
(1934) 07 AHC CK 0002
In the Allahabad High Court

Ram Chandra and Another

APPELLANT

Vs

Jaith Mal and Others

RESPONDENT

Date of Decision : 21-07-1934

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66

Citation : AIR 1934 All 990

Hon'ble Judges : Niamatullah, J

Bench : Division Bench

Judgement

Niamatullah, J.—The suit, which has given-rise to this appeal, was brought by the plaintiff-respondent for declaration of right and for "absolute possession" of the property in dispute on the allegation that the plaintiff was the real mortgagee under a deed, dated 12th June 1872, which stood ostensibly in the name of Ganga Bishan, and that the purchase of it by the latter in 1875 in enforcement of that mortgage was on behalf of the plaintiff, who has ever since been in adverse possession thereof. The cause of action, on which the plaintiff's suit is founded, is refusal by the defendant, the son of Ganga Bishan, to pay profits to the plaintiff. Both the lower Courts have decreed the plaintiff's suit. The plaintiff has preferred the present second appeal. The following pedigree will explain the position of the parties and other persons whose names occur in the narrative of the case:

Radha Kishan | _____ | | | Sahib Ram Ganesh
Ram Ganga Bishan | | | | _____ | | | | | Badri Das
Jaithmal | | P. | Badri Das Param Sukh Das (adopted son) D-1 (since
deceased) | Ram Chandar (respondent)

2. It has been found by both the Courts below that the mortgage-deed, dated 12th June 1872, executed by one Chain Sukh ostensibly in favour of Ganga Bishan, was in favour of the plaintiff and Badri Das, to whom the mortgage money in fact be. longed. It is however not denied that Ganga Bishan brought a suit on foot of the mortgage for sale of the mortgaged property and purchased it

himself in 1876. Ganga Bishan died in 1879, leaving his son Param Sukh, who was impleaded in the present suit as defendant 1. He died during the pendency of the litigation and is now represented by his adopted son, Earn Chandar, the respondent. Mutation of names was effected in favour of Ganga Bishan, and after his death, in favour of his son Param Sukh Das. Ram Chandar's name now stands recorded in place of his father and grandfather.

3. If there had been nothing else in the case, the plaintiff's claim would have been clearly untenable in view of Section 66, Civil P.C., which was pleaded by the defendant and has been strongly relied on before me. The plaintiff however pleaded that he and Badri Das were minors at the time when the mortgage deed of 1872 was executed and their affairs were managed by Ganga Bishan, who took a mortgage-deed for the benefit of the plaintiff and Badri Das. It is also alleged that, in spite of the auction sale and mutation of names following it, Ganga Bishan acknowledged the right of the plaintiff and Badri Das, for whom he had purchased the mortgaged property and paid the entire profits to them. In other words, according to the plaintiff's allegations, though Ganga Bishan was declared to be the auction purchaser, he managed the property for the plaintiff and Badri Das, and paid the entire profits of the property to them, treating himself as a mere manager on their behalf. At a partition between the plaintiff and Badri Das this property was allotted solely to the plaintiff, a fact which is not denied by Badri Das, who is defendant 2 in the case. According to the plaintiff, this state of things continued for a considerable length of time, and his right was not questioned till three years before the institution of the suit, when profits were withheld from him. On these allegations the plaintiff, who claims to be in possession at least constructively, seeks a declaratory relief coupled with what he calls "absolute possession," which I take to mean that he is in possession but mutation of names stands in the name of the defendant, who for that reason is entitled to collect rents. Both the lower Courts decreed the plaintiff's suit and found that Ganga Bishan, who was the uncle of the plaintiff and Badri, managed their property during their minority and that the money advanced under the mortgage deed of 1872 belonged to them. It has been definitely found by both the Courts below that Ganga Bishan and Param Sukh paid to the plaintiff and Badri all the profits of the property after the auction sale down to the year 1899, i.e., for nearly 23 years, during which time their right was acknowledged unconditionally. In Sambaftc 1956 the plaintiff left for Calcutta, where he resided for 15 years. There is no finding that during this period the plaintiff received profits from the defendants.

4. The finding noted above has been impugned by the learned advocate for the defendants-appellants on the ground that it is based on a certain account-book purporting to have been written partly by Ganga Bishan, whose handwriting has not been proved by any witness other than the plaintiff, Jaithmal. The latter admits that he did not learn the Marwari characters till after the death of Ganga Bishan. It is argued that the plaintiff cannot be considered to be one recognizing the handwriting of Ganga Bishan. This argument was addressed to

the lower appellate Court, but was not accepted on the ground that it is not impossible for a person unable to read and write certain characters to know the handwriting of another person in those characters, if he had had the occasion to see the latter write. If this had been a first appeal I would have hesitated to take the view which found favour with the lower appellate Court; but I do not think the finding of the learned Subordinate Judge can be questioned in second appeal. I think it is possible to conceive a case in which a person knows the handwriting of another in certain characters, though he himself cannot read those characters. Such an instance is rare: but I am unable to say that it is impossible. In this view, the finding of the learned Subordinate Judge, already referred to, must stand.

5. The next question is whether, on the facts found by the lower Court, the plaintiff's suit was rightly decreed. In my opinion it was. Ganga Bishan's right arising from the auction sale in his favour cannot be questioned by the plaintiff, having regard to the provisions of Section 66, Civil P.C. It is however permissible for the plaintiff to claim title, not on the ground that he was the real auction purchaser, Ganga Bishan being his "benamidar," but on the ground that, after Ganga Bishan acquired title under the auction-sale, he subsequently transferred it to the plaintiff or that the latter acquired the same otherwise. For example, the plaintiff can show that he acquired a right by adverse possession for more than 12 years after Ganga Bishan became the owner at the auction sale. Both the lower Courts have found that Ganga Bishan acknowledged the title of the plaintiff and year after year paid all the profits of the property to him. This was obviously due to the fact that the purchase money belonged to the plaintiff and Ganga Bishan was then honest enough to recognise the plaintiff's title. Ganga Bishan should be deemed to have constituted himself a trustee immediately after he became the auction purchaser in 1878. He gave effect to the trust in favour of the plaintiff by payment of the entire profits arising from the property. The Indian Trusts Act (No. 2 of 1882), which requires a registered instrument for creating a trust had not been passed. The position would not have been materially different if Ganga Bishan had made a verbal shift of the property to the plaintiff and defendant 2. This view is supported by a series of cases decided by their Lordships of the Privy Council. To appreciate the ratio decidendi of those cases it should be noted that in Oudh all rights in the soil had been confiscated by the famous proclamation of Lord Canning issued in 1858. Subsequently grants were made on behalf of the Crown to certain individuals, in most cases to the former talukdars. In some cases the estates were granted to named individuals without express recognition of the rights of their co-sharers who had an interest before the confiscation. The grants were made first by the Summary Settlement of 1859, which itself did not confer any title but was followed by a letter of the Governor-General, dated 10th October 1859, which declared that the talukdars with whom the aforesaid Summary Settlement had been made, thereby acquired an indefeasible title to the estates⁸ settled with them. Subsequently sanads were granted which also conferred absolute titles on the grantees to the exclusion of

every one else, whatever might have been his right before the confiscation. Lastly, the names of such talukdars were entered in a list appended to the Oudh Estates Act (No. 1 of 1869), Section 10 which declared that the title of such talukdars shall be unassailable at the instance of any claimant and that the presumption that they are the talukdars shall be absolute and irrebuttable. The Privy Council held in the under-noted cases that, in spite of the irrebuttable presumption as regards their rights to the estates claims based on acknowledgments made by the talukdars of the rights of their co-sharers must be upheld on the ground that such acknowledgments which had been given effect to amounted to trusts in favour of those whose rights had been acknowledged. The claimants were allowed to succeed not on the ground that they had previously an interest in the estates or that the grants made by the Government directly conferred any right on them, but because the talukdars, after acquisition of an exclusive title under the grants in their favour, should be deemed, by their acknowledgment and conduct, to have created a trust in favour of their former co-sharers. See *Window of Shanker Sahai v. Raja Kashi Pershad* (1877) 4 I.A. 198 and *Hardeo Bakhsh v. Jawahir Singh* (1877) 3 Cal. 522. Other similar cases are noted in Chhail Behari Lai's Taluk-dari Law notes, u/s 3, Oudh Estates Act (No. 1 of 1869). Similarly, though Section 66, Civil P.C. raises an irrebuttable presumption in favour of the auction-purchaser, there is nothing to prevent the latter from creating a trust in favour of the person who supplied the purchase money. Such a course is not possible after the passing of the Indian Trusts Act, which requires a registered instrument for creation of a trust. But twelve years' enjoyment by the beneficiary will in general confer a prescriptive right even in the absence of a registered instrument.

6. It was urged by the learned advocate for the appellant that the plaintiff did not allege a case of trust in his plaint. It may be true that trust is not specifically mentioned in the plaint, but all the facts, which entitle him to relief on that footing are stated in the plaint; and it is pleaded in view of those facts that the plaintiff is entitled to the property. I think that it was not necessary for the [plaintiff to use the word trust or to employ any particular phraseology so long as all the facts on which a case of trust can be founded are alleged in the plaint.

7. The case may be approached from another point of view. In spite of the auction-sale in favour of Ganga Bishan, the plaintiff was allowed to assert his right as owner and to enjoy all the rents and profits arising therefrom. Far from contesting the plaintiff's right, Ganga Bishan acquiesced in it, managed the property for him and handed over all the profits of the property. Ganga Bishan's possession was only that of an agent of Jaithmal, who should be considered to have been in adverse possession for over twelve years.

8. The learned advocate for the defendant-appellant lays stress on the fact that the plaintiff is not proved to have received any profits during the last 15 years. The plaintiff having acquired title under the trust already mentioned or by more than 12 years' adverse possession before 1899 could have lost it only if the

defendants resumed possession and held it adversely to the plaintiff during the 15 years referred to above. This is not the case of the defendants, nor is there any evidence in support of it. There is a cross objection by the plaintiff as regards costs; but it has no force. For the reasons stated above, I am satisfied that the decree appealed from is right. Accordingly I uphold it and dismiss the appeal and the cross-objection with costs.