, for the lower appellate Court finds that

defendants 1 to 5, in good faith, placed reliance on the statement of Jogesh and took settlement from Baikuntha Mukherji.

13. I think the appeal should be dismissed, but in the circumstances there will be no order as to costs of the appeal.

14. It remains now to notice a cross-objection on behalf of the respondents with regard to property No. 3. The lower appellate Court has decreed joint possession of 5 annas share in respect of this property. It is? said Section 66, Civil P. C, is a bar to the claim. The first Court found against the respondents. No cross-appeal was filed with reference to this property on the ground that plaintiff's claim for declaration of title should have been dismissed. The decree was adverse to that extent against the respondents and there being no cross-appeal, the point cannot be raised now. It is admitted in the grounds of cross-objection that property No. 3 was not included in the auction purchase in respect of which Jogesh was the benamidar. The cross-objection is also dismissed but without costs.

15. Leave to file an appeal u/s 15, Letters Patent, has been asked for. But I do not think it is a fit case in which leave should be granted.