
(1928) 08 CAL CK 0020
In the Calcutta High Court

Macneil and Co.

APPELLANT

Vs

Saroda Sundari Debi and Others

RESPONDENT

Date of Decision : 14-08-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1929 Cal 83 : 114 Ind. Cas. 142

Hon'ble Judges : Bose, J;B.B. Ghose, J

Bench : Full Bench

Judgement

Bose, J.—The Appeal No. 10 of 1926 arises out of Title Suit No. 15 of 1923 and the Appeal No. 102 of 1926, arises out of Suit No. 1 of 1924. Both the Suits Nos. 15 of 1923 and 1 of 1924 were tried together by the Subordinate Judge, 2nd Court, Hooghly. The properties in dispute originally belonged to Earn Chand Chatterji. The following short genealogical table will be of use in understanding the facts of the case:

Ram Chand Ghatteerjee | Prasanna Kumar died in 1885. Wife Saroda Sundari Debi Plaintiff 2. | _____ | | |
Debendra Nath Surendra Nath Rajendra Plaintiff 1 Defendant 3 Died unmarried in 1899 2. Each of the brothers Debendra, Surendra and Rajendra inherited 1/3 share and on the death of Rajendra their mother Saroda Sundari, plaintiff 2 inherited his 1/3 share.

3. Defendant 2 Messrs. Macneil & Co., with a view to construct mills began to acquire lands in the village of Bansberiah and the neighbouring villages. Defendant 1 Babu Pran Krishna Chatterji appears to have been employed by the company for the purpose of helping the company in the acquisition of large quantities of lands. Pran Krishna accordingly proceeded either to purchase or to take permanent leases of lands and then to grant sub-leases to defendant 2 company. Defendant 3, Surendra, helped defendant 1 in all these transactions. Surendra on "behalf of himself and his brother Debendra granted mourashi mokurari patta in respect of 16 annas share of the disputed lands (7 plots) in

favour of defendant 1 Pran Krishna on 23rd June 1921. Plaintiff 1 Debendra resided at the time at Lucknow where he was in the service of the railway company. Surendra held a general power-of-attorney from the plaintiff 1 Debendra. The management of the properties was left with Surendra who used, to pay and realize rents and looked after the properties in a general manner

4. Plaintiffs' case is that Surendra had no right to grant permanent lease and that the lease in favour of defendant 1 was a fraudulent and collusive transaction and the rights of the plaintiffs could not be affected by the lease. The subject-matter of the Suit No. 15 of 1923 is plots 2 to 7 of the lease. The area is 19 bighas 4 cattas and 11 chittaks of land. In this suit plaintiffs' prayer is for declaration that they have 2/3rds share and for partition. In Suit No. 1 of 1924 the subject-matter is the plot 1 of the disputed lease. Its area is 2 bighas. Plaintiffs in this suit pray for declaration of right and for confirmation of possession of land.

5. The defence of defendants 1 and 2 inter alia is that the suits are not bona fide, that defendant 3 Surendra had full authority to grant the permanent lease under the general power-of-attorney executed by plaintiff 1 Debendra, that the plaintiff's and Surendra formed an undivided Hindu joint family of which Surendra was the karta, that the plaintiffs were all along aware of the transactions and have ratified them, that the joint family was benefited by the transaction, that the disputed lease was for a selami of Rs. 650 per bigha and on a rental of Rs. 20 per bigha, that Rs. 13,180 was paid as selami, that the suits have been instituted at the instigation of Surendra, that the suits are not maintainable in the present form and that the suits are barred by estoppel, acquiescence and waiver. I should mention here that defendant 1 has granted a permanent lease in respect of the lands in favour of defendant 2.

6. The learned Subordinate Judge dismissed the claim of plaintiff 1 Debendra but he decreed the claim of plaintiff 2 Saroda Sundari. He has held that plaintiff 2 has 1/3rd share in the land in Suit No. 15 of 1923 and so he has passed a preliminary decree in this case directing, the partition by metes and bounds. In Suit No. 1 of 1924 he has held that the plaintiff 2 has 1/6th share in the jamai right in the 2 bighas plot. So he has declared plaintiff 2's 1/6th share and confirmed her possession in it. Defendant 2 company prefers this appeal.

7. The appeal came on for hearing on 25th May 1927 before this Court when the following two issues were framed and sent down to the lower Court for specific findings upon the evidence on the record and upon such further evidence as the parties might adduce.

1. Whether plaintiff 2 is estopped from asserting her right to the property in suit by reason of her conduct or of any statement made by her or of her silence when it was her duty to speak? 2. What is the area of the lands in the possession of the tenants under plaintiff 2 and her cosharers which were purchased by Debendra or Surendra either at a Court sale or by private treaty and whether

plaintiff 2 was entitled to khas possession of these lands in any event?

8. The learned Subordinate Judge after taking further evidence has found that the plaintiff 2 is not estopped by reason of her conduct or of any statement made by her or of her silence; with regard to the second issue his finding is that the total quantity of land in the possession of tenants under plaintiff 2 and her co-sharers which was purchased by Surendra and Debendra is 6 bighas 3 cattas. He is of opinion that these tenants had under-raiyati interest and that after they vacated the lands these reverted to the khas possession of their landlords plaintiff 2, Surendra and Debendra and so plaintiff 2 is entitled to get khas possession of her 1/3rd share in the said 6 bighas and 3 cattas. He also finds that the "Pataria" tank which was surrendered by the tenant and the land held by Punna Das came into the khas possession of plaintiff 2 and her cosharers.

9. The appellant company has taken objection to the findings of the learned Sub-Judge on the two issues stated above. The first point urged by the learned Counsel appearing on behalf of defendant 2 is that defendant 2 was protected in the circumstances of the case by Section 41, T.P. Act. It is in evidence that defendant 1 Pran Krishna Chatterji had great confidence in defendant 3 Surendra--defendant 3 Surendra Nath says in his deposition that he helped defendant 1 P.K. Chatterji in the matter of acquisition of lands in that locality for defendant 2 and that P.K. Chatterji had confidence in him. There were dealings by defendant 3 at the time in thousands of rupees of defendant 1. The office of defendant 1 was located in the house of defendant 3. Defendant 1 occasionally went there. When the office was opened there the females of Suren's family used to cook the food for defendant 1 and his officers. Suren's daughter had some trouble in her eyes and both Suren and Deben went with her to defendant 1's Calcutta house for treatment on one occasion and remained there. The properties in dispute belonged to Prasanna Kumar Chatterji who died in 1885 leaving the widow plaintiff 2, Surendra, defendant 3, Debendra, plaintiff 1 and Rajendra who died in 1899. On the death of Rajendra plaintiff 2 Saroda Sundari inherited his 1/3rd share. Defendant 1 did not know at the time of the patta that Surendra and Debendra had a brother Rajendra and that the mother inherited the 1/3rd share of Eajendra. Defendant 3 Surendra in the permanent lease granted to defendant 1 stated that he and his brother Debendra had the 16 annas share. Some dakhilas, kabuliats, copies of plaints, decrees and sale certificates were produced before defendant 1 by Suren, defendant 3. The dakhilas were granted by Surendra and Debendra to tenants in respect of some of these lands. Ex. G, registered kabuliat was executed by one Purna Chandra Das in favour of Debendra and Surendra on 24th May 1916 in respect of some of these lands. Ex. J. will show that Debendra and Surendra instituted a suit for recovery of arrears of rent in April 1917 against Umasashi, widow of Purna Chandra Das in respect of lands. Ex. 1 is the decree passed in favour of Surendra and Debendra. Ex. K to Ex. K-2, sale-certificates show that Surendra and Debendra purchased some of the lands at sales held in execution of their decrees.

10. It will be seen that the rent receipts were granted by the two brothers, the kabuliats were obtained by the two brothers and rent suits in respect of the lands were instituted by the two brothers. The two brothers have been dealing with the properties for many years. The evidence of defendant 3 Suren is that his mother's name was not explicitly disclosed in any dakhila granted by them, that all the settlements were made in the names of himself (Suren) and his brother Deben and not in his mother's name and that Sarat Rajak surrendered his holding in the names of the two brothers only. All the properties were recorded in the name of Deben in the settlement proceedings in 1907--I have already said that defendant 1 had great confidence in Suren. Reference has been made to the evidence of P.K. Chatterji defendant 1 where he says:

Suren and my manager usually approved title. They referred to me in cases where they could not understand. I also consulted my pleader and attorney.

11. This goes to show that in cases of doubts the documents were referred to P.K. Chatterji by Suren and P.K. Chatterji's manager, and that P.K. Chatterji in those cases consulted pleaders and attorneys. In the present case the title-deeds given to defendant 1 did not show any defect in the title of the two brothers Surendra and Debendra.

12. It has been urged on the side of the respondent that Ex. 9 mortgage-bond executed by defendant 3 in 1911 in favour of his brother-in-law showed that defendant 3 had one-third share, that defendant 3 had a brother Rajendra and that had defendant 1 enquired for incumbrances in the Eegistry Office he would have discovered the secret title of the mother. Ex. 9 does not relate to any of the properties in dispute. Had defendant 1 inspected the Registry Office he would have found in the index that some other properties had been mortgaged by Suren to his brother-in-law. That would not have led him to an enquiry as to the title of the properties which are the subject-matter of the lease.

It is a principle of of natural equity, which must be universally applicable that where one man allows another to hold himself out as the owner of an estate and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man who so allows the other to hold himself out shall not be permitted to recover upon his secret title, unless he can overthrow that of the purchaser by showing either that he had direct notice or something which amounts to constructive notice, of the real title, or that there existed circumstances which ought to have put him upon an enquiry, that, if prosecuted, would have led to a discovery of it " : Ramcoomar Kundu v. Macqueen [1872] 11 B.L.R. 46.

Section 41, T.P. Act which was founded on the aforesaid dictum of the Judicial Committee requires the following conditions for its application--(1) that it was by consent, express or implied of the persons claiming title that another person is held out as the ostensible owner of such property ; (2) that such ostensible owner transfers it for valuable consideration ; (3) that the transferee has acted in

good faith and has taken reasonable care to ascertain that the transferrer had power to make the transfer.

13. The expression " reasonable care " in the section has been interpreted as meaning such care as an ordinary man of business or a person of ordinary prudence would take and it is not enough to assert generally that enquiries should be made or that a prudent man should have made further enquiries but some specific circumstances should be pointed out as the starting point of an enquiry which might be expected to lead to some result.

It is indeed, scarcely possible to declare a priori what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes :--First, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, encumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments to a knowledge of which he would have been led by an enquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice ; and, secondly cases in which the Court has been satisfied from the evidence before it, that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice. The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which in truth related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second class of cases proceeds, is not that the party charged had incautiously neglected to make enquiries, but that he had designedly abstained from such enquiries, for the purpose of avoiding knowledge, a purpose which if proved, would clearly show that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gesta* would suggest to a prudent mind, if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser, there the doctrine of constructive notice will not apply ; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice.

14. This is clearly Sir Edward Sugden's opinion (Sugden's Vendor and Purchaser Ed. 10, Vol. 3, pp. 471, 272), and with that sanction, I have no hesitation in saying it is mine also : see *Jones v. Smith* [1841] 1 Hare 43.

15. In the present case defendant 1 who had great confidence in defendant 3 Suren-dra was told by him that he and his brother Debendra had 16-annas share. Defendant 1 from the deeds viz., rent receipts, copies of plaints, sale-certificates, kabuliats etc., produced before him by defendant 3 found that the

two brothers had 16-annas share in the properties. Surendra no doubt in his deposition states that he told defendant 1 that he had a brother Rajendra. Defendant 1 denies having been informed about it by Debendra. I have already referred to the recital in the permanent lease to the effect that the two brothers had 16 annas share. There is no doubt that Surendra has perjured himself. The learned Subordinate Judge has also disbelieved the story of Surendra. Had the title of plaintiff 2 been disclosed in any manner to defendant 1 then surely he would have taken care to have plaintiff 2 joined in the lease as he was paying very good price for the property. In this connexion, I should state here that the finding of the Subordinate Judge Mr. M.N. Das to the effect that the mother was at Lucknow at the time of the lease is not supported by evidence. In order to come to the finding that the mother was at Lucknow from 1919 up to the date of the lease i.e., June 1921 the learned Subordinate Judge relies upon the evidence of plaintiff's witnesses and upon a post-card Ex. 13 written by Surendra to Debendra on 26th December 1919. The postcard certainly does not show that the mother was at Lucknow in 1921. The learned Subordinate Judge observes:

it is only defendant's witness, Rajendra Nath Choudhuri who says that Surendra's mother was at the Bansberiah house when Pran Krishna's office was located there. I feel no hesitation in rejecting this statement as unworthy of credit.

16. He is not correct there. There is the evidence of defendant 1 Pran Krishna Chatterji that when he opened his office in Suren's Baithakkhana Suren Babu's mother was at the house, that whenever he went to Bansberiah during the continuance of his work, he all along saw Suren Babu's mother in the house from 1919 to 1921, that he called her as mother also and she used to come out before him and that Suren's mother was aware of all the transactions in dispute at their respective times. There is no reason to disbelieve him as no question was specially put to him in cross-examination with regard to this matter on the side of the plaintiff-respondent.

17. It is now urged that as defendant 1 knew that Surendra had a mother he ought to have enquired of the mother if she had any share in these properties. Reference has been made by the learned advocate appearing for the respondent to the case *Azima Bibi v. Shamalanand* [1913] 40 Cal. 378:

The appellants were female members of a Mahomedan family which had adopted the Hindu religion in matters of worship, and as to which both Courts in India concurrently held that there was no custom proved excluding female members from inheritance which was the ease set up by respondent (who was a pleader of some standing). In a suit brought by the latter to enforce a mortgage bond which had been executed only by the male members of the family, in which the appellants were also joined as defendants, the first Court made a decree against the interest of the male defendants only in the property; but the High Court decreed the suit against both the male and female defendants on the ground that, because the female members had not actively interfered in the

management of the property, the male defendants must be taken to have represented them in the mortgage transaction. It appeared that in other transactions the male members of the family had dealt with the family property without the active concurrence of the females. Held : by the Judicial Committee (reversing the decision of the High Court), that the evidence did not prove that the male defendants had " represented " the appellants. The latter were pardanashin ladies, and naturally left the management of the properties to their male relatives. There was nothing to show either that the appellants had misled the respondent by word or conduct to the belief that they had no proprietary interest in the property; and he made no enquiries in the matter from them or from their husband as he might have done if he had any doubt in the matter. The decree of the High Court was therefore erroneous so far as it made the appellants liable, and should have been limited to making liable the only interests in the property of the male defendants, the executors of the mortgage bond.

18. In the present case as the property belonged to Hindus defendant 1 had no reason to suspect that the mother could have any share in the property while in the ruling referred to as the property belonged to Mahomedans, daughters would ordinarily get shares in the properties of their fathers. In these circumstances defendant 1 should be considered to be a bona fide purchaser without notice.

19. It has been urged on the side of plaintiff 2 that the consideration money for the lease has not been paid to defendant 3. (The judgment discussed evidence in this respect and concluded.) It is clear from the evidence both oral and documentary that the selami money for Ex. B lease has been duly paid to defendant 3. I have already said that defendant 1 had no direct notice of the title of plaintiff 2. There was no circumstance which would be calculated to put defendant 1 upon enquiry. I now find that the lease was for valuable consideration. In the circumstances of the case defendant 1 was protected by Section 41, T.P. Act. I therefore hold that defendant 1 and consequently defendant 2 has acquired valid and good title to the 16-annas share of the properties in dispute in the two suits i.e. Suit No. 15 of 1923 and Suit No. 1 of 1924 by virtue of the lease Ex. B.

20. The next point urged in Appeal No. 10 of 1926 on the side of the appellant is that in case of a decree for partition there should be a partition of all the lands of plaintiffs 1 and 2 and defendants 3. In my opinion there is substance in this contention and all the lands of the brothers and the mother should be brought into the hotchpot. In the first place defendants 1 and 2 are co-sharers of the two brothers and their mother. Defendants 1 and 2 obtained permanent lease of the lands and so they have subordinate interest. In the second place there is evidence on the record to show that defendant 3 and the two plaintiffs have other lands. The evidence of plaintiff 1 is that they have 18 bighas of land in Sultangacha, 4 bighas near Charaktola and some properties at Amta, They have also a commodious dwelling house. The general principle no doubt is that a co-sharer in joint property cannot by dealing with such property affect the interest

of the other cosharers therein. There can be a partition between parties the interest of one of whom is subordinate to that of the others. In the present case plaintiff 2 is an old lady over 80 years old. On her death the property will go to plaintiff 1 and defendant 3. In these circumstances we are of opinion that all the properties of plaintiff 1 and 2 and defendants 3 should be partitioned so that if possible the properties in dispute may be allotted to defendant 3 and plaintiff 1. In that case defendant 2 would be recouped out of the share of the lessors. I should mention here that it is not urged on the side of defendant 2 appellant that the suit is not maintainable in its present form inasmuch as all the properties have not been brought into the hotchpot. His contention which is to the effect that all the properties may be included so that as a matter of equitable relief defendant 2 may get these lands from the share of plaintiff 1 and defendant 3 and that plaintiff 2 may get her allotment elsewhere is well-founded. In this connexion I should mention here that the learned Counsel appearing for the defendant 2 states that defendant 2 is ready to bear all the costs of such partition. Reference has been made to *Sris Chandra v. Mahima Chandra* [1915] 23 C.L.J. 231 on the side of the respondents. It was a suit by a lessee for partition of the lands leased out to him. Defendant 2 no doubt can bring a suit for partition of these properties alone. So the ruling referred to above has no application to the present case.

21. In view of my finding on the first point i.e. regarding the protection afforded to defendant 2 u/s 41, T.P. Act, we hold that plaintiff 2 is not entitled to succeed in the two suits. The claim of plaintiff 1 has been dismissed in the lower Court and he has not preferred any appeal. So the Appeals Nos. 10 and 102 of 1926 are allowed with costs. The decrees and judgment of the Subordinate Judge are set aside so far as they were in favour of plaintiff 2. The suits are dismissed with costs. In Appeal No. 102 costs one gold mohur.

B.B. Ghose, J.

22. I agree.