

(1940) 08 CAL CK 0010
In the Calcutta High Court

Raja Jagat Kishore Acharjya Chowdhury and Others	APPELLANT
Vs	
Kulakamini Dasya and Others	RESPONDENT

Date of Decision : 06-08-1940

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 1941 Cal 233

Judgement

1. One Kamala Kanta Tarafdar was a wealthy man. He died leaving immovable properties of considerable value as also a money-lending business of an extensive character. His death occurred in August 1904. He left him surviving his widow Kulakamini and two minor sons Dharani and Tarini. Before his death he executed a will by which he appointed his widow Kulakamini executrix during the minority of his sons. By the will he gave his properties to his two sons Dharani and Tarini. Kulakamini applied for probate of the said will. The order for probate was made on 29th July 1905 and probate was actually issued to her on 7th September 1905. After taking out probate, she went into possession as executrix of the estate of her deceased husband and got her name registered as executrix in respect of the properties left by her deceased husband. Dharani, the eldest son, attained majority in the year 1908 or 1909 and Tarini, the youngest, in 1911. On 16th March 1913, Dharani along with two others Abedulla and Jamser took a lease of the 8 annas share of a certain forest from Raja Jagat Kishore for a term of six years. In the said forest Kamala Kanta had 1 anna odd gandas share as proprietor and Raja Jagat Kishore had 8 annas share. The lease was to begin from 1st Chaitra 1319, and to terminate on 30th Falgun 1325. The total rent payable under this lease to Raja Jagat Kishore was Rs. 50,000. Rupees 20,000 out of the said sum was paid at the date of the instrument of the lease and the remaining sum of Rs. 30,000 was made payable in two instalments, Rs. 12,000 on or before 30th Sravan 1320 corresponding to 15th August 1913, and the balance Rs. 18,000 on or before 30th Kartick 1321 corresponding to 16th November 1914. In default of payment of the said instalments interest was to run at the rate of Rs. 3-2-0 per cent. per month. As we construe the lease, there

was a provision that in default of payment of the first instalment of Rs. 12,000 the whole of the balance would become due and payable.

2. A large portion of the balance of rent was not paid to Raja Jagat Kishore with the result that on 12th January 1916, he instituted a suit for recovery of the amounts due to him against Dharani, Abedulla and Jamser. On 31st January 1917, a consent decree for Rs. 20,000 was passed in his favour. On 28th January 1918, the Raja started an execution against the properties in suit which had been the properties of Kamalakanta but which had devolved upon Dharani and Tarini by virtue of his will. The property in suit was sold in course of that execution and purchased by the Raja himself on 15th July 1919. Proceedings to set aside the said sale, started at the instance of the judgment-debtor, succeeded in the Court of first instance but on appeal the said sale was confirmed by this Court by its order dated 18th August 1923. On 4th June 1924, the sale certificate was issued to the Raja who took actual possession of the property purchased by him on 5th July following. Thereafter the Raja sold some portions of the properties purchased by him to defendants 2 and 3 who in turn sold a portion thereof to defendant 4. The present suit is a suit for recovery of possession instituted by Kulakamini on the basis of a trust deed, Ex. 1, executed in her favour by her sons on 28th April 1914. This suit was instituted on 15th June 1936, that is, a few days before the expiry of the period of limitation. In the said deed of trust, ex. 1, all the properties of Tarini and Dharani which they had got from their father as also the leasehold interest in the said forest were included. Nothing was left out of the trust deed. Kulakamini, however, was not made a party to Raja Jagat Kishore's rent suit or in the execution proceedings which followed and in which the property in suit was ultimately purchased by the Raja.

3. The plaint proceeds on the footing that by reason of the execution of the trust deed on 28th April 1914, in her favour by her sons Dharani and Tarini, the property in suit as well as other properties had vested in her, and inasmuch as she was not made a party either in the rent suit of Raja Jagat Kishore or in the execution proceedings the title which had vested in her as trustee has not been affected by the purchase of Raja Jagat Kishore at the execution sale. The suit, therefore, is entirely founded on the said trust deed, Ex. 1. The material portion of the defence which has been placed before us and on which the argument of Dr. Sen Gupta has proceeded is as follows: (1) that the document, Ex. 1 is not a trust deed at all; it is only a deed by which the management of the properties was conferred by Tarini and Dharani on their mother, the plaintiff. (2) That the said document, Ex. 1, represented a paper transaction; and (3) that it was a document executed with the intent of defrauding the creditors of Tarini and Dharani, that is to say, it was merely a cloak to shield the properties from their creditors. The learned subordinate Judge has overruled all the defences and has passed a decree in favour of the plaintiff for possession. In the appeal before us, the three points which we have noticed above have been argued on behalf of the defendants to the suit, namely the heirs of Raja Jagat Kishore and defendants 2, 3 and 4 who have derived title from Raja Jagat Kishore. We cannot accept the

first contention of Dr. Sen Gupta. In our judgment, the document, Ex. 1, according to its purport, is not a mere deed of management. It is a trust deed, for the title to the properties by the terms of the document vested in the plaintiff Kulakamini. By the terms of the document she was to take upon herself the obligation to maintain the family of Dharani and Tarini. According to its terms, it is a trust deed and not a document for management of the properties of Tarini and Dharani. We accordingly overrule the first point raised by Dr. Sen Gupta. We will now proceed to consider the second and third points together.

4. It appears from the copy of the probate, Ex.19, produced in this case, that the estate of Kamalakanta was valued at Rupees 1,20,277-0-7. We have in evidence that the net income of the immovable properties left by him was about Rs. 4000 a year and the capital in his money-lending business was about Rs. 70,000 to Rs. 80,000. "We further have in evidence that during the time that Kulakamini was acting as the executrix she incurred no debts but in fact acquired some properties, partly out of the income of the properties left by Kamalakanta and partly "by employing a portion of the money of the money-lending business. The position, however, is well established that there were no debts at the time when she was managing the properties as executrix. According to the terms of the will, her executrixship ceased about the year 1911, when the youngest son of Kamalkanta, namely Tarini attained majority. The financial position of the family, however, changed considerably in the space of a very short time thereafter. We have the definite evidence that in 1913 Dharani and Tarini had recourse to borrowing heavy amounts. On 21st March 1913, they along with Abedulla and Jamser borrowed Rs. 60,000 by executing a mortgage in favour of Binayak Das Acharjee Choudhury of Muktagacha. This was five days after the lease granted by Raja Jagat Kishore. Probably, out of the sum of Rs. 60,000 so borrowed, Rs. 20,000 which was payable on the date of the execution of the said lease was paid. There is also evidence that about this time they were indebted to the extent of about Rs. 10,000, partly secured and partly unsecured, to one Balmukund Misir and they were further indebted to the extent of about Rs. 2000 to Raja Bijoy Singh Dudhuria.

5. The position, therefore, in 1913 was that all the capital of the money-lending business left by Kamala Kanta had disappeared and the two sons were involved in heavy financial obligations. Under the terms of the lease which Dharani had taken along with Abedulla and Jamser from Raja Jagat Kishore, Dharani along with his two co-tenants became liable to pay Rs. 30,000 to Raja Jagat Kishore within a very short time. In the earlier part of our judgment, we have indicated the time of the payment of the instalments of Rs. 30,000 made payable under this lease. The evidence further establishes the fact that Dharani could not make anything out of the lease which he had taken along with Abedulla and Jamser from Raja Jagat Kishore. The evidence indicates that Dharani could not get any share of the profits of the said concern and all the profits were being taken by his co-tenants and co-partners namely Abedulla and Jamser. That was the position after 1913. Not only heavy debts had been incurred, both secured and

unsecured, but there was that doubtful venture undertaken by Dharani namely of working the forest of which he and his co-partners had taken a lease from Raja Jagat Kishore. In these circumstances, the trust deed was executed on 28th April 1914. We are to see whether the trust deed was a bona fide document or was a fraudulent device for the purpose of defeating or delaying the creditors of Tarini and Dharani or a cloak to shield the properties of Tarini and Dharani. For the purposes of considering this question we would have to take into consideration the financial position of Tarini and Dharani at the time of the execution of the document together with the terms of the trust deed.

6. The trust deed recites that Kulakamini, the mother, had been successful in managing the estate of Kamalakanta in her capacity as executrix. It further recites that it would be better to leave the management still in her hands. The obligation under this trust was that the trustee was to maintain the family of Dharani and Tarini. In the document it is recited that there were debts of Tarini and Dharani to pay. But the provision for the payment of the debts is as follows: That those debts were to be cleared up from the profits and income of the properties included in the trust. The trustee will have no power to sell or mortgage any of the properties for any account, but in case of necessity she could only contract a debt up to the amount of Rs. 10,000 on mortgage of the properties if she was so advised by four named persons whose advice she was directed to take in cases of difficulty.

7. We have already indicated the amount of indebtedness of Dharani and Tarini at the time of the execution of the trust deed as also the income from the immovable properties. We have also found that in the year 1919 the money-lending business left by Kamalakanta had disappeared. The income of the immovable properties in the year 1914 was accordingly quite insufficient for the purposes of keeping down the interest of the debts even in the share of Dharani and Tarini. The trust deed was executed a year after the lease of Raja Jagat Kishore and during the course of the year it had become quite apparent to Dharani and Tarini and their well-wishers that the Rs. 30,000 left outstanding to Raja Jagat Kishore could not be paid from out of the income and profits of the forest and that there was every chance of Raja Jagat Kishore realizing the same from their properties. A large portion of the immovable properties of Dharani and Tarini had already been mortgaged to Binayak Das Acharjee Choudhury and it must have been foreseen that the other properties of Dharani would be proceeded against by the Raja for realizing his dues due under the said lease. The position must have been realized about the time of the execution of the trust that nearly all the properties of the family would be taken in execution by the Raja and Binayak Das Acharjee Choudhury. These circumstances lead us to the conclusion that the trust deed was a fraudulent deed executed with the intent of shielding the properties from the claims of the creditors of Dharani and Tarini. It was a mere cloak intended to serve as a shield against the just claims of the creditors. The subsequent dealings of Dharani and Kulakamini would also point to the conclusion that the trust deed was only meant to be a cloak for retaining the

properties in the family by defeating, if possible, the claims of the creditors. In 1919 we find four fictitious mortgages executed by Dharani and Kulakamini for heavy amounts in the short space of a few days, namely end of June and the beginning of July 1919. Those mortgages were in our view executed to serve as a second line of defence if their plan on the trust deed happened to fail.

8. No doubt after the execution of the trust deed Kulakamini purported to act as trustee. She executed as trustee a deed of management, she executed leases as trustee of the properties, she instituted and defended suits as trustee and the collections were made in her name as trustee. In some of the properties she also had her name registered as trustee, but in our judgment these facts can have no important bearing on the question and to us it seems that those acts were done only for the purposes of keeping appearances. We are accordingly of opinion that the trust deed was a fraudulent document intended as a cloak. On the basis of this trust deed the plaintiff cannot recover the property from Raja Jagat Kishore, for, we are of opinion that one of the objects of the trust deed was to deprive Raja Jagat Kishore of his dues.

9. We are not impressed by the argument of Mr. Bose that the defendants cannot take by way of defence the plea that the trust deed was a fictitious deed, or a fraudulent deed executed with the intent of defeating or delaying the creditors. His argument is that such a case comes within the provisions of Section 53, T. P. Act. Under that section, a document executed with that object is only a voidable one and Mr. Bose says that there were two ways open to Raja Jagat Kishore and his transferees, namely either to institute a suit in a representative capacity for setting aside the deed or to express their intention of avoiding the deed-before the suit. We do not think that this contention is sound. The plaintiff seeks to recover possession of the property on the basis of the trust deed, Ex. 1. That is her document of title. We think that the defendants are entitled to plead by way of defence the fact that the plaintiff should not be allowed to recover on the basis of the said document as the document was a fraudulent one intended to defeat the rights of the creditors of which Raja Jagat Kishore was one. If the fraud is established, as we think that it has been established on the evidence, the plaintiff cannot ask for relief on the basis of the said document for, if relief is given to the plaintiff in spite of the fact that the document was a fraudulent one, this Court would only be assisting the fraud. It is one of the fundamental duties of the Court to prevent fraud being committed. On this principle we hold that the defence urged in this case was a defence which was open to Raja Jagat Kishore and his transferees.

10. We accordingly hold that the plaintiff cannot recover the property in suit from the defendants. The result is that this appeal is allowed and the plaintiff's suit dismissed. As the plaintiff has sued in forma pauperis we direct the plaintiff to pay the amount of court-fees to the Government payable on the plaint. With regard to other costs, each party would bear their own costs throughout. Let a copy of the decree of this Court; be forwarded to the Collector of the district.