(1955) 11 AP CK 0022

In the Andhra Pradesh High Court

Case No : Appeal No. 257/4 of 1358 F

Gosia Begum APPELLANT

Vs

Mohd. Gaziuddin and Others RESPONDENT

Date of Decision : 29-11-1955

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, 54

Citation : (1955) 11 AP CK 0022

Hon'ble Judges : Manohar Persad, J;Kumarayya, J

Bench : Division Bench

Advocate : Ahmed Sayeed Khan, for the Appellant; Syed Zamir Ali Khan, for the Respondent

Judgement

1. This appeal is from the judgment of the Darulkaza Court dated 29th Mehar 1357 P. (29-8-1948), whereby the suit of the Plaintiff for partition of Matruka property of the deceased Dr. Nasiruddin was dismissed to the extent of Ijara villages arid Patta lands holding that they were not the personal property of the said deceased.

2. Briefly stated the facts of the case are: Dr. Mohd. Nasiruddin, the father of the Plaintiff, died on 16th Aban 1343 F. leaving behind him four sons (Defendants 1 to 4), two daughters, (Plaintiff and Defendant 5) and two widows in, eluding Defendant 6, as his heirs. Rahimunnissa Begum, the mother of the Plaintiff and Defendants 1 to 5, was the eldest widow died after him on 22nd Ardibihesht 1349 F. The property that Nasiruddin possessed consisted of both movable and immovable estate.

The Plaintiff Ghousia Begum''s case is that the movable property soon after his death was Partitioned and that the property still to be partitioned is the immovable property which according to her consists of three houses situated in Chanchalguda, three Ijara villages-Modpally, Munajapally, Godlapuri and some patta lands about 75 acres in area. Out of the three houses, house No. 8420 is admittedly in possession of Plaintiff and Defendants 4 and 5; house No. 8418/19 is in her own possession and house No. 8415 is in possession of Defendants 1 to 3.

The three Ijara villages, Modapally, Godlapurt and Munjampalli are in possession of Defendants 1, 2 and 3 respectively. The first two admittedly stand in the name of their respective holders (Defendants 1 and 2). Munjampalli is in the name of Najmuddia who according to Plaintiff is not; the same person as Defendant 3. Patta lands situated in Islampally and Kadpalli, however, are In possession of Waheeduddin Defendant 4.

The Plaintiff''s contention is that these Ijara villages and patta lands were the property of her father till he died; that he being a doctor in the Government service working in the taluka where these Ijara villages and lands were situated, could not purchase them in his name on account of circulars of the Government then in force; that he therefore purchased the same in the name of his sons with the help of his own money without any intention of gift in their favour; that the deceased spent money for the necessary improvements and management of the said property and enjoyed the profits and income derived from them during his lifetime and that the said Defendants, after his death got possession of the said property and have been enjoying its proceeds without giving the Plaintiff her due share.

The Plaintiff, therefore, brought the suit for her share in the entire property left by the deceased and for profits therein from the time of his death. As the eldest widow Rahimunnissa Begum, the mother of Plaintiff and Defendants 1 to 5, had also a share in the matruka property of the deceased, the Plaintiff has prayed for her legal share therein as well.

3. Defendants 4 and 5 admitted the claim of the Plaintiff, but Defendant 1 resisted the same, denying that the transaction in question was benami and stated that the ijara in his possession was purchased by him and that he is the exclusive owner thereof. Defendants 2 and 3 also denied that the transaction was benami and averred that though the villages were purchased by Nasiruddin with his money in their name, they were for their benefit and were intended to be a gift in their favour. They further state that Defendant 3 Zaheeruddin is the same as Najmuddin in whose name Munjapalli was purchased.

Legal objection was also raised that the suit against the ijara lands is not maintainable without the previous sanction of the Government; that the Plaintiff has not included the property in her possession and unless this property is included, the suit is not tenable. The Defendants claim that Rs. 6,000/- have been spent by them for the marriage of the Plaintiff and huge amounts on repairs of the house and improvement of the lands and that they are entitled to the credit of the same in case any decree is passed against them. It is further averred that the house No. 3418/19 is not matruka of the deceased but of Rahimunnisa Begum.

4. The Plaintiff in her rejoinder denied the allegations in the written statement of

Defendants and reiterated her allegations in the plaint.

5. On the basis of these pleadings, 12 issues were framed; Parties led evidence both oral and documentary. On the evidence led, the Court below found that Najmuddin is the same as Defendant 3; that the purchase of ijara villages and the patta lands was not benami; that the moveable property has already been partitioned; that the amounts claimed to have been expended on marriage of the Plaintiff etc., have not been proved and that the suit houses are matruka property of the deceased. In the result it gave a decree to the extent of the said houses and dismissed the claim with regard to the patta lands and ijara villages.

6. Aggrieved by this decree and judgment of the lower Court, the present appeal is preferred.

7. In the present appeal, the main plea taken by the Appellant is that when the source of money for the purchase of ijara and patta lands has been traced to the deceased Nasiruddin, and there is no evidence that the deceased intended to make a gift in favour of his sons, the property would be deemed to be matruka property and the order of the lower Court is, therefore, erroneous.

8. On behalf of the Defendants it is urged that according to the view taken by this Court, a purchase in the name of a son, though with the money of the father, will be presumed to be for the benefit of the son or a gift to him unless contrary intention is proved. It is further urged that apart from this presumption there is sufficient evidence on record to show that the deceased intended to benefit his sons.

9. We have given careful consideration to the arguments advanced at the Bar and also material on record. On perusal of the record, it is evident that all the property in question was purchased by the deceased with his own money when his sons were minors. No doubt, Defendant 1 in para. 5 of his written statement has averred that Modpaliy ijara was purchased by himself with his own money and that he was not a minor at the time of the purchase.

But the evidence on record does not lend support to this. Of course in his sworn testimony in relation to this ijara he has deposed that he himself entered into contract with Mohd. Ankus in 1319 and 1320 F, purchased the same from him and his partner when he was 20 years old and was officiating as Tahsildar of Lakshatipet.

But this is rebutted by the very statement of his brothers. Najmuddin deposes that ail the brothers were minors when their father purchased these ijaras in the name of his sons with his own money and that all the expenses which the subsequent litigation in relation to these ijaras entailed were borne by his father alone and that Gaziuddin was not employed anywhere then. Even Syeeduddin deposes that at the time of purchase, the boys were under the care and protection of their father and there was no personal source of income to them.

He further states that when Syed Mohd. was appointed as Muktar, Gaziuddin was

17 or 18 years old. Syed Mohd., it may be noted, was appointed as Muktar after Mohd. Raza. Prom the statement of Syeeduddin, it is abundantly clear that Gaziuddin was a minor at the time when ijara lands were purchased and that he had no source of income. Defendant 1 himself in criminal proceedings on 21st Khurdad 1353 F. has admitted that his father had purchased the village in his name (vide Ex. 4). This gives lie to the statement that he has purchased the ijara lands with his own money. As regards the other two ijara villages, it is a common ground that they were purchased by Dr. Nasiruddin.

But the Defendants in their written statements aver that the deceased had made them the owners of the same. Gaziuddin has stated that the deceased gifted away the villages to these sons. In Ills written statement he goes to the extent of saying that his father during his lifetime had made mention of this gift on several occasions; but in his sworn testimony, he is not definite whether his father had actually made a gift or not but asserts that he got the mutation effected in their names. This, he thinks, tantamounts to gift. We have now to see whether the fact that the deceased intended that the sons should become the owners is substantiated by the evidence on record.

(Their Lordships discussed oral and documentary evidence and proceeded:)

10-17. The oral and documentary evidence adduced by the parties taken as it whole makes it clear that it was the deceased who purchased the Ijaras when his sons were minors, that he purchased them in the names of his sons with his own money; that there was some litigation after the purchase and the deceased made arrangements for pairvi and Incurred expenses; that the ijaras after the purchase not only were entered in the names of the respective sons in the Government, papers, but also all the proceedings were carried in their names and the muktar was appointed for every village who used to act on behalf of these sons and maintain accounts and incur expenses and that Sayeeduddin and Gaziuddin after they had become majors used to look after the affairs but the general supervision of the father continued till his death.

The relevant papers of course including the sale deed continued to be in possession of Defendants concerned.

18. This is the material on record on which we have to base our decision whether the purchase in question is Benami. The law of benami in India is not a branch of Hindu or Mohammadan Law. It is merely an application of equitable general rule, which is laid down in the Indian Trusts Act, 1882. This rule is analogous to the general rule of English Law that the trust of legal estate results to the man who pays the; purchase money. Both in India and in England when the property is purchased by ''A'' with his money in the name of ''B'', the trust of the property is in the name of ''A'' and he will be the real owner.

But in England, there is exception to this general rule. When the purchase is made in the name of the wife or a child though with the money of the husband or father, English Law would not regard such purchase as benami, but would presume that there was advancement or gift in favour of the wife or child and the burden to prove contrary intention lies on the person who claims it to be benami.

19. There is a great divergence of opinion in this regard in the Indian High Courts and this Court. According to the view taken by the Indian High Courts there will be no such presumption. The only presumption in such cases will be of benami unless it is rebutted.

20. The Calcutta High Court in the case of - Bhuban Mohini Dasi and Others Vs. Kumud Bala Dasi and Others, (A), following the decision of the Privy Council in the case of - ''F.J.R. Kerwick v. K.M. Kerwick AIR 1921 PC 56 (B) held:

The doctrine of advancement in favour of wife or child does not; apply in India but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not

21. The Lahore High Court in the case of - ''Mt. Nawab Begum v. Hussain Ali Khan AIR 1937 Lah 589 (C) observed:

Where a husband purchases some property with his money in the name of his wife, it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction, and if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation.

In this case their Lordships relied on two Privy Council decisions - ''Gur Narayan v. Sheo Lal Singh'' AIR 1918 PC 140 (D) and - Lakshmiah Chetty V. Kohandrama Pillai (E) and further observed that the doctrine of advancement does not apply to India.

22. The Lahore High Court in another case - ''Pushkar Nath v. Shambhu Nath AIR 1943 Lah 321 (F) made the following observations:

The general rule of law is that where a person with funds, supplied by himself, buys property in the name of another, there is a resulting trust in favour of the former, the beneficial interest, being in him though the ostensible ownership is in the latter. In England an exception has been engrafted on this rule by the Court of Chancery, that where the purchase is made ostensibly in the name of wife or child, there is a presumption of an intended advancement.

But no such presumption arises in India whether the purchase is in the name of wife or child or near relative such as a nephew. The onus is on the person in whose name the property is purchased to prove the ''contrary intention''.

In this case also their Lordships relied on the Privy Council decision in AIR 1921 PC 56 (B).

23. The Allahabad High Court in the case of - ''Mt. Siddiqa Begum v. Abdul

Jabbar Khan AIR 1942 All 308 (G) has taken a similar view that the English equitable doctrine of advancement is not applicable in India.

24. The Patna High Court in the case of - Sahdeo Karan Singh and Others Vs. Usman Ali Khan and Others, (H) relying on the Privy Council decisions - ''Moulvie Sayyud Uzhur Ali v. Mt. Bebee Ultaf Fatima 13 Moo Ind App 232(PC) (I) and AIR 1921 PC 56 (B), - Lakshmiah Chetty V. Kohandrama Pillai (E), held:

There is no rule in India corresponding with the presumption of advancement which is in existence in England.

If ''A'' purchases property and takes at conveyance or transfer in the name of ''B'' B is hot a beneficial owner of the property but holds it in trust for ''A''. There is a resulting trust in favour of the person who provided the consideration. In England, however, if the conveyance of transfer is made not to a stranger but to the wife or child of the person who provided the consideration, then, no resulting trust arises. If the transaction is wholly unexplained, the law in England presumes an intention to benefit wife or child. In India no such rule exists.

Hence where property is purchased by father in the name of the son and the latter claims the property as his own by alleging that the father intended to make a gift of the property to him, onus rests upon him to establish such a gift.

25. The view held by the Madras High Court in this regard is clearly stated in the case of - Kovvuri Satyanarayanamurthi and Others Vs. Tetali Pydayya and Others, (K) in the following terms:

Where the promissory notes which formed the consideration for the sale-deed in favour of the wife, although described in the sale deed to be In favour of the wife are found to be in favour of the husband there being no presumption, as to advancement in India, the sale deed must be. in the absence of anything else that would suggest to the contrary, found to he benami in character.

The reason why exception recognised by English law is not followed by the Indian High Courts is obvious from the observation of their Lordships of the Privy Council in - ''Gopeekrist v. Ganga Pershad 6 Moo Ind App 53 (PC) (L) which is to the effect that benami purchases in the name of children without, any intention of advancement, are frequent in India. This has been reiterated in 13 Moo Ind App 232 (PC) (I), and all the subsequent cases vide; Lakshmiah Chetty V. Kohandrama Pillai (J). The High Courts of India have as a result did not recognise the exception known to English Law.

26. This Court on the contrary has followed the rule with due recognition of the exception known to English Law that if the father or husband purchases any property in the name of his son or wife though with his money. (sic) cannot be necessarily, presumed unless such intention is made out by any circumstance, vide; - Badshah Begum v. Zamiruddin 29 Deccan LR 247 (M); - ''Aziz Bi v. Manzur Ahmed 33 DLR 593 (N); - ''Mohd. Osman v. Sheik Doulat'' 34 DLR 817 (O); - ''Md. Ikrarm Ali v. Peddapalli Venkateshwar Rao 39 D LR 382 (P) and -

''Jeevan Khatoon v. Mahtab'' Khatoon 42 DLR 475 (Q).

27. In 33 D LR 593 (N); 39 D LR 382 (P) and 42 DLR 475 (Q) it has been further observed that so far as the general practice in this State is concerned, it can be said without the least hesitation that benami purchases or sales are not made without any sufficient cause.

Any such transaction is always made with some motive and set purpose and unless such purpose is apparent from the record, the transaction in the name of a child or the wife cannot be presumed to be benami.

It may be noted hare that Indian Trusts Act till the application or the Indian Laws in the year 1951 was not in force in this State and principles of English Law were under the circumstances being adopted by this Court. The above view taken by this Court has been consistently followed so far and we see (SIC) reason to depart from the same. We, therefore hold that, the initial burden lay on the person alleging benami. The Plaintiff had, therefore, to prove her case that the purchase was not for the benefit of the persons in whose name it was made, but she has as shown above failed therein.

28. It is urged that apart from such a presumption in their favour, the Defendants have by evidence substantiated that the purchase was for their benefit and that they are the owners. It is true that the deceased had paid the purchase money, and according to the principle (referred to above) as followed in the Indian Courts, the source of purchase money being thus determined, the doctrine of resulting trust in favour of the; deceased will come into immediate play. Certainly in order to displace this doctrine, gift must be proved. But this evidence may not be direct or even documentary but only of circumstances.

It should, however, be sufficient to show that advancement or gift was intended. Possession of the property, custody of the title deeds and conduct of the parties, and the motive behind the transaction are the most effective circumstances of proof in this regard. The only reason given on behalf of the Plaintiff for purchasing in the names of the sons was that the deceased was a government servant who could not, save with the previous sanction of the Government, purchase the lands in that area in his name.

The Circulars relied on are Gashti No. 43 of 31st Shehrewar 1299 F., of the Revenue Secretariate read with Gashti No. 14 of 1311 F., of the Finance Department. Para. F of the Gashti No. 43 which is said to contain such prohibition reads thus:

No Government servant within the local limits of his territorial jurisdiction shall carry on, save with the previous sanction of the Govt., trade, or cultivation or other occupation whether in his own name or in the name of his relatives whether major or minor.

The Circular of the Finance Department makes the said Circular applicable to all Government servants. The wording of the Gashti clearly shows that the prohibition intended is not limited td the Government, servant only but extends to his family and relatives. So then if the deceased doctor could not cultivate or even purchase lands for this purpose himself, he could not do so through his relatives whether major or minor. If he was sincere, as it is said, to avoid contravention of the provisions of the circular, certainly the purchase in the name of his sons, could not serve his purpose.

It is significant that in his deposition, (the copy of which is filed by the Plaintiff), the deceased did not state that he purchased these lands in the name of his sons to avoid the breach) of these prohibitory directions. There ensued litigation sometime after the purchase of the ijaras out he did not try to be in the background for fear lest his unauthorised purchases may be exposed. It is said that there were some complaints made against him in relation to purchase of these lands but the order of transfer produced does not bear any mention of this.

It is clear that the plea that the deceased purchased the villages in the name of his sons only on account of the above-mentioned circulars is incorrect and an afterthought. It is worthy of note that he purchased three villages in the names of three different sons and the lands in the name of the fourth son. Such purchases are not a mere coincidence but a well thought out plan. Evidently be wanted to make provisions for each son. He did not merely make purchases in their names but also got, mutations effected in the Revenue papers.

The ijara and patelgi sanads were obtained in, their names. Mukhtars for management of each village and for patelgi were appointed. The mukhtarnamas were got executed by the son when they became of age. Even the Court proceedings were started or prosecuted in their respective names through their agents. The account of each village was kept separate. Of course, he would have general supervision. This, us a father, he was bound to do as some of the sons were minor. Even the documents were kept with the sons and the adult sons used to manage whenever necessary.

The conduct of the deceased was such that Mohd. Haya the mukhtar examined by the Plaintiff has stated that these villages were purchased for the benefit of the sons. The sons too in various documents relied on by the Plaintiff did not make any statement inconsistent with their title in the villages. Gaziuddin in the criminal proceeding started by his wife has stated that his father had purchased but he is realising no income therefrom. This suggests that the purchase was for him but the ijara is not proving a source of appreciable income.

In the Ikrarnama executed in favour of Defendant 4 too there is mot an averment which is incompatible with their right. The three brothers offered to make gratuitous payment of the land to the fourth, as there was no adequate provision made for him by their father. This itself suggests their right. It is clear from their conduct, custody of the title deeds, possession of the property and the entries in the government records, etc., that the deceased had purchased the villages not for his own benefit but for the benefit of his sons whom he intended to make the owner of the respective property. Thus so far Ijara villages are concerned we see no reason to differ from the conclusion of the Court below.

29. But there remains the question of the patta lands, 75 acres in area. They are said to be in possession of Defendant 4 who admits the claim of the Plaintiff and even states that she is in joint possession thereof. The Defendants 1 to 3 do not claim any right in these lands. The Plaintiff''s suit in that regard must on the admission of the Defendant 4 himself be decreed.

30. We, therefore, partly allow this appeal vary the decree of the lower Court and pass a decree for the suit patta lands also to the extent of the legal share of the Plaintiff as the heir both of Dr. Nasiruddin and also of her mother Rahimunnissa Begum who had her shave as a widow in the matruka left by Dr. Nasiruddin.

31. As the decree passed by the Court below is not in conformity with the provisions of Order 20, Rule 18, Code of Civil Procedure, corresponding to Section 243, Hyd. Code of Civil Procedure, we pass a preliminary decree in the case In favour of the Plaintiff in the following terms:

1. (a) The three suit houses as detailed in list (a) filed by the Plaintiff in the case are hereby declared as the matruka property of Dr. Nasiruddin in which the parties as heirs have a right according to their legal share;

(b) The Plaintiff is entitled to a share of 3/32 in the said matruka property of the deceased. In this way, out of a total number of shares of 160 which represent the aggregate interest of the parties in the property, the Plaintiff and Defendant 5 will get 15 shares each while Defendants 1 to 4 thirty each, and Defendant 6 as one of the two widows, will have ten;

(c) The above property shall be partitioned in the said proportion by the Commissioner to be appointed by the Court in the proceedings for the final decree and the share of the Plaintiff shall be given in her possession. Costs of the Commissioner shall be the costs of the suit.

(d) If the division of the property cannot be conveniently effected, recourse may be had to the provisions of the Partition Act (Act 4 of 1893) or to any alternate solution to which the parties may agree, and

2. (a) The Plaintiff shall also be entitled to her legal share as specified above in the suit lands at Islampalli and Kadja, as detailed in list (c) filed by her in the suit.

(b) Defendants 1 to 3 shall not be entitled to any share in the said lands. The remaining share in the said lands barring the share of Defendant 6 shall continue to belong to the Defendant 4.

(c) The division and separation of the Plaintiff''s share in the lands shall be effected and possession thereof shall be delivered to her by the Collector or his subordinate officer competent to act in this behalf in accordance with the provisions of Section 54, Code of Civil Procedure.

32. The Plaintiff shall be entitled to costs of both the Courts to the extent of her success. The suit for Ijara lands is dismissed with costs.

