

(1982) 02 CAL CK 0045
In the Calcutta High Court
Case No : A.F.O.D. No. 491 of 1975

Jugal Kishore Kundu (deceased by L.R.'s) and Others APPELLANT
Vs
Narayan Chandra Kundu and Another RESPONDENT

Date of Decision : 02-02-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
Evidence Act, 1872 — Section 32, 32(1), 32(2), 32(3), 32(4)

Citation : AIR 1982 Cal 342 : 86 CWN 516

Hon'ble Judges : P.K. Banerjee, J; B.N. Maitra, J

Bench : Division Bench

Advocate : M.M. Ghosh and S.C. Roy, for the Appellant; B.G. Mitter and Aruna Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

B.N. Maitra, J.—The plaintiff has alleged that defendant No. 1, Jugal Kishore and defendant No. 2, Bhupendra, are his brothers. Their father, Rasamoy Kundu, lived at Ichhapore in the district of Jessore, which is now in Bangladesh. He was governed by the Dayabhaga school of Hindu law. On the 21st Feb. 1948, he died leaving behind those three sons as his only heirs. His wife had predeceased him. He was very well off, owned many properties and extensive business. He constructed a godown and carried on jute business therein at Langal Bandh Bazar near his native village in the benami of Monorama Kundu, Jugal's wife. In 1946 a riot broke out in Bengal and so Rasamoy wanted to have a house in Calcutta. He sent Jugal to purchase land in Calcutta for that purpose. On the 23rd Dec. 1946, a deed of agreement was thus executed regarding the suit land. On the 16th Jan. 1947, a kobala was executed in respect of that property. Though both the documents stood in his daughter-in-law Monorama's name, she was merely his benamidar. After the purchase, he began to raise building on that land, but "he construction was not completed during his lifetime. He and his three song lived in a joint family. Jugal was the karta. Rasamoy left many properties and business. In 1950, there was a communal riot in East Pakistan.

Shortly, thereafter, the plaintiff and Jugal shifted from East Pakistan to the disputed property. Bhupendra was then unmarried and he used to live in East Pakistan. From time to time he would come to Calcutta. The disputed property belonged to the joint family and the three brothers had one-third share each therein. In 1967, they separated in mess, but are still in joint estate. A fire broke out in Lungal Bandh Bazar jute godown in 1951 and 1952. A sum of Rupees 130,000.00 was received from the Insurance Company as compensation, That amount forms part of the joint estate of the brothers. Jugal falsely filed Title Suit No. 340 of 1967 in the First Munsif's Court, Sealdah, for the plaintiff's eviction on the bogus ground that he was a tenant in respect of one room in the disputed house under him and his children. But he lost that case up to the appellate court. Monorama is dead and the pro forma defendants are her heirs. The suit is for partition and for taking accounts also regarding the disputed property.

2. The defendant No. 2 filed a written statement supporting the plaintiffs version.

3. The defendant No. 1 and pro forma defendants Nos. 3 to 6 and 8 and 9 filed a written statement denying the plaintiff's allegations. They allege that Rasamoy separated his three sons and distributed all his assets in 1940 or so. After his death nothing came in the hands of Jugal. There was no existence of any joint family or joint family property. Monorama had considerable money and she acquired the property in question with her own money. Thereafter, she constructed a house on that land with her own money. The godown at Lungal Bandh Bazar belonged to her. Narayan (plaintiff) used to come to the disputed house and live as her guest or licensee-Thereafter, he rented one room from her. As he refused to vacate, the ejectment suit was filed.

4. The learned Subordinate Judge accepted the plaintiff's version and granted a preliminary decree for partition. He also passed a decree for accounts against the defendant No. 1 only regarding the income received from the disputed property. The rest of the prayer for accounts regarding the joint estate was not allowed.

5. Hence this appeal by defendants Nos. 1 and 3 to 8. It has been contended on behalf of the appellants that the moot question is as to who acquired the disputed property and whether Monorama was the real owner or a mere benamidar regarding the property in question. The plaintiff's version cannot be accepted.

6. It has been contended on behalf of the plaintiff-respondent that Monorama was not a woman of substance. It has not been proved that she had sufficient money to acquire the godown at Lungal Bandh Bazar of the disputed property in Calcutta. She died in 1963. A Hindu Joint Family is presumed to be joint in food, estate and worship. That presumption has not been rebutted. Even if it is assumed that Monorama was the real owner regarding the disputed property, the evidence on the record clearly shows that subsequently that property was thrown into the common stock of the joint family. Jugal said in the Sealdah Court that he had received Rs. 30,000/-and property from his father. Of course, the plaintiff

filed some affidavits in the High Court making such damaging statements. Those admissions have no value because u/s 31 of the Evidence Act, an admission is not conclusive. The uncorroborated testimony of DW 2, Jugal Kishore (defendant No. 2), cannot be believed. He failed to establish that Monorama had any source from which the godown at Langal Bandh Bazar, Jessore, and the disputed property could be acquired.

7. Let the position of law be discussed first. After following a bench case of Gouranga Sundar Mitra and Another Vs. Mohendra Narayan Mitra and Others, , it has been stated in the bench case of Hemchandra Ganguli Vs. Matilal Ganguli, " that under the Dayabhaga Law, there cannot be a joint family consisting of the father and the son. A son can acquire separate property even if he lives with his father. If the brothers live jointly, one of them cannot claim a share in the acquisition of another unless it is proved that they also had contributed towards its acquisition. A self acquired property becomes joint when it is thrown into the common stock voluntarily with the intention of abandoning all claim over it. After following the case of Protap Chandra Gope and Others Vs. Sarat Chandra Gangopadhyaya, presided over by Sir Ashutosh Mukherjee, it has been stated by R. C. Mitter, J., in the case of Surendra Bala v. Bhupendra Kumar in (1941) 45 CalWN 177 at pages 179 and 180 that a wife or daughter-in-law or son is not coparcener in the joint family under the Dayabhaga system of Hindu Law and hence if the purchase is made in their names, there can be no presumption that the purchase was made for the benefit of the family and the apparent title will prevail. In the case of Akshoy Kumar Bose and Others Vs. Sukumar Dutta and Others, , K.C. Das Gupta, J., has stated that when a document stands in one's name and another party claims it as a joint property, the onus is on the latter to show that it was a joint acquisition and the joint family had sufficient nucleus. It such onus is discharged, only then the burden shifts to the other side.

8. In a case of benami, the most important test is the source of the consideration, vide the cases in AIR 1949 FC 88 (92); Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, , Bibi Saddiqa Fatima Vs. Saiyed Mohammad Mahmood Hasan, and Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, .

9. It seems that much of the pleadings and the observations made by the learned Subordinate Judge are misconceived because there could not be a joint family amongst the brothers so long as Rasamoy was alive. The most outstanding fact in this case is that the disputed property was acquired when Rasamoy was alive. So long as he was alive, Jugal could not be a karta. No question of blending was pleaded in the written statement. Since it is outside the pleadings, such case cannot be accepted, vide decisions of Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, and of Sri Venkataramana Devaru and Others Vs. The State of Mysore and Others, .

10. Now it will be our duty to point out that the learned Subordinate Judge has made out a new case. The reason is very simple because in para 6 of the plaint,

it has been stated that after making the purchase, Rasamoy began to construct building on the land with his own money, whereas the learned Subordinate Judge has held that the building was constructed with the money of the joint fund of the three brothers. Law on this is well settled because in view of the Supreme Court case of Sheodhari Rai and Others Vs. Suraj Prasad Singh and Others, , the court cannot make a new case not made out in the pleadings.

11. Then about the evidence given on behalf of the plaintiff's side. PW 1", Jitendra Nath Kundu, has stated that Rasamoy acquired the godown in Jessore and the Calcutta property in Monorama's benami. Subsequently he says that this is only his hearsay. The learned Advocate appearing on behalf of the respondent has stated that this evidence is relevant u/s 32 of the Evidence Act. This submission cannot be accepted because such statement is not covered by any of the Sub-sections (1) to (3) of that section and hence, such hearsay evidence cannot be accepted. This witness also says that Jugal's father-in-law was not well-off and he used to work in a cloth shop. Subsequently, he is constrained to say that this also is his hearsay.

12. Then about the evidence of PW 2, Gopal Chandra Kundu, He has stated that the brothers lived jointly and they separated in mess after the suit was filed in the Sealdah Court in 1967. But PW 1, Jitendra Nath Kundu, has stated in his cross-examination that Narayan Babu (plaintiff) has been living in his own house in Banamali Chatterjee Street, Calcutta, from 1360 B. S. This clearly shows that the three brothers were not living in a joint mess, as alleged on behalf of the plaintiff.

13. The evidence of P. W. 3, Shyamapada Dey, an employee of the State Bank of India, is not relevant because it has been pointed out on behalf of the appellant that the Account Book of that bank, Ext. 12, speaks of the entries starting from 1960. So, it has no relevancy about the acquisition of the disputed property.

14. PW 4, Radhaballav Sikdar, has supported the plaintiff, stated that Rasamoy was alive till the completion of the construction work of the house and he died in 1954. There is no manner of doubt that he is not at all a witness of truth because on the 28th Feb. 1948, Rasamoy breathed his last and a plan of that house was sanctioned only in June, 1948, vide Ext. E. He further says in his cross-examination that he does not know about the source of money from which the properties at Jangal Bandh Bazar and Calcutta were acquired. He deposed on behalf of the plaintiff in the Sealdah Court-At last he admits in his cross-examination that he does not know whether Jugal and Narayan lived separately or in a joint mess.

15. PW 5, Narayan Chandra Kundu, being the plaintiff, is an interested witness.

16. DW 1, Bhupendra Nath Kundu, is defendant No. 2 and he filed a written statement supporting the plaintiffs version. He has stated in his evidence that he only heard from his father that the disputed property had been purchased by the former. This is hearsay evidence and should not have been admitted in evidence.

He first says that he saw the Account Books in connection with the cost of purchase of the suit land and in the next breath, he denies the same. We did not pin any faith on the evidence given by the PWs.

17. Let us now deal with the alleged admissions made by the plaintiff. A fire broke out in the godown at Jangal Bandh Bazar in Jessore, and this has already been stated. Suit No. 2021 was filed in the Calcutta High Court in 1954, vide Ext. J. The present plaintiff made several admissions in that case. Law in this respect is well settled. It appears from the case of Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, and of Avadh Kishore Das Vs. Ram Gopal and Others, that an admission, though not conclusive, is decisive on the point unless it is successfully withdrawn or proved to be erroneous. None of those two elements has been proved because PW 5, Narayan Chandra Kundu, has not been able to show that the admissions made by him in connection with that High Court suit had been withdrawn or the same were erroneous. When he was confronted with the same, he pretended not to recall if he had stated the same. It will appear from his affidavits, Ext. L series, that the properties in Calcutta and at Jangal Bandh Bazar in Jessore belonged to Monorama, she was a woman of substance and she made such purchase with her own money. In that view of the matter, it can be safely slated that the observations made by the learned Subordinate Judge about the existence of the joint family and of a joint family fund are of very little value.

18. The learned Advocate appearing on behalf of the respondent placed reliance on the letters, Exts. 1 (a) and 1 (c) dated 20th April, 1949, and 22nd April, 1949, to show that Jugal had given information about the raising of the house on the disputed land. At all events, these letters do not show that the brothers had any title thereto or contain any statement that it was their joint property. Reliance was also placed on behalf of the respondent on the letters, Ext. 2 series. At any rate, those letters did not create any title in their favour to the property in question.

19. It is thus not necessary to deal with the fact how and who acquired some compensation from the Insurance Company, when fire broke out in the godown at Jangal Bandh Bazar. This is irrelevant for deciding the main question, whether Monorama was the real owner or a mere name-lender.

20. It has been stated on behalf of the respondent that the documents, Ext. 5 series, show that the electric meter in the back portion of the disputed house stands in plaintiff's name and Jugal himself wrote some of the muris, Ext. 13.

21. Now no handwriting expert was examined to show that, in fact, Jugal wrote the same.

22. Title Suit No. 340 of 1967 was filed in the Sealdah Court, vide copy of the plaint, Ext. 3. The trial court left the question of title to the property open, vide the judgment, Ext. 8- It has been stated that the plaintiff had no cause of action. It will appear from the decision of Wanchoo, J., in the case of Sheodan Singh Vs.

Smt. Daryao Kunwar, that where the court holds that the suit will fail for want of cause of action, there is no question of any res judicata. The decision of the lower court was affirmed in appeal, vide Ext. 9. The appellate court made a damaging statement by stating that though Narayan (present plaintiff) alleged that Monorama was only a benamidar, but the case of benami was not proved.

23. There is another important aspect of the case because Narayan occupied only one room in that house, in which there were ten rooms. If, in fact, he was the owner of 1/3rd share, it would be normally expected that as a co-sharer he would have possession in more than one room. It has already been stated that P. W. 1, Jitendra Nath Kundu, says that from 1360 B. S., Narayan (plaintiff) has been living in his own house in Banamali Chatterjee Street, Calcutta. It appears from those judgments, Exts. 8 & 9, that the single room in which the plaintiff lived in the disputed house, has no separate bath-room or kitchen. That clearly shows that his possession therein was only permissive.

24. It has been stated by the Supreme Court in the case of Bharat Singh and Another Vs. Bhagirathi, , Bishwanath Prasad and Others Vs. Dwarka Prasad and Others, , Union of India (UOI) Vs. Moksh Builders and Financiers Ltd. and Others, and Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by Lrs. and Another, that an admission by a party is substantive evidence of the fact admitted therein, if it is clear and unambiguous. It has already been stated that in the affidavits, Ext. L series, Narayan made a clear and unambiguous admission that Monorama was the owner of the disputed property and she acquired it with her own fund. Such admission was made in 1955 and 1960, vide Ext. L series, whereas the suit in the Sealdah Court was commenced only in 1967, vide Ext. 3. Such previous admissions made by the plaintiff regarding the disputed property at a time, when there was no controversy over it, clearly show the hollowness of his case. The learned Subordinate Judge approached the case from a completely wrong angle.

25. Thus, from the totality of the facts, discussed above, it is clear that the brothers did not own any joint property which can be regarded as a nucleus, which provided for a sufficient source for the acquisition of the disputed property or for construction of a new building thereon. We, therefore, reject the contention put forward on behalf of the respondent and find that Monorama was the real owner of the disputed property and she acquired that land and constructed a house thereon with her own money and she was not Rasamoy's benamidar regarding that property. We further held that the plaintiff has no interest therein, and his claim for partition and for taking accounts will fail.

26. The appeal is allowed. The judgment and decree appealed against be set aside and the suit dismissed. There will be no order as to costs.

27. In that view of the matter, no order is called for on the application dated 16-5-1980 filed on behalf of the appellant for acceptance of additional evidence.

Banerjee, J.

28. I agree.