

(2000) 11 CAL CK 0012
In the Calcutta High Court
Case No : F.A. No. 394 of 1988

Jagat Kumar Saha Banik

APPELLANT

Vs

Sachindra Lal Saha Banik (Deceased)

RESPONDENT

Date of Decision : 22-11-2000

Acts Referred:

Citation : (2001) 2 ILR (Cal) 45

Hon'ble Judges : Tarun Chatterjee, J; S.N. Bhattacharjee, J

Bench : Division Bench

Advocate : Dipak Kumar Sengupta, Amitabha Ganguly and Dhruba Jyoti Ghosh, for the Appellant; S. Dasgupta and Bratin Roy, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Bhattacharjee, J.—In this appeal the judgment and decree dated March 14, 1987, passed by the Assistant District Judge, Cooch Behar in Title Suit No. 24 of 1976 has been challenged.

2. The Respondents herein are the Plaintiffs of the aforesaid title Suit. Plaintiffs 1,2 Bimal Kumar Saha Banik (the predecessor of the Plaintiffs 3 to 9) and the Defendant Jagat Kumar Saha Banik are the four sons of Kunjalal Saha Banik. Plaintiffs filed the aforesaid Title Suit alleging, inter alia, that the suit properties were purchased by the joint fund of the four brothers in the benami of their mother Brojabala Saha Banik but the Defendant get a deed of gift purportedly executed and registered by their mother on March 18, 1964, in his favour by exercising undue influence. Such a deed of gift, according to them, is not a genuine document and the Defendant did not acquire any right, title, interest by virtue of the said deed of gift. The suit was filed for declaration of 12 annas share of the Plaintiffs in a suit property and for partition. This suit was contested by the Defendant asserting that Brohabala acquired 16 annas interest in the suit property by virtue of purchase dated Ashar 14, 1350, B. S. and gifted away the suit property in favour of the Defendant. The contention of the Plaintiff was that the aforesaid purchase dated Ashar 14, 1350, B. S. was a benami transaction or

that the deed of gift was obtained by fraudulent means.

3. The learned trial Judge framed 9 issues out of which issue Nos. 4 and 6 are relevant for our purpose:

Issue No. 4. was the suit property purchased by joint fund of Plaintiffs and Defendant in the benami of Brojobala, she having no right, title, interest in the suit property being only a Benamder for the parties ?

Issue No. 6 has the Defendant acquired any right, title, interest in suit property by the deed of gift ? Is it a valid document ?

4. The learned trial Judge decided both the issues in favour of the Plaintiffs and decreed the suit by the judgment dated March 14, 1987 which gives rise to this appeal.

5. It has been argued by the Learned Counsel Mr. Sengupta for the Appellant that the learned trial Judge misdirected himself in deciding both the issues and his judgment being based on erroneous findings in favour of the Plaintiffs is liable to be set aside.

6. The Supreme Court held:

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The Supreme Court further held that whether a particular sale is benami or not, is largely one of fact and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down. However, the Supreme Court has laid down the following guidelines for the purpose of determination of a benami transaction:

- (1) the source from which the purchase money came ;
- (2) the nature and possession of the property after the purchase ;
- (3) motive, if any, for giving the transaction a benami colour;
- (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;
- (5) the custody of the title-deeds after the sale and
- (6) the conduct of the parties concerned in dealing with the property after the sale. Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others,

7. In K.V. Narayanaswami Iyer Vs. K.V. Ramakrishna Iyer and Others, it was held, The legal position is well settled that if in fact at the date of acquisition of a

particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property, unless the contrary is shown.

8. But the presumptive doctrine available in respect of property acquired in the name of any male member of the joint family is not applicable in the case of properties standing in the names of female members and that in the latter case, it is for the party who claims properties as joint family properties to specifically plead the particulars and details in the pleadings and establish the same by adducing necessary evidence. Smt. Manohari Devi and Others Vs. Choudhury Sibanova Das and Others,

9. The onus is, therefore, upon the Plaintiffs to prove by cogent evidence that the transaction evidenced by the sale deed dated June 29, 1943, corresponding to Ashar 14, 1350, B.S. was a benami transaction.

10. In the plaint the Plaintiffs stated, That at the relevant time or before or after Brojabala Saha Banik had no money, assets or ornaments, she came of a poor family and her parents were also poor. Kunjalal Saha Banik (father) also at the material time or before or after had no money or assets of his own. The whole consideration money of the said property was paid from the fund of the aforesaid business by the Plaintiff No. 1 but kobala of the land and the structures was taken in the name of Brojobala Saha Banik (mother) at the instruction of father Kunjalal Saha Banik to avoid any future creditor in case of failure of the business of the brothers.

11. The Plaintiff sought to prove the payment of consideration money from the fund of the joint business through p.W. 3 who is the service of the deed. He has stated that Plaintiff Sachindralal Saha Banik and his brothers made an advance of Rs. 325/ and the deed of agreement for sale was executed by the vendor. Other P. Ws. were attesting witnesses also corroborated regarding payment of consideration money by the Plaintiff No. 1. The deed was registered in 1943 and the evidence was recorded in 1978 i.e. after 35 years. It is not possible at all for a scribe and other P. Ws. to speak from memory about the payment of consideration money after 35 years unless the P. Ws. are interested person. P.W. 3 admits in his evidence that P.W. 3 is an old acquaint. Such evidence cannot be conclusive on the point of payment of purchase money. Account book of the joint family business in respect of the relevant year i.e. 1350 B.S. would have been the clinching evidence on this point but the Plaintiff has already stated in para. 8 of the plaint that all the account books of the business upto the year 1355 B.S. were kept in the room where the father and mother lived. Then again in para. 10 of the plaint it has been stated by the Plaintiff that e-mail account books of the brothers from 1356 B.S. to the time of separation in 1359 B.S. were lying in the shop room but the title deeds of the house property and other documents were always with the real purchaser. The Plaintiff, therefore, could not produce the e-mail account books of the year 1350 B.S. which could show conclusively as to

whether the purchase money was paid from the joint family fund. The sale deed was in the custody of the Plaintiff No. 1 who filed the same in the court. It was suggested in evidence to the Plaintiff that the sale deed was in the custody of the mother but the Plaintiff No. 1 took it from her to get her name mutated. The suggestion has been denied but the name of the mother has been recorded in the R.S.R.O.R. and the Plaintiff No. 1 did not taken any steps for correction of the record of right. Although the Plaintiff's case is that the mother came of a poor family and had no fund at the material time the admitted fact is that Brojobala gave up his ornaments for redemption of mortgage of other house property. It is in the evidence P.W. 4, Plaintiff No. 1 that his father utilized ornaments of his mother for meeting expenditure of the family, (page 68 of the paper book). He has also stated that his father repaid the loan of Rs. 600.00 by selling the ornaments of mother and the utensils. Further, he has admitted that Krishnalal Saha Banik and Amritlal Banik, the maternal uncles were well-to-do persons, (page 83 of the paper book). It is further in evidence in P.W. 4 that at the time of registration of sale deed (ext. 1) they had no creditors. There is no evidence that the mother Brojobala had neither any money nor ornaments at the time of purchase. Admittedly, after purchase the parents of parties used to live in the suit property along with 4 sons and after few years Plaintiffs got themselves separated by shifting to new houses constructed by them giving the suit building in favour of their mother and the Defendant. In view of the relationship between the parties and Brojobala possession of the suit property jointly is not an important factor but the fact remains that after some years Plaintiffs constructed separate houses for themselves.

12. As against the standard of evidence adduced by the Plaintiff other facts which appear from the record are that the record of right stood in the name of alleged benamdar, and there is also documentary evidences to show that Brojobala paid taxes to the municipality and collected rents. It is, therefore, apparent that when the Plaintiffs started living separately by constructing separate houses the suit building was in possession of the Defendant and the mother. No action was taken by the Plaintiffs by asserting their title as real owners. On the other hand, the conduct of the parties do not point out that the suit property was treated as joint family property of which the mother was the benamdar or ostensible owner. This would be evident from the admitted facts that the relevant account books of the year 1350 B.S. upto 1355 B.S. were in the custody of the mother. The mother was in possession jointly with the sons and thereafter the Plaintiffs themselves separated from her. The record of right was in the name of the mother. The mother's ornaments were utilized in dealing with the property under mortgage and the maternal uncles of the Plaintiffs were well-to-do men. The mother also used to pay taxes to the local authority and used to realize rent which would be evident from the evidence of D.W. 1 in his evidence has stated, "my mother used to look after the property after her purchase. My mother paid the said taxes and rents of house. I have filed the tax receipts in order to show that my mother used to pay the rent and taxes. The property was

recorded in the name of my mother Brojobala Saha Banik, ext. 6(1) will show it. Plaintiff No. 1 or any of my brothers never tried to get the record of right corrected by making an application before the settlement authority." He has admitted the suggestion put to him by the Plaintiff by stating, "that is a fact that the Plaintiffs raised objection during R.S. operations." This only goes to show that the name of Brojobala herself was not recorded at the instance of the Plaintiff brothers put Brojobala herself asserted her right in the suit property by getting her name recorded.

13. The learned trial Judge argued himself as to why the wife of the Plaintiff pledged her ornaments to redeem the mortgage when mother-in-law had been in possession of ornaments or "stridhan". From this the court below held that the mother had no money to purchase the suit property. Such a conclusion is neither reasonable nor warranted as such a conduct is dependant on many other factors beyond the knowledge of other persons. Therefore, from the evidences discussed above we are not in a position to agree with the learned court below that the transaction evidenced by the kobala dated March 14, 1943 is a benami transaction whereby the mother of the parties did not acquire any title or was a mere benamdar of the sons. We hold that Brojobala was the owner of the suit property by purchase.

14. The next point is whether the learned court below was justified in holding that the deed of gift dated March 18, 1964, was not a genuine document. In support of the case the Plaintiff has stated that due to Bimal's being untraceable their mother was so-much shocked that she was rendered incapable of executing a deed of gift. (The evidence adduced by the parties, however, does not substantiate the case of the Plaintiffs.) P.W. 1 does not say anything about it. P.W. 2 also does not say anything about the mental condition of Brojobala, so also P.W. 3. P.W. 5 is a witness on this point. This P.W. has stated that Brojobala used to lose her senses from time to time since her son was missing from 1361 B.S. and that condition of Brojobala continued till her death. She did not go to market and other places. Her evidences is contradicted by P.W. 4 himself who says in his evidence, "We used to take our mother with us to Dacca and Murshidabad. She used to visit the house of the persons of the locality and the persons of the locality used to visit our house." In cross-examination this P.W. has stated that he could not say if Brojabala could move about prior to her death. This witness, therefore, cannot be relied upon. P.W. 6 is another witness, on the point. According to him, Brojobala became mentally imbalanced after Bimal was untraceable. Plaintiff No. 1 is the husband of her aunt. In cross-examination she has stated that she had talked with Brojobala long before her death and cannot even remember by guess how many years before he had talked with her. P.W. 7 is the friend of Plaintiff No. 3. In cross-examination he has stated that he could not say if she could move about after 74/75 years of age but her physical condition was not good. She could move about upto the age of 74/75 years. D.W. 2 is Jyotish Chandra Guha. He has an attesting witness to the deed of gift. He did not state anything about the mother of the parties. He has no personal

knowledge about the Defendant or his mother. D.W. 4 did not say anything about the Defendant's mother. D.W. 6 does not say anything about the health of mother. No other evidence has been examined by the Defendant. From the tenor of the evidence it is clear that the mother of the parties was not incapable of executing any deed. When the suit has been filed long after the execution of the impugned deed as also after a decade from death of the executants and when the witnesses contradict themselves on point, the truth has to be ascertained by reasonable inference to be drawn from the admitted and proved facts, conduct of the parties and attending circumstances which may be set out as under:

(i) The land was purchased by the mother on 29.6.43.

The father of the parties died on 12.6.1948.

The brothers separated themselves by raising constructions on the suit land in 1952.

Bimal was missing since 1954.

The impugned deed of gift was executed on 18.3.64. The Defendant filed Title Suit No. 25/74 for recovery of khas possession in 1974.

This suit was instituted on 4.8.1976.

The mother died on 26.9.1974.

(ii) The three sons of Brojobala (the mother) did not raise any protest or objection to the separate constructions raised by the sons on the suit land under the deed of gift for their separate living so long she was alive. It is, therefore, evident that she had active consent to such construction.

(iii) It transpires from the evidence that the mother was under traumatic shock for a considerable period for the loss of her epileptic son, Bimal, since 1954. The Defendant admits in evidence that she was mentally upset and physically debilitated (page 142 of paper book). It can hardly be conceived that she would bestow her bounty upon the Defendant by executing a deed of gift exclusively in his favour depriving other sons and Bimal's family in particular of their residence and rendering them homeless on the ground that only the Defendant looked after her during her last days.

(iv) It is admitted that the Defendant used to live with the mother and was in her active confidence. According to the Defendant, Upendra Nath Chakraborty, an advocate, drafted the deed and it was scribed by Mahendra Chakraborty. The executants being illiterate and an old lady of 75 years it is necessary to prove that the contents of the deed were read out and explained to her.

Admittedly she did not put her L.T.I, in presence of the Registrar. On this point, the evidence of the Defendant D.W. 1 may be set out, The deed was drafted by Sri Upendra Kumar Bhattacharjee and it was scribed by Mahendra Ch. Chakraborty. The deed was written at the place where Mahendra Chakraborty

used to take his seat, on the verandah adjacent to the Bar Library. At the time of preparation of the deed of gift my mother was at Cooch Behar. Actually she was sitting in front of Mahendra Chakraborty, This is the deed of gift, which was executed by my mother by affixing her thumb impression. At the time of the execution of the deed the witness of the deed were present her.

My mother was not present when the deed was being scribed at Bar Library on 17.3.64. It was registered on 18.3.64. Not a fact that the deed was described at the instant of my mother but it was written according to a draft prepared by Mahendra Babu. The draft was prepared 2/3 days prior to scribing. The draft was prepared in the presence of my mother.

There are 13 witnesses in the deed of gift. My mother put her L.T.I, in present of witness Mahendra Chakraborty, and thereafter the witness also put them signates the execution was completed in presence of witnesses. After the execution of the deed my mother, myself and Mahendra Chakraborty went to sub-registry office for registration, Mahendra Chakraborty is the scribe the deed of gift. Jagosh Ch, Saha Banik was identifying witness and he identified my mother and thereafter the deed was registered.

All my witness are dead including the scribe excepting Jogesh Ch. Saha Banik. Jyotish Ch. Saha, Jogendra Nath Roy, Gagadish Pal, Kishori Lal Saha.

It has not been stated anywhere that contents of the deed were read over and explained to the executant.

(v) The Defendant states in his evidence that his mother had a soft corner for his epileptic son Bimal and was mentally upset when Bimal was found untraced. He has further stated that the other brothers did not feed their mother and as such relationship became strained and that the mother asked them to vacate but they did not.

Bimal being epileptic and untraceable his family being in distress cannot be expected to have incurred the displeasure of the donor and there was no question of strained relationship with her. It is not explained why the mother acted with such cruelty to the family of Bimal which was totally deprived of a small parcel of land out of 13 cotoahas and add land was rendered homeless. This conduct appears to be unusual.

(vi) The Defendant did not take any legal step for a period of ten years for eviction of the Plaintiffs from the date of extension when the mother would have been available for giving evidence.

(vii) There is no convincing evidence that mother took any legal step even through the Defendant to evict her sons during her life time, despite the so-called strained relation with the Plaintiffs. Therefore, the unusual reliance of the Defendant for a decade, the inexplicably inconsistent conduct of the mother, her old age, her illiteracy, the manner of execution of the deed of gift are suspicious circumstances which cast heavy doubt on the genuineness of the deed of gift. We

are inclined to hold in agreement with the learned court below that the deed of gift is not a genuine document. The judgment and decree passed by the learned trial Judge is upheld to the extent stated above. The appeal is dismissed without costs.

Tarun Chatterjee, J.

15. I agree.