

(1871) 07 CAL CK 0005
In the Calcutta High Court
Case No : Special Appeal No. 501 of 1871

Kedarnath Chuckerbutty

APPELLANT

Vs

B. Donzelle

RESPONDENT

Date of Decision : 28-07-1871

Acts Referred:

Citation : (1871) 07 CAL CK 0005

Judgement

Bayley, J.—I am of opinion that the judgment of the lower Appellate Court should be reversed and the case remanded for re-trial. The plaintiff sued for arrears of rent for the Aghran Kist of 1278 (1870-71) on a kabuliat dated the 27th January 1860, executed by one of the former managers of the Toolshia Concern in favour of Mussamut Anusul Burkut. Anusul Burkut was one of the wives of Golam Hossein, and is alleged to have been a proprietor of the lands in suit in her own title, and the suit is brought on the basis of the above kabuliat alleged to have been given to her in her own right. The defendant did not deny the kabuliat relied upon by the plaintiff, but contended that, although the kabuliat was executed in favour of Anusul Burkut, yet the real ownership of the mehal leased was with her husband; and after his death the rent was paid to the eldest wife, Anusul Burkut, not as malik, but as the head of the family, and was distributed among all the heirs as sharers. The defendant alleged that about the period of the institution of this suit she obtained a putni potta of fifteen-sixteenths share of Talook Gungapore from the heirs of Golam Hossein, the late proprietor, and that therefore the plaintiff was only entitled to the rent of one-sixteenth share.

2. The first Court held that Anusul Burkut was the real malik, and in possession, and in the enjoyment of the rent; that the plaintiff was her putnidar; that when the amulnamah was proclaimed in the Mofussil the defendant had knowledge of the same, and that therefore the plaintiff was entitled to recover the rents sued for.

3. The lower Appellate Court, without going at all into the question whether the real title was solely with Anusul Burkut or also with the other heirs of Golam

Hossein, and if so, to what extent the title of each sharer extended, simply remarks: It appears to be unnecessary to enter into the merits of the question of title raised by Mr. Gregory. This is a suit for rent based on a kabuliat executed in favor of a lady who has granted a putni of the estate to the plaintiff. The Court will not look behind this kabuliat, on the principle that a tenant cannot under the circumstances stated by the learned Counsel deny his landlord's title." Upon this view the lower Appellate Court dismisses the appeal and decrees the plaintiff's suit.

4. The plaintiff appeals specially, chiefly on the ground that the judgment of the lower Appellate Court is erroneous in law and defective in investigation, in that it has not tried the question as to who the real owner was, and that such defect has affected the case on the merits. Two oases were quoted in the lower Appellate Court--*Durga Charan Mazumdar v. Mahomed Abbas Bhuya* 6 B.L.R., 361; both of them were measurement cases, and the question turned on the actual words as in possession as used in Act VI of 1862 (B.C.). The real question in this case is whether the lower Appellate Court has correctly laid down the principle that it could not go behind the kabuliat. The whole case turned on the question whether the lady Anusul Burkut was the real owner of the land. The lower Appellate Court begs the question in assuming that she was. This has led the Court to the conclusion that the real title was with her. It is stated that the title of Anusul Burkut arises from a deed of gift given by her husband and making her the absolute proprietor. It is also stated that this very fact is recited in the kabuliat. It is further alleged that the letter of Mr. Donzelle, junr., as to the payment of rent shows that this lady to whom the kabuliat was given had the real title. Each and every one of these facts, however, is quite consistent with a benami transaction. In fact, it would be inconsistent if it were not so, as all the subordinate parts are in such cases notoriously fitted in to correspond with the benami arrangement in its integrity. It has been laid down in the case of *Gopeekrist Gosain v. Gunga Persaud Gosain* 6 Moore's I.A., 53, that benami transactions are to be regarded as a recognised system amongst Hindoos: further, that they may be bond fide or not, and that the criterion of such bona fides may be taken by seeing whence the money came.

5. Taking this view of the Privy Council in the case cited as a guide, the question which the lower Appellate Court ought to have tried was, whether, with all the facts as stated above in favour of the plaintiff, there still might not be only a benami or fictitious title in his lessor. It is well known that a benamidar-recorded proprietor has to pay the revenue, receive the rent, do everything in the collectorate in connection with the revenue affairs of his estate, using the benami name; and such person, moreover, is the only person who is entitled to draw the excess funds from the collectorate, being the recorded proprietor, though not the real proprietor. We have been referred to the case of *Mussamat Purnia v. Torab Ally* 3 Wyman's Rep., 14, but the real question in that case was not as regards the ownership of the land, but as to the trusteeship. There is the case of *Bipin Behari Chowdhry v. Ram Chandra Roy* 5 B.L.R., 234. The illustration of the

benami system by Mr. Justice Louis Jackson is exactly in point,--viz. that A. contracts with B., though by the desire and for the convenience of one or other of those parties, the name of C. is used instead of the name of the party. In such a case C. did not contract at all. He was not the agent for either, but was and is a stranger to the whole business." In that view it would be impossible to say that really the contract in this case was with Anusul Burkut, to whom the kabuliat was given, if in fact her husband is upon the evidence shown to be the real owner, and to have had the real profits transferred to him after they had gone through the necessary form of passing through his wife's hands as benamidar. Whether it was really benami or not, and whether the real title was with the husband, or with Anusul Burkut, or with the co-wife, were points which were necessary to be investigated before a proper decision could be come to in this case. It is said that this was only a suit for rent, and that the question of title could not be decided in such a suit; but it has been laid down that although the jurisdiction of the Revenue Courts is limited to the trial of suits for rent, yet they are not precluded from trying questions of title when requisite in order to enable them to come to a decision as to who is entitled to the rent. In one case Sir Barnes Peacock observed, that if questions of title cannot be gone into in a suit for rent, any ryot wishing to evade payment of rent has only to collude with the lakherajdar, set up a lakheraj title, and defeat the landlord's just claim for rent.

6. For the above reasons I would remand the case for re-trial on the merits.

Paul, J.

7. I also think that the case should be (sic) (sic) tried on the merits. This case is very clear and (sic) The plaintiff's allegations are that he obtained a putni from a certain lady named Anusul Burkut, who is one of the widows of Golam Hossein; that this lady was the owner of the whole sixteen annas of the property which once belonged to Golam Hossein, and which was made over to this lady by gift; and that is such owner Anusul Burkut was entitled to create, and she? created, the said putni deed in his favour. That the defendant executed a kabuliat, or the counterpart of a lease, in favour of the lady from whom the plaintiff claims, and that thus the plaintiff became entitled to the rents of the lands comprised within the zamindari. He therefore brings this suit for arrears-of rent due to him. The defendant's allegations are that he is the tenant, so to speak, of only one-sixteenth of the property in suit to the plaintiff, and that he is the tenant of a fifteen-sixteenths share to the other heirs of Golam Hossein, and that Golam Hossein was the real proprietor of the land, and only made use of his wife Anusul Burkut's home in the papers as benamidar for him; that after Golam Hossein's death, one-sixteenth share of his property vested in the widow, through whom the plaintiff claims, and fifteen-sixteenths rested in the other heirs, through whom he (defendant) claims. In short, the point in issue was whether or not the lady Anusul Burkut was the de facto landlord of the defendant. That question was a simple question to try upon the evidence, but (sic)ed doing so, the Judge disposed of the substantial case put forward by the defendant by adjudicating in

the plaintiff favor upon the question of estoppel raised by him, and applying the technical doctrine of estoppel obtaining under the English law. The Judge considered that he could not look behind the kabuliat which was admitted by the defendant, inasmuch as a "tenant could not deny his landlord's title. My learned colleague has pointed out how this mode of treatment amounts to a begging of the whole question, I do not propose to discuss here the doctrine of estoppel, but as this subject is so often used in arguments, and in grounds of appeal before the Court, I wish to make a few remarks with reference to it. In England, where the usage denoted by benami transactions is wholly unknown, it is supposed, and therefore assumed, that all deeds and conveyances truly represent the titles of parties set forth in them. Deeds are called solemn instruments; they are executed after considerable deliberation, and under the guidance, with the advice, of able legal advisers. In England, and in fact, wherever the English law prevails, and English institutions exist, it is right to suppose that what is stated in deeds and other similar documents represent the true state of things, and, consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. But in this country, it being well known that documents are neither so drawn nor executed as in England, and it being equally well known that persons make statements wholly regardless of the truth for present and ulterior purposes, it would be unsafe and unjust to hold parties strictly to statements made by them in deeds and other documents, and to apply the technical doctrine of estoppel in the manner in which that doctrine is applied in cases governed by English law. The tendency of the Privy Council decisions has been to make the law harmonize with justice in each case, and it would be departing from this wholesome and beneficial rule to apply the doctrine of estoppel to cases which are not governed in this country by English law. As the Courts of this country are constituted, they should so decide cases that the real truth should be arrived at, and should be made to prevail by their decrees. The application of a technical doctrine which must, I believe, lead to inevitable fraud and clear injustice, should neither be enforced nor adopted by Courts which are directed to decide cases by the principles of justice, equity, and good conscience. The question between the parties was very simple,--viz., was the lady Anusul Burkut the real proprietor of the whole sixteen annas of the property in suit? and I regret to find so simple a question entangled with a technical rule of the English law of evidence. I would observe, that although the rules of evidence as they obtain in England are drawn from experience of human affairs by eminent men, it cannot be maintained that that experience is the same everywhere and should be universally accepted. As to the broad principles of evidence, no doubt they must be everywhere the same; but the question here is whether any highly technical doctrine ought to have any place in the course of the administration of justice, amongst a people whose institutions and usages differ widely from those which exist amongst western nations; and I consider the question admits of one correct answer, namely, that the technical doctrines of one system of laws should not be imported into another and wholly different system. The case must, therefore, be remanded to be tried on its merits, and in trying it, the Court below

should minutely examine all the facts of the case, and give due weight to each circumstance. For instance, it has been represented to us in the course of the argument (I only say represented," for I do not wish to conclude parties by any statements of the facts by me) that the property in dispute was the sole property of which Golam Hossein died possessed. If it were so, it would be a strong circumstance to take into consideration in determining whether the alleged gift by Golam Hossein was ever made in favor of the one wife to the exclusion of the other, for whom also it is not denied that he had a strong attachment, and by whom he had children.

1

Before Mr. Justice Loch and Mr. Justice Macpherson.

The 9th July 1869.

Jainarayan Bose and Others (Defendants) v. Kadimbini Dasi (Plaintiff).

Special Appeal No. 604 of 1869, from a decree of the Officiating Judge of Moorshedabad, dated 1st March 1869, reversing a decree of the Principal Sudder Ameen of that district, dated 31st January 1868.

Mr. J.S. Rochfort, Baboo Srinath Das and Durga Das Dutt for the appellants.

Baboo Mahesh Chandra Chowdhry for the respondent.

This judgment of the lower Appellate Court confirmed by the High Court in Special Appeal No. 604 of 1869, was as follows:-

This is an appeal against a judgment of the Subordinate Judge dismissing a suit for rent of a certain filature instituted by appellant against respondent No. 1 (Mr. J. Perrin), on the ground that plaintiff (appellant) is only the nominal lessor of the filature, and that the transaction upon which the suit is founded was a "benami transaction." The "kabuliat executed by the defendant, Mr. J. Perrin, in favor of plaintiff (appellant) has been produced, and its execution admitted. The defendant, however, alleges that he has paid rent under the lease not to plaintiff, but to certain relations of her's, Jainarayan Bose and others (who have accordingly been made co-defendants by the lower Court), and he denies his liability to plaintiff as his lessor.

The case has been argued at great length on both sides, principally with the view of showing whether the transaction was or was not benami." The lower Court decided the suit partly on the ground that the plaintiff was only the nominal lessor, but principally on the ground that plaintiff had failed to prove actual receipt of rent for the filature previously to the institution of this suit. In Adopting this question of actual receipt of rent as the principal issue in the case, the lower Court appears to have been under an erroneous impression. That, no doubt, is the issue to be decided in a suit of this nature under Act X of 1859, but in a civil suit the right of the plaintiff to receive rent must be decided without reference to the receipt or non-receipt of rent previously, except so far as the evidence on

this question may assist the Court in deciding the question of title.

The question in this case is whether the defendant, Mr. J. Perrin, can avoid the terms of his written contract, on the allegation that plaintiff is not the real but is the nominal lessor,

It is one of the most settled rules of law that a lessee is estopped from denying the title of his lessor, and this rule has been constantly acted upon in this country. In the case of *Mussamat Purnia v. Torab Ally Wyman*'s Rep. 14, the High Court ruled that the question of lessor's title was one foreign to a suit for rent instituted against the lessee, though the ostensible lessor might very likely be merely a trustee, and as such liable to account to the cestui que trust. Other cases to the same effect might be quoted, and the principle laid down is no doubt, of universal application. It is true that in cases of Bale and purchase, evidence is admitted to show that the parties really interested are different from those whose names appear in the written instrument, but I am not aware that a similar course of procedure has been followed in cases as between lessor and lessee. Looking at the question as one simply of law, I am of opinion that the order of the lower Court must be set aside.

As regards the facts of the case, I feel bound to record my opinion that the defendants, on whom the onus pro-bandi" lies, have failed to prove that any one but the plaintiff has the real ownership of the property in question. I have read the evidence and heard the arguments of the pleaders, but nothing contained in one or the other amounts in my opinion to proof on this point. The presumption is one in favor of the plaintiff, and this is not set aside.

I therefore decree this appeal and reverse the judgment of the lower Court and remand the case u/s 351 for trial on the merits, i.e., as to the amount of rent actually due to plaintiff. Costs to follow the result of re-trial. Stamp to be refunded to appellant,

The following was the judgment of the High Court:

The judgment of the lower Appellate Court is perfectly right, and we see no ground for interfering with it. We dismiss this appeal with costs.