

(1955) 02 PAT CK 0004
In the Patna High Court
Case No : A.F.O.D. No. 399 of 1951

Hiraluxmi Pandit

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 21-02-1955

Acts Referred:

Bihar and Orissa Public Demands Recovery Act, 1914 — Section 21, 25
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 21 Rule 63, 80
Evidence Act, 1872 — Section 101, 102, 103, 67

Citation : AIR 1955 Patna 404 : (1955) 27 ITR 643

Hon'ble Judges : Sinha, J;Jamuar, J

Bench : Division Bench

Advocate : B.C. De and P.K. Bose, for the Appellant; R.J. Bahadur, for the Respondent

Judgement

Sinha, J.—This is an appeal on behalf of the plaintiff against the judgment of the Court below dismissing her suit for a declaration that the property in suit is her property and as such cannot be sold in Certificate Case No. 29 O. D. of 1948-49 or in any other certificate case for recovery of the Income Tax assessed on late Vijoy Shankar Tuthabhai Pandit for the year 1947-48, and for a permanent injunction restraining the defendant from selling the property in question.

2. The plaintiff is the widow of late Vijoy Shankar Juthabhai Pandit. The said Vijoy Shankar Juthabhai Pandit has taken settlement of lands mentioned in schedule A to the plaint on 20-11-1933 from the District Board of Manbhum on an annual rental of Rs. 37-13-0. Out of this land, he had settled, by a registered deed of lease, dated 1-12-1941, an area of 8 kathas 8 chataks with the Burmah Shell Oil Storage and Distributing Company of India Limited on a monthly rental of Rs. 25. On 4-9-1945, he made a gift, as per registered deed, of all the properties which he had taken, in lease from the District Board in favour of the plaintiff, his wife.

The plaintiff's case is that she accepted the gift and came in possession of the

gifted property, she realised rent from the Burmah Shell Oil Storage and Distributing Company from month to month, got her name mutated in the office of the District Board, paid rent to the said District Board and had also settled a portion of the land with one S. K. Thacker of Dhanbad on a monthly rental of Rs. 100.

3. Vijoy Shankar Juthabhai Pandit had been assessed by the Income Tax department with income tax to the extent of Rs. 51,295-3-0 for the year 1947-48. He had paid a portion of this Income Tax and, before he could pay the balance, Rs. 39,572- 13-0, he died on 13-8-1948. Thereafter, the Income Tax Officer sent a certificate, u/s 46(2), Income Tax Act, to the Deputy Commissioner, Dhanbad, for realising this amount of Rs. 39,572-13-0 as land revenue, and Certificate Case No. 29 O. D. of 1948-49 was started.

The certificate mentioned the Income Tax Officer as the certificate-holder. This certificate case was started on 30-3-1949, after Vijoy Shankar Juthabhai Pandit had died. Later on, his son, Shew Kumar Juthabhai Pandit, was substituted in his place on 13-9-1949. On 17-1-1950, however, the plaintiff came to know that the land in suit had been put up for sale in the aforesaid certificate case.

She filed an application, u/s 21, Bihar and Orissa Public Demands Recovery Act (4 of 1914), claiming the property as her own and alleging that it was not liable to attachment and sale. This application, however, was summarily rejected under the provisions of Section 21 (1) of the said Act, as the Certificate Officer considered that the claim was designedly and unnecessarily delayed.

The plaintiff, thereafter, filed the suit alleging that the certificate proceeding was illegal, without jurisdiction and void inasmuch as the certificate proceeding was taken after the death of the assessee against the assessee. She further alleged that the property was her exclusive property and was not liable to attachment and sale for realization of the dues from Vijoy Shankar Juthabhai Pandit.

4. The defence was that the suit was not maintainable, that the Union of India was a necessary party, that the suit was barred under the provisions of Sections 42 and 56 (d), Specific Relief Act and also under Sections 44 and 46, Public Demands Recovery Act, and that the suit was not maintainable as no notice u/s 80, Civil P. C. had been served upon the defendant,

Apart from these, the defendant alleged that the deceased Vijoy Shankar Juthabhai Pandit and his sons were members of a joint Hindu family governed by the Mitakshara School of Hindu Law and the deceased died in a state of jointness with his sons, and that the deed of gift was a fictitious, fraudulent and collusive transaction, which was never given effect to. Some other defences not relevant for the purpose of the present appeal were also relied.

5. The learned Subordinate Judge in the Court below found all the issues in favour of the plaintiff, except the main issue about the sham and fictitious nature of the deed of gift. He held that the gift was a sham and benami transaction and

was not given effect to. In these circumstances, the plaintiff has come up to this Court in appeal.

6. The only point, therefore, which arises in this appeal is, whether the judgment of the Court below holding that the gift is a benami transaction can be sustained by this Court. Mr. Bahadur, appearing on behalf of the respondent, has challenged the findings of the Court below on three points, namely,

1. that the Union of India was a necessary party,
2. that the suit was not maintainable for want of notice u/s 80, Civil P. C. and
3. that the Court below was wrong in holding that the certificate proceeding was void and illegal.

He has, however, supported the judgment of the Court below on the issue on the benami nature of the gift. I would like first to deal with the main point raised in the appeal. Before I consider the matter on merits, I would like to mention the facts admitted, proved or not challenged before this court. The plaintiff is the third wife of the deceased Vijoy Shankar Juthabhai Pandit. She was married in 1937, her husband died in 1948, the deceased was in affluent circumstances at the time of his death, and from the records of this case it does not appear that he had any creditor whose payment he wanted to defeat or delay by executing a false and fictitious document at the time when the deed of gift was executed, namely, in the year 1945, In considering the question of benami, motive plays an important part. In the present case, however, no evidence was adduced, as the Court below itself says, as to what was the motive for the execution of this deed of gift.

The other question of importance is the custody of the document in question, and it is undeniable that the deed of gift in this case has been produced from the custody of the plaintiff. Another important question is, whether the transferee is herself in possession of the property. This question has got to be looked into with great care and caution. The question of passing of consideration does not arise in this case.

In a case where a transaction is challenged as "benami", the onus is upon the person who challenges the apparent tenor of the document. In a suit, however, whether it be one under Order 21, Rule 63, Civil P. C. or u/s 25, Public Demands Recovery Act, the present one being under the latter provisions, the onus is upon the plaintiff to establish the right which he claims to the property in suit. In the present case, therefore, the burden of proving that the deed of gift was given effect to and the plaintiff was given possession and continued in possession as the donee must, therefore, lie upon the plaintiff.

In -- AIR 1927 237 (Privy Council) , it was laid down that, where the ostensible owners of the property under a duly registered deed and a deed of transfer object to an attachment by a party, claiming to attach that property under his debt due from the vendor, the person attaching must show that the sale was a

fraudulent one. This case was, however, reviewed and explained in -- Mahadeo Missir Vs. Ram Prasad and Others, , where it was held that, in order to understand the true significance of the observation mentioned above, one must read the observation with reference to the facts of the particular case.

This case was again considered in -- (Firm) Zinda Ram Madan Lal Vs. Ramrup Das and others , by Fazl Ali J. (as he then was) and, upon a review of several other cases of the Privy Council and of other Courts, his Lordship laid down as follows :

"It is plain that in a suit under Order 21, Rule 63 (Civil P. C.) as in all other suits, the onus lies on the plaintiff of proving the facts upon the proof of which only the relief sought by him can be granted. It follows therefore that where the plaintiff in such a suit is the creditor, it is for him to prove that the property sought, to be seized by him in execution belongs to his judgment-debtor and not to the person whose claim to the property has been upheld by the executing Court; and if he is the claimant whose claim has been rejected by the executing Court, he has to show that the property belongs to him and not to the judgment-debtor.

A difficulty, however, arises, when the plaintiff happens to be the ostensible owner of the property whose objection has been dismissed under Order 21, Rule 58. In such a case the question arises as to how far he is entitled to the benefit of the presumption that the apparent state of things is also the real state of things. Now, the view which has prevailed in Courts in India is that in such a case the onus is upon the plaintiff to show affirmatively that not only the ostensible, but the real title is in him.

This view is based on the ground that the suit under Order 21, Rule 63, is essentially a suit to set aside an order made adversely to the plaintiff in execution and the order must be presumed to be correctly made until it is set aside. In other words the presumption as to the correctness of the order is ordinarily sufficient to rebut or at least to considerably weaken the presumption that the ostensible owner is the real purchaser."

I am, with great respect, in entire agreement with the observations quoted above. In my opinion, however, a different consideration may arise if there has been no order in the claim case on merits and it has been summarily rejected as in the present case. I will assume for the purposes of this case that the plaintiff has got to prove her title and possession under the deed of gift. It is also well established that, in cases of "benami" transactions, the Court's decision must rest, not upon suspicion but upon legal grounds established by legal testimony although there may be grounds for suspicion, and further that the determination of the question must depend not merely upon direct oral evidence but also upon circumstances, namely, the custody of the title deed, the possession of the property, the source from which the purchase money came and the adequacy of the consideration -- Abdul Latif Kazi Vs. Abdul Huq Kazi, and -- Hazaribagh Mica Mining Company Limited Vs. Mrs. Ashalata Kapoor and Others, .

The deed of gift (Ex. 4) has been produced on behalf of the plaintiff, and it has been proved on her behalf that, soon after the deed of gift was executed in 1945, the Burmah Shell Oil Storage and Distributing Company had sent a letter (Ex. 8(h)) to the plaintiff on 16-1-1946, intimating that they were remitting by money order a sum of Rs. 100/- on account of rent for the period from September to December, 1945 at the rate of Rs. 25/- per month.

They had also sent another letter (Ex. 8(g)) on 30-4-1948, to her, intimating remission of rent by money order for the month of April, 1948. This letter was written before the death of her husband. Then there are a series of letters from the Burmah Shell Oil Storage and Distributing Co to her in similar terms, namely, Exs. 8(f), 8(e) 8(d), 8(c), 8(b), 8(a) and 8. The last letter is dated 1-3-1949. These letters bear the official reference number of the correspondence.

These letters were put in evidence without objection that is to say, the formal proof was dispensed with. One of the witnesses for the plaintiff, namely, P. W. 2, also proved these letters, which was not at all necessary because they were admitted into evidence without objection. It has been contended by Mr. Bahadur, as was contended in the Court below, that this witness had admitted that none of the documents which he proved had been signed in his presence, but he had said that he had known the writing of the persons whose signatures he had proved because he had always correspondence with them.

In my opinion, a witness can be a quite competent witness to prove one's handwriting if he has been in correspondence with that person although the witness who proves the handwriting may not have actually witnessed the writing. The letters, therefore, in my opinion, were duly proved. It has, however, been contended, which contention had found favour with the Court below, that these letters were suspicious because nobody has been examined from the office of the Burmah Shell Oil Storage and Distributing Company and, in the absence of such evidence, it was extremely suspicious whether these letters were actually issued at the time they were alleged to have been written. .

Speaking for myself, I entertain no suspicion about these letters which appear to me to be absolutely genuine. They are on printed form and bear the reference number of the company. Even if there was some suspicion, that could have been easily removed by the defendant calling for the original of these letters from the office of the Burmah Shell Oil Storage and Distributing Company which is in Dhanbad.

The trial of the suit was also at Dhanbad and, therefore, there was no difficulty in getting the originals of these letters (Exs. 8 series). The defendant sat tight over the matter and did not choose to call for the original letters. If I believe -- as I must -- these letters to be genuine, it must be held that the deed of gift was given effect to, the donee accepted the gift, the donee was put in possession and she continued to be in possession of the gifted property.

A comment has been made that the plaintiff has not produced any document

showing that her name was mutated in the office of the District Board, Manbhum. It is so, no document has been produced; but a letter has been produced from the Vice-chairman, Local Board, Dhanbad, addressed to the husband of the plaintiff, which is dated 29-3-1946. It is a covering letter by which the deed of gift was returned from the office of the Local Board, Dhanbad, to the plaintiff's husband.

It is possible -- and no other possible suggestion has been made by the defendant -- that the deed, of gift was sent to the office of the Local Board for the purpose of mutation of the name of the plaintiff and after mutation was made, the document was returned. Even if for one reason or the other, mutation was in fact not effected, it does show beyond doubt that the husband had sent the deed of gift to the office of the Local Board for mutation and that by itself is evidence of the donor making all possible efforts to put the donee in possession.

As I have already said, one of the letters (Ex. 8(h)) is dated 16-1-1946, and that is long before the assessment order which is dated 28-2-1948, and it is idle to contend that even at that time, when from the records of this case there was no creditor of the husband of the plaintiff, her husband was trying to create false and fictitious documents. It has been contended that the plaintiff did not examine herself and, therefore, adverse inference should be drawn against her,

I find from some of the petitions, which are in the paper book, that the plaintiff was anxious to examine herself in the case. There is a petition dated 12-1-1951, which says that the evidence of the plaintiff was absolutely necessary and as she was not at Dhanbad, some time may be given to her. The case was then adjourned. There is another petition dated 13-2-1951, which says that the plaintiff was at Rajkot, and a prayer for adjournment of the case for a month was made.

The hearing of the case started on 21-6-1951, and it appears that for some reason or other the plaintiff could not come to Dhanbad from Rajkot. The Court below appears to doubt the fact that she was at Rajkot and according to the Court below she was at Dhanbad and she deliberately retrained from going to the witness-box: I do not take the same view. The Court below says that from Ex. 1, a certified copy of the petition filed by the plaintiff u/s 21, Public Demands Recovery Act, it appears that she was at Dhanbad on 14-1-1950, and came to know of the impending sale in the certificate proceeding on 17-1-1950, and that there was nothing to show that the plaintiff had gone back to Rajkot after that date.

The petitions which I have already referred to above, which were filed in the Court below show unmistakably, in my opinion, that the plaintiff was not at Dhanbad but was at Rajkot in January-February, 1951, and there is no evidence that she was at Dhanbad at or about the time the suit was taken up for hearing in the Court below. I am of the view that the plaintiff did not deliberately keep herself out of the witness-box.

Another comment has been made against the evidence given on behalf of the plaintiff and that is that no son of late Vijoy Shankar Juthabhai Pandit has been examined in this case to prove the genuineness of the deed of gift. I fail to understand as to how that could be a ground for drawing adverse inference against the plaintiff. It is likely that the interest of the sons may have been adverse to the plaintiff so far as this deed of gift was concerned. It is true that it was said on behalf of the plaintiff that a portion of the land in suit had been settled by her with S. K. Thacker, and no documentary evidence has been produced to show that settlement or the realisation of rent from the said settlee.

P. W. 1 has of course stated on oath that settlement was made with one Thacker on a monthly rental of Rs. 100/-, and he was not cross-examined on that point. His evidence is corroborated by P. W. 2 an employee of Thacker. I am not, therefore, disposed to hold that this witness was lying when he said that the plaintiff had given some land to Thacker on monthly rental. In my opinion, it was most natural for Vijoy Shankar Juthabhai Pandit to have thought of providing his wife with some means of subsistence.

He had married this plaintiff rather late and she must have been very young when her husband died. In my opinion, the deed of gift shows a genuine effort on the part of the husband to provide for his widow. In view of the fact that no evidence to the contrary has been given by the defendant, the evidence given by the plaintiff must be accepted, and I would hold that the deed of gift was given effect to, that it was a real and genuine transaction and that the plaintiff was given possession and she continued to be in possession ever since as the donee under the gift.

7. It is contended by Mr. Bahadur that the Union of India should have been made, a party to this suit because, he says, the Income Tax Officer was merely an agent of the Union of India for realising the Income Tax due from the deceased Vijoy Shankar Juthabhai Pandit. Whatever the position of the Income Tax Officer may be, it is certain that in the column meant for the name and address of the certificate-holder, the Income Tax Officer, Special Circle, Charge I or III, Patna, has been mentioned.

The plaintiff, who had failed in the claim case and had filed the suit, was, therefore, not obliged to go beyond the records of the certificate proceeding and implead anybody else other than the person named in that proceeding. The Court below was, therefore, right in holding that the Union of India was not a necessary party.

8. It is said that the suit is not maintainable because notice u/s 80, Civil P. C. has not been given as required by law. It is true that no notice has been given. It is also true that a notice u/s 80 is imperative if a suit is instituted against the Union of India or against a public officer in respect of any act purporting to have been done by such a public officer in his official capacity, and it is established that suit of the nature contemplated in Section 80 cannot be maintainable without such a

notice. In the present case, however, a different consideration may arise, and it is this that the suit is merely a continuation of the previous proceeding under the Public Demands Recovery Act, and it is so conceded by Mr. Bahadur. If that be so, then, in my opinion, no notice u/s 80, Civil P. C. was at all required in this case. If any authority were needed, I would refer to the case of -- "S. A. Rajanier v. Subramaniam Chettiar AIR 1928 Mad 120 (F). At one place, their Lordships refer to the fact that "no fresh notice is necessary" and it was contended that in that case some notice u/s 49(1), Court of Wards Act (Madras) must have been given.

Section 49(1), Court of Wards Act is in terms similar to the terms of Section 80, Civil P. C. I do not find any warrant for that suggestion. That was a suit under Order 21, Rule 63, Civil P. C., and as no notice was necessary in a claim case under Order 21, Rule 58, I cannot accept that any previous notice was given u/s 49(1), Court of Wards Act before the suit was brought. This case was followed in -- Muhammad Yusuf Sahib Vs. The Province of Madras, , by Somayya J.

I would, therefore, hold that the Court below is right in finding that the suit is maintainable even without a notice u/s 80, Civil P. C.

9. So far as the other point of Mr. Bahadur is concerned, namely, whether the certificate was void and illegal, I do not propose to answer that question because it is not at all necessary for the purpose of deciding this suit. In view of my decision that the plaintiff has been able to prove that the land in suit is her exclusive property and is not liable to attachment or sale in execution of a certificate for the dues of the Income Tax department against her deceased husband, I find it absolutely unnecessary to hold, whether the certificate proceeding was otherwise void or illegal. That matter must, therefore, be left undecided.

10. In the circumstances mentioned above, the appeal is allowed, the judgment and decree of the court below are set aside and the suit is decreed. The plaintiff-appellant will be entitled to her costs throughout.

Jamuar, J.

11. I agree.