

(1918) 04 CAL CK 0022
In the Calcutta High Court

Mahammad Shafikul Huq Chowdhury	APPELLANT
Vs	
Krishna Gobinda Dutta and Others	RESPONDENT

Date of Decision : 30-04-1918

Acts Referred:

Transfer of Property Act, 1882 — Section 54

Citation : 47 Ind. Cas. 428

Hon'ble Judges : Teunon, J;Richardson, J

Bench : Division Bench

Judgement

Teunon, J.—In execution of a mortgage decree three taluks belonging to the defendant-respondent in this appeal were brought to sale. The sale took place on the 4th May 1901, and was confirmed on the 1st of March 1902.

2. On the 8th of March the auction-purchaser transferred the properties by a conveyance executed ostensibly in favour of the present plaintiff-appellant.

3. His case is that the purchase was one made by him on his own account, while the defendant-respondent alleges that the purchase was for his benefit and that the plaintiff was his benamidar.

4. The question thus arising is the only question of fact we have to determine in this appeal.

5. It is not disputed that the purchase-money was in fact provided by the plaintiff, but this, the defendant says, was in pursuance of negotiations initiated before the execution sale and was in part payment to the defendant of a sum of Rs. 6,000 for which the defendant had agreed to sell to the plaintiff two smaller Bhils (Rongia Bhil and Rongia Howar) and an 8-anna share in a larger Bhil, the Souleswar Bhil. These Bhils, are part of the properties included in the mortgage and sold under the mortgage-decree first referred to. The remaining 8-anna share in the Souleswar Bhil had been previously sold by the defendant to one Abdul Hamid and others, this sale taking place after the mortgage but before the institution of the suit thereon. The Bhils, it may be observed, are excluded from

the plaintiff's claim.

6. That there was what may be called a secret arrangement between the parties is admitted by the plaintiff, who says however that the arrangement was not with regard to the 3 Bhils but with regard to the defendant's homestead, 5 rials of land adjoining the homestead and also a parcel of land outside the 3 mortgaged taluks known as Kobadigha Kotta.

7. The learned Subordinate Judge has accepted the case made for the defendant, and having been taken over the whole of the evidence I agree in his conclusions.

8. The auction-purchasers who executed the conveyance now in question were 4 in number, of whom two are dead. Of these two the son of one and the two brothers of the 2nd, and of the two survivors (both Mohammadans) one Mohammad Jaifar have been examined (by the defendant. They are disinterested witnesses and I cannot but attach importance to their evidence. That evidence is in itself reasonable and clearly explains how it was that for a small profit of Rs. 400 plus small portions of the lands in -suit (including a 2 anna share in each of 3 Bhils), they consented to give up to the defendant the valuable properties they had purchased and the defendant "thereupon discontinued his application for setting aside the sale. The defendant's evidence is further corroborated by that of Abdul Hamid, one of the purchasers of the second half of the Souleswari Bhil. As the result of the negotiations with the defendant, out of the 8 annas they gave up 3 1/2 annas. The defendant's case is further supported by the value of the 3 Bhils, and by the possession given by the defendant to the plaintiff immediately after the date of the conveyance of the remaining 9 1/2-annas share of Souleswari Bhil. The original arrangement with the plaintiff no doubt was that he was to take 8 annas in Souleswari and the extra 1/2 anna represents the 2 annas in the Rongia Bhil surrendered to the auction-purchaser.

9. The case for the plaintiff is supported only by the evidence of interested witnesses. For the reasons I have given I agree with the Subordinate Judge in holding that under the conveyance in question the real purchaser was the defendant and that plaintiff was merely his benamdar.

10. In this view of the case it is not very necessary to discuss the contention advanced by the learned Pleader for the appellant, namely, that title being in the plaintiff by virtue of the conveyance, the defendant cannot resist his claim for possession on the basis of a mere agreement to re-convey. In support of this view he has placed before us Section 54 of the Transfer of Property Act and the oases of *Immudipattam Thirugnana Kondama Naik v. Periya Dorasami* 28 I.A. 46 : 24 M. 377 : 5 C.W.N. 217 : 7 Sar. P.C.J. 811 (P.C.), *Timangowda v. Benepgowda* 28 Ind. Cas. 946 : 39 B. 472 : 17 Bom. L.R. 335, *Kurri Veerareddi v. Kurri Bapireddi* 29 M. 336 : 1 M.L.T. 153 : 16 M.L.J. 395 and *Maung Shwe Goh v. Maung Inn* 37 Ind. Cas. 938 : 44 C. 542 : 25 C.L.J. 108 : 21 M.L.T. 18 : 15 A.L.J. 82 : (1917) M.W.N. 117 : 32 M.L.J. 6 : 19 Bom. L.R. 179 : 21 C.W.N. 500 : 5 L.W. 532 : 10 Bur. L.T. 69. Even if I were to accept the appellant's contention

that title is in him, having regard more particularly to the immediate delivery of possession of Souleswari Bhil by the defendant, I should be inclined to hold that the present case falls within the principle enunciated in Puchha Lal v. Kunj Behary Lal 20 Ind. Cas. 803 : 18 C.W.N. 445 : 19 C.L.J. 213.

11. In the result in which my learned brother agrees, we dismiss this appeal with costs.

Richardson, J.

12. The appellant is the plaintiff in a suit for the declaration of his title to certain land, for possession and for mesne profits. The dispute relates to three taluks known by their numbers as No. 60, No. 32 and No. 21. These taluks originally belonged to the principal defendant, the defendant No. 1, Krishna Gobinda Dut. He mortgaged them to the Sylhet. Loan Co., and then sold a portion to the defendants Nos. 3 to 10, or partly to some of those defendants and partly to the predecessors of others. The mortgagee obtained a decree on the mortgage and in execution, on the 4th May 1901, taluk No. 60 was bought by defendants Nos. 14 and 15, taluk No. 32 by defendant No. 13 and taluk No. 21 by the father of defendants Nos. 11 and 12, the total price paid being Rs. 3,065. On the 8th March 1902, in pursuance of an agreement arrived at on 18th February 1902, when the plaintiff paid Rs. 400 as earnest money, the purchasers sold to the plaintiff for Rs. 4,000 all the lands so bought with certain exceptions. Formal possession was delivered to the plaintiff by the Court on the 26th April 1903 and confirmed on the 16th May 1903.

13. The plaintiff founds on the title created in his favour by the conveyance of 8th March 1902, but the suit does not extend to all the lands covered by that document. The three taluks comprise lands both on the north and on the south of the Kushi River. The lands on the south are known as Souleswari Bhil, Rangia Howar and Rangia Bhil. The case for the defendant No. 1 is that the plaintiff's purchase was made on his behalf under an oral agreement whereby the lands on the north of the river were to be his property and the plaintiff was to have the greater part of the lands on the south of the river at a valuation of Rs. 6,000, so that defendant No. 1 would receive from the plaintiff a sum of Rs. 1,600 in addition to the Rs. 4,000 which he had paid to the auction-purchasers and in addition to two sums aggregating Rs. 400 advanced by him during the course of the litigation.

14. As to the lands on the south of the river it is not disputed that the plaintiff is in actual possession of a 9 1/2-annas share of Souleswari Bhil. There were certain subsidiary agreements between the plaintiff and the other parties interested, namely, the prior purchasers from the defendant No. 1 and the auction-purchasers. In the case of the Souleswari Bhil a 4 1/2 annas share was taken by some of the prior purchasers, Hamid Ali and others, in lieu of the 8 annas (subject to the mortgage) which they had bought from the defendant No. 1. A further one-anna share was retained by certain of the auction-purchasers. I

need not further refer to this and the other subsidiary-agreements, except to say that it is in controversy whether the plaintiff or the defendant No. 1 was instrumental in bringing them about. On the evidence I agree with the Subordinate Judge that the agreement was procured by the exertions of the defendant No. 1.

15. As to the remainder of the lands as well on the south as on the north of the river, the further case made for the defendant No. 1 is that he has never been deprived of actual possession, though the lands were nominally sold to the plaintiff and possession was formally given to him. Both the plaintiff and the defendant No. 1 claim actual possession of Rongia Howar and Bhil (so far as they were nominally sold to the plaintiff). As the suit does not embrace these lands, the issue is not one which a final opinion need be expressed.

16. The suit is confined to the lands on the north of the river, as to which the plaintiff asserts that he lost possession by reason of an order made by the Magistrate u/s 145 of the Criminal Procedure Code on the 15th March 1912. On the evidence I accept the finding of the Court below that the defendant No. 1 was in possession throughout.

17. This statement of the facts leads to the crucial issues in the case, whether there was such an agreement between the plaintiff and the defendant No. 1 as the latter alleges, and if so, what was its legal effect. There is no doubt that these persons were at the time excellent friends and that the plaintiff intervened in the affairs of the defendant No. 1 at his request and in order to assist him. The evidence is that there were two agreements, one prior to the sales in execution and the other subsequent to those sales, in view of the altered position which then arose. It is common ground that the conveyance in the plaintiff's favour was preceded by some agreement between him and the defendant No. 1, but the parties differ as to its terms. The question is not entirely free from difficulty, but I agree with the learned Subordinate Judge and my learned brother that the evidence establishes the case made for the defendant No. 1. As in the case of the subsidiary agreements, it was he who induced the auction-purchasers to part with their rights for the small sum of Rs. 4,000 and as part of the whole arrangement he withdrew from the proceedings which he had instituted to have the auction-sales set aside.

18. It having been found that the agreement set up by the defendant No. 1 is established, the next question is whether it is in law a good defence to this action.

19. It is urged for the plaintiff that he has the legal title and that the legal title cannot be defeated unless the defendant No. 1 is in a position to prove a countervailing title under an instrument formally executed and registered, in compliance with the requirements of Section 51 of the Transfer of Property Act. The learned Pleader referred among other authorities to the decision of a Full Bench of the Madras High Court in Kurri Veerareddi v. Kurri Bapireddi 29 M. 336 : 1 M.L.T. 153 16 M.L.J. 395 followed in Chidambara Chettiar v. Vaidilinga

Padayachi 30 Ind. Cas. 408 : 38 M. 519 and in Ramanathan v. Ranganathan 43 Ind. Cas. 138 : 40 M. 1134 : 6 L.W. 300 : 22 M.L.T. 173 : 33 M.L.T. 262 : (1917) M.W.N. 757 and to the observations of the Privy Council in Maung Shwe Goh v. Maung Inn 38 Ind. Cas. 938 : 44 C. 542 : 25 C.L.J. 108 : 21 M.L.T. 18 : 15 A.L.J. 82 : (1917) M.W.N. 117 : 32 M.L.J. 6 : 19 Bom. L.R. 179 : 21 C.W.N. 500 : 5 L.W. 532 : 10 Bur. L.T. 69. No reference was made by him to the decisions of this Court based on Walsh v. Lonsdale (1882) 21 Ch. D. 9 : 52 L.J. Ch. 2 : 46 L.T. 858 : 31 W.R. 109 such as Puccha Lal v. Kunj Behary Lal 20 Ind. Cas. 803 : 18 C.W.N. 445 : 19 C.L.J. 213 and Rhagendra v. Sonatan 31 Ind. Cas. 987 : 20 C.W.N. 149, but it was contended that if there was ever an agreement capable of being specifically enforced the appropriate remedy, had not been sought within the time prescribed, by the law of limitation and the defendant. No. 1 was now too late to avail himself of any such rights.

20. Before dealing with these agreements let me turn for a moment to the nature of the transaction. It was suggested for the defendant No. 1 in the first place that the plaintiff was a mere benamidar and that the position was as if the defendant No. 1 had borrowed the Rs. 4,000 and then made, the purchase in the plaintiff's name. That, however, was not the form which the transaction took and it appears to me that the plaintiff was something more than a mere "name-lender." He paid the money out of his own pocket and he took in effect a substantial interest in at least a part of the property purchased. It seems nevertheless to come to this that as regards the land on the north of the river the plaintiff is a bare trustee. The plaintiff became the purchaser subject to the trust and confidence reposed in him by the defendant No. 1. In other words, he purchased the whole on behalf of the defendant No. 1 subject to the agreement between them. It is true that in the result the defendant No. 1 secures a part of the land without paying anything for it, but that was in accordance with the intention of all parties including the auction purchasers and it cannot be said that there was no consideration moving from the defendant No. 1 to the plaintiff. The consideration consisted of the influence which the defendant No. 1 brought to bear on the prior purchasers and the auction-purchasers in regard both to the principal agreement and the subsidiary agreements, of his withdrawal from the proceedings taken to annul the execution sales and of his promise that the plaintiff should retain a part of the land at a valuation. On the merits, the plaintiff's present claim is open to be stigmatized as fraudulent. He is seeking for an advantage which no one ever intended that he should obtain.

21. It is clear that the agreement has been in part performed. It was under the agreement that the conveyance was taken in the plaintiff's name, and this must be coupled with the fact that the plaintiff was allowed to remain in actual possession of the lands on the north of the river.

22. Again, there seems no reason why the agreement should not have been specifically enforced if the defendant No. 1 had instituted proceedings for the purpose within the time prescribed.

23. What then is the legal effect? As to Section 54 of the Transfer of, Property Act, the question is not as simple as might at first sight appear. Recent cases suggest that the Act does not contain the whole law on the subject of the transfer of property, because there are other Acts which contain provisions relating to the same subject : *Bapu v. Kashinath* 39 Ind. Cas. 103 : 41 B. 438 : 19 Bom. L.R. 100 and *Loke Yew v. Port Fwettenham Rubber Co.* (1913) A.C. 491 : 82 L.J.P.C. 89 : 108 L.T. 467. The Transfer of Property Act must be read for instance with the Specific Relief Act, by Section 3 of which (subject no doubt to Section 4) "trust" is defined as including "every species of express, implied or constructive fiduciary ownership," and "trustee" as including every person holding, expressly, by implication or constructively, a fiduciary character," Illustrations (g) and (h) apply, in no narrow spirit, the principle underlying these definitions to concrete cases. Moreover by Section 4 of the Transfer of Property Act, paragraphs 2 and 3 of Section 54 are to be read as "supplemental to the Indian Registration Act, 1877." There may be a doubt as to the precise effect of those words but it is perhaps permissible to advert to Section 48 of the Registration Act, which lays down that all non-testamentary documents duly registered under this Act and relating to any property shall take effect against an oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession." Apart, however, from that provision, which might raise a difficulty as to "delivery" of possession, Section 54 of the Transfer of Property Act is not of itself sufficient to carry the plaintiff home.

24. As to the argument that the defendant No. 1 cannot rely on the agreement because it is too late for him to sue for specific performance, it may be that he cannot now actively enforce his rights under the agreement by legal proceedings, but the answer to the argument seems to be that possession is itself a title (at any rate to remain in possession") which a plaintiff must displace before he can succeed. Here the plaintiff fails because equities founded on the agreement block his way. The possession which the defendant No. 1 was allowed to retain lulled him into security or partial security and there is no reason for denying him any advantage which that possession gives him. The" observation of Lord Moulton in *Loke Yew's* case (1913) A.C. 491 at p. 505 : 82 L.J.P.C. 89 : 108 L.T. 467 is apposite: "The present action from this" point of view is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and is cultivating it."

25. The defendant No. 1 states that he is still willing to perform his part of the agreement as regards the land on the south of the river.

26. I concur in thinking that the appeal should be dismissed.