

(1969) 07 GAU CK 0007

In the Gauhati High Court

Case No : Second Appeal No. 99 of 1965

Keshab Chandra Das and Others

APPELLANT

Vs

On the death of Sriram Chandra Dag (Plaintiff) his legal representatives (Macihab Chandra Das and Others) and Another

RESPONDENT

Date of Decision : 23-07-1969

Acts Referred:

Limitation Act, 1963 — Article 142, 144

Registration Act, 1908 — Section 49

Suits Valuation Act, 1887 — Section 8

Citation : (1969) 07 GAU CK 0007

Hon'ble Judges : P.K. Goswami, J

Bench : Single Bench

Advocate : R.K. Goswami and D.C. Goswami, for the Appellant; D.K. Sarma and J.N. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Goswami, J.—This second appeal is on behalf of the principal Defendant. The Plaintiff brought a suit for declaration of his right and title over the suit land measuring 2 Kathas 12 1/2 lechas in Barpeta town described in schedule Kha to the plaint. This land originally belonged to the principal Defendant, who sold the same to the Plaintiff by executing a registered sale deed on 11-2-43 for a consideration of Rs. 1,000/-. The Defendant had his houses over the suit land and although it is recited in the document that possession was delivered, he took permission from the Plaintiff for removal of his houses within 6 or 7 months and the Plaintiff agreed to the same. The Plaintiff got his name mutated in the record of rights. The Defendant was unable to remove the houses within that time and requested for permission to continue there and on 14-8-43 he executed an unregistered kabuliyat in favour of the Plaintiff agreeing to pay a rent of Rupees 5/- per month and stay there for one year after which he will remove his houses without notice. The Plaintiff agreed to the said arrangement.

After the expiry of one year also he could not vacate and executed two successive unregistered kabuliyats on 15-12-46 and 15-12-47 agreeing to stay on the land by paying an annual rent of Rupees 60/-. The Defendant ultimately did not vacate and the Plaintiff has been unsuccessfully asking him to vacate the land since 1954 and finally on the 27th February, 1956 (14th Falgoon 1362 B. S.) he served a registered notice on the Defendant asking him to vacate on the expiry of 30th Falgoon, 1362 B. S. There was also a demand in this notice for payment of arrear rent for three years from 1953 to 1955 amounting to Rs. 180/-. The Defendant received the notice on 28-2-56 but did not comply with the same and hence the suit.

2. The Defendant admitted to have executed the sale deed on 11-2-43 but stated that that was not a genuine sale but only a benami transaction to save the property from his creditors. He avers that the Plaintiff was Ms class-mate from school and a special friend and, therefore, he in honest belief put his trust on him and made this benami transaction. He also stated in paragraph 9 of his written statement that the property in suit at the time of alleged sale was in much worse condition than it was at the time of his filing the written statement and that the Defendant had "improved the property at his own costs several times". Defendant also admitted to have executed the three kabuliyats but stated that these were part of the Defendant's benami sale to the Plaintiff in order to give a colour of genuineness to the benami transaction. He stated that no rent was ever paid to the Plaintiff and he denied to have made the various promises attributed to him. He questioned the validity of the notice and also the pecuniary jurisdiction of the court stating that the land in suit was of the value of more than Rs. 4,000/-.

In an additional written statement filed more than a year after his first written statement, he averred that the kabuliyats were inadmissible and illegal and as such the Plaintiffs right and title are barred under Articles 142 and 144 and other provisions of the Limitation Act, even if it could not be proved this the Plaintiff is not a benamidar for the defendant as alleged in his earlier written statement.

3. The learned Munsiff framed the following issues:

- (1) Whether the suit is maintainable?
- (2) Whether the suit is barred by limitation?
- (3) Whether the suit is bad for nonjoinder of the Defendants?
- (4) Whether the Plaintiff has right, title and interest over the suit lands?
- (5) Whether the notice to quit on the Defendant was valid?
- (6) Whether this Court has jurisdiction to try the suit?
- (7) Whether the aliened sale of the suit land was benami?
- (8) To what relief the parties are en-titled?

The learned Munsif in answering issue No. 6 held that the land in suit was of the value of more than Rs. 2,000/-, which is his pecuniary jurisdiction, but since the suit is between the landlord and tenant, he had jurisdiction to try the suit, which has been correctly valued on the basis of the annual rental of the property, which will also be the amount for the purpose of jurisdiction u/s 8 of the Suits Valuation Act. He answered the issues in favour of the Plaintiff and decreed the suit with costs with regard to the Plaintiff's prayer for khas possession over the suit land, but dismissed the Plaintiff's claim with regard to rent.

4. The Defendant took an appeal to the Subordinate Judge and there was also a cross objection filed by the plain-till with regard to the refused rent. The Subordinate Judge set aside the decree of the Learned Munsiff and remanded the suit to him for fresh disposal by deciding the following issues, namely:

(1) Whether there was any relationship of landlord and tenant between the Plaintiff and Defendant No. 1?

(2) If so, whether the tenancy was legally determined by service of any valid notice?

(3) Whether the Defendant is liable to pay any arrear rent and if so what amount?

(4) To what relief, if any, the parties are entitled?

It appears, the Subordinate Judge had observed first that the Munsiff had pecuniary jurisdiction to try the suit as he agreed with the finding of the learned Munsiff that the suit was by the landlord against the tenant.

5. The Defendant was not satisfied with this remand order and filed a revision petition before the High Court, being Civil Revision No. 70/61, and Mehrotra, C.J. on 30-5-62 set aside the order of remand and sent back the case to the Subordinate Judge to dispose of the appeal on merits. It is, therefore, apparent that after the order in this revision, the matter was in the same position as it was after the passing of the judgment and decree by the Munsiff. It is not possible to read the judgment of the learned Chief Justice as indicating that his Lordship at all gave any decision on the points that arose for consideration in the appeal before the Subordinate Judge. The matter is, therefore, as it was when the appeal was first preferred before the learned Subordinate Judge and after the remand order of the Subordinate Judge has been set aside, the whole matter will be at largo before that court in pursuance of the High Court's order in revision.

6. The learned Subordinate Judge after remand answered issue No. 6 in favour of the Plaintiff by holding after appreciation of the evidence led by the parties that the value of the land in suit was not more than Rs. 2,000/-, and he fixed the value at Rs. 1,500/- both for the purpose of court-fees and for jurisdiction. The learned Subordinate Judge, therefore, held that the suit was within the pecuniary jurisdiction of the Munsiff and he treated the suit as being one for declaration of the Plaintiff's right and title to the same and for khas possession. The Subordinate Judge held that the suit was maintainable and that it was not bad

for non-joinder of Defendants. He also held that the same was not barred by limitation. He held that the Plaintiff had right and title to the suit land by virtue of the registered sale deed and rejected the Defendant's plea of benami transaction. He also held that the notice given by the Plaintiff was a valid notice and was duly served. He thereupon decreed the suit in Plaintiff's favour by declaring his right and title to and for khas possession of the property and ordered the Plaintiff to pay additional court-fees, which had since been paid by the Plaintiff. He also decreed the Plaintiff's claim for Rs. 180/- as arrears of rent on the cross-objection filed by him.

7. Mr. Goswami, the learned Counsel for the Appellants submits that the learned Subordinate Judge erred in law in interfering with the finding of the learned Munsiff, which had been earlier affirmed by his predecessor-in-office in the previous appeal with regard to the question of pecuniary jurisdiction. He further submits that the Subordinate Judge, therefore, had only one alternative before him to dismiss the appeal on his own Interpretation of the plaint as a suit for declaration of right, title and khas possession on the point of jurisdiction.

The above argument is based on a misconception of the judgment of the learned Chief Justice in the Civil Revision. As noted earlier, there is no decision of the High Court with regard to the question of jurisdiction, nor about the finding relating to the value of the property. The earlier judgment of the learned Subordinate Judge having been set aside by the High Court, the reasonings and findings of the Judge in that appeal did not survive after his judgment had been set aside and the whole matter was remanded back to the same court for disposal of the appeal. The learned Subordinate Judge was, therefore, competent to rehear the entire matter in the first appeal before him.

Reading the judgment of the Subordinate Judge, it is clear that both the parties addressed the court on issue No. 6 regarding pecuniary jurisdiction of the Munsiff. The Plaintiff while supporting the decree, could do so even by showing that some of the findings of the court below were wrong provided in doing so, he is supporting the ultimate decree of the court. Since the learned Munsiff held that he had pecuniary jurisdiction to try the suit on the footing that the suit was between the landlord and tenant, the Plaintiff could support his jurisdiction on the basis of an argument that even as a title suit, the Munsiff would have jurisdiction to try the suit, if the property can be shown to be of the value of not more than Rs. 2,000/-, which was the pecuniary limit of the Munsiffs jurisdiction.

It is exactly this position, which appears to have been taken by the Plaintiff as appearing in the judgment of the learned Subordinate Judge. The learned Subordinate Judge after appreciating the entire oral and documentary evidence, came to the conclusion that the property could not be valued at more than Rupees 2,000/- and this finding of fact cannot be interfered with in second appeal. The objection of the learned Counsel for the Appellants, is, therefore, not tenable in law.

8. The learned Subordinate Judge also found against the Defendants on the benami plea set up by him. The [learned counsel submits that the evidence of the witnesses, particularly that of Sri Talukdar and Sri Sadananda on that point were not considered in proper light. In this context, he relies upon a decision of the Supreme Court in the case of Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, This decision has explained the meaning of the expression "benami". It is observed thus:

The word "benami" is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transact" at which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word "benami", is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B.

But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid.

The benami transaction which is referred to by the learned Counsel is of the second type. According to him, there was no sale and the transaction was a sham transaction. In order to establish this, he had to establish that there was absolutely no consideration for the sale. There is however a concurrent finding of fact of the Courts below against the Defendants en this point. The Courts below have found after appreciation of the oral and documentary evidence that there was passing of consideration for the sale in question. That being the position, the plea of benami sat up by the Defendants falls through. It follows therefore that the Plaintiff has established his title to the land in suit.

9. The next question to be considered is whether after the sale, the Defendants remained in the land with permission from the Plaintiff and later as his tenants. Mr. Goswarni submits that Exts. 3, 7 & 8 are inadmissible in evidence and they should not be relied upon for any purpose whatsoever. It is difficult to appreciate this submission in view of the provisions of Section 49 of the Indian Registration Act. Even if a document is compulsorily registrable and is not registered, the said document may be received as evidence of any collateral transaction not required to be effected by a registered instrument. These documents therefore show the

nature or character of the possession of the Defendant after title had passed to the Plaintiff from him. The fact that the first Kabuliyat was made after six months of the sale goes to support the story of the Plaintiff that the Defendant had initially promised to vacate within a few months. The execution of Ext. 3 supports this statement of the Plaintiff. Although therefore these documents are not admissible as lease, they would however establish the nature of at least the permissible possession of the property by the Defendant. That being the position, there is no question of limitation in this case.

10. Mr. Goswami strenuously relied upon a decision of the Supreme Court in the case of *Mst. Kirpal Kaur Vs. Bachan Singh and Others*, in support of his contention that Exts. 3, 7 & 8 should not be received in evidence to show the nature of possession in this case where the Defendant had already been in possession of the land. He draws my attention to the following passage at para 14 of the report where their Lordships have distinguished the case of the Privy Council in *Varada Pillai v. Jeevaruthnammal* AIR 1919 P.C. 44.

In *Varada Pillai's* case, *Duraisami* had got into possession only after the caption and claimed to retain possession only under the gift mentioned in it. The petition was therefore admissible in evidence to show the nature of her possession. In the present case *Harnam Kaur* had been in possession before the date of document and to admit it in evidence to show the nature of her possession subsequent to it would be to treat it as operating to destroy the nature of the previous post-session and to convert what had started as adverse possession into a permissive possession and, therefore to not give effect to the agreement contained in it which admittedly cannot be done for want of registration. To admit it in evidence for the purpose sought would really amount to getting round the statutory bar imposed by Section 49 of the Registration Act. In the instant case before this Court, the documents are not relied upon for the purpose of extinguishing any right or title in the Defendant. The Plaintiff's right and title is based upon the sale deed which has been found to be validly executed by the Defendant for adequate consideration. On the date the sale deed was executed, the Defendant himself, by this deed, extinguished his right and title to the land in favour of the Plaintiff who is now filing this present suit for declaration of his right and title based on that deed and for khas possession. This case is therefore clearly distinguishable on the particular facts and circumstances of the case from those that obtained in the above Supreme Court decision.

In the decision of the Supreme Court the agreement was sought to be relied upon to effect the right of the widow who had agreed in pursuance of this agreement. In this case, the Plaintiff is not at all relying upon Exts. 3, 4 & 7 in order to establish his title. These documents are only an answer to the claim of the Defendant to a possible plea of limitation by adverse possession. These documents are therefore clearly admissible u/s 49 of the Indian Registration Act to show the nature of possession and they are not relied upon for the purpose of effecting any right title or interest in the land. The right and title of the

Defendant had already been extinguished by virtue of the sale deed extinguished by him in favour of the Plaintiff. Since these documents are unregistered, they created a monthly tenancy which has been also validly determined in this case. The principle laid down in Varada Pillai's case (supra) is clearly applicable and the decision of the Supreme Court in Mst. Kirpal Kaur Vs. Bachan Singh and Others, does not come to the aid of the Appellant. The Plaintiff has therefore established his right and title to the property and is entitled to get a decree for khas possession of the property on declaration of his right and title as claimed. He is also entitled to the decree for Rs. 180/- as arrears of rent.

11. Disposal of this appeal had to be delayed as I discovered that the memorandum of appeal was insufficiently stamped when considering judgment. The Appellant was therefore given time to deposit the deficit court-fee which has since been made.

12. In view of the foregoing discussion, there is, therefore, no substance in this appeal which is dismissed and in the entire circumstances of the case, there will be no order as to costs in this appeal as well as in the courts below. The Defendants are allowed six months' time to vacate the land.