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In the Calcutta High Court

Case No : S.A. No. 188 of 1982

Renubala Karmakar and Others — APPELLANT

Vs

Ranubala Karmakar and Others — RESPONDENT

Date of Decision : 01-08-2001

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 51

Citation : 105 CWN 1115

Hon'ble Judges : Pranab Kumar Chattopadhyay, J

Bench : Single Bench

Advocate : Sudhir Dasgupta and Hazari Prasad Roy Chowdhury, for the Appellant;Shyama Prasanna Roy Chowdhury and Debasish Roy, for the Respondent

Judgement

Pranab Kumar Chattopadhyay, J.—This appeal is directed against the judgment and decree dated June 12, 1981 passed by the Learned Additional District Judge, 4th Court, Alipore in Title Appeal No. 318 of 1980 reversing those dated 14th February, 1980 passed by the Learned Munsif, 4th Court, Alipore in Title Suit No. 93 of 1970. The plaintiffs have filed the suit before the Learned Munsif, 4th court, Alipore for declaration and permanent injunction. According to the plaintiffs, suit property described in the schedule of the plaint was purchased by late Panchanan Karmakar, husband of plaintiff No. 1 and father of other plaintiffs. It has been stated by the plaintiffs that late Panchanan Karmakar purchased the suit property by a registered kobala from one, Khiroda Dasi in the Benami of Smt. Kiran Bala Dassi, the mother of said Panchanan Karmakar. According to the plaintiffs, Panchanan Karmakar out of the total consideration money paid Rs.400/- to Khiroda Dasi, at the time of execution of the deed and the balance consideration money amounting to Rs. 800/- was not paid to Khiroda and was retained for the purpose of maintaining Khiroda and another deed of maintenance in favour of Khiroda was executed by said Panchanan Karmakar. Plaintiffs also stated that Panchanan Karmakar maintained Khiroda till her death.

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2. It has been mentioned in the plaint that the parents of late Panchanan Karmakar were very poor and did not possess sufficient means for their sustenance. According to the plaintiffs, Panchanan Karmakar had been working as a goldsmith and also had independent business of his own and Panchanan out of his own income acquired the suit property in the Benami of his mother Kiran Bala. Plaintiffs are the heirs of Panchanan Karmakar and the said plaintiffs claimed that as heirs of Panchanan Karmakar they have inherited the suit property. It has been stated by the plaintiffs that the registered deeds and other documents in respect of the said property were all along in the custody of Panchanan and after his death defendant No. 2 managed to capture the same by fraudulent means.

3. It has further been mentioned in the plaint that defendant No. 2 also managed to execute the deed of gift in her favour by exercising undue insurence and pressure upon the original defendant No. 1 Kiron Bala Dasi. The plaintiffs further contended that the said deed of gift was not binding upon the plaintiffs as the same was a fraudulent document and defendant No. 2 did riot acquire any right, title, interest and possession in the disputed property as original defendant No. 1 was only a Benamdar in respect of the suit property.

4. It was also contended by the appellant that said Panchanan Karma-kar constructed a one-storied pucca house with 4 rooms on the suit land and the defendants never contributed any amount towards cost of construction of the building or towards consideration amount in respect of the suit land. The plan in respect of the house drain was sanctioned by the Calcutta Corporation in the name of late Panchanan Karmakar and the electric meter in the said suit premises had also been installed in the name of said late Panchanan Karmakar who had been paying the electrical bills during his life time.

5. Plaintiffs further contended that late Panchanan Karmakar used to pay the municipal taxes in respect of the suit premises and the plaintiffs had been in continuous possession of the suit premises from the time of their predecessor-in-interest without any interruption. However, according to the plaintiffs, on account of the execution of the aforesaid deed of gift by the original defendant No. 1 in favour of the defendant No. 2 the right and title of the plaintiffs in the suit property had become doubtful and therefore the plaintiffs filed the suit before the Learned Munsif for a declaration that Kiran Bala Dasi had been a mere "Benamdar" of late Panchanan Karmakar in respect of the purchase of the suit property. The plaintiffs also prayed for a permanent injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the plaintiffs in the suit property.

6. The defendants contested the suit by filing separate written statement denying all the material allegations in the plaint. According to the defendants Kiran Bala Dasi was the absolute owner of the suit property and she had valid right and/or authority to execute the deed in question in favour of the defendant No. 2. According to the defendants late Panchanan Karmakar was the ''Karta'' in the

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joint Hindu family for managing the affairs of the household. It has been stated by the defendants that Panchanan separated himself from the original defendant No. 1 herein after Chaitra 1374 B.S. According to the defendants Panchanan never maintained his parents and it is his second son Kalipada Karmakar, husband of defendant No. 2 herein maintained his mother Kiron Bala all a long and accordingly out of love and affection and in appreciation of the devoted services of defendant No. 2 Kiran Bala, the original defendant No. 1 herein had executed the said deed of gift which according to the defendants is valid and legal.

7. The defendants specifically denied the payment of consideration money by Panchanan Karmakar for purchasing the suit property and or the claim of the plaintiffs in respect of the custody of the registered deed by Panchanan. The defendants accordingly prayed for dismissal of the suit.

8. On the basis of the materials on record and after hearing the submissions of the respective parties, Learned Munsif dismissed the suit and against the said order of dismissal plaintiffs preferred the appeal before the Learned Additional District Judge, 4th Court, 24 Parganas.

9. In the said appeal preferred before the Learned Additional District Judge, plaintiffs as appellants contended that the Learned Munsif erred in dismissing the suit. According to the plaintiffs said suit should have been decreed and the Learned Munsif should have held that late Panchanan was the real owner of the suit property and defendant No. 1 was only a "Benamdar" of late Panchanan.

10. The Lower Appellate Court after considering the evidence on record (both oral and documentary) came to the conclusion that the Learned Munsif was hot justified in dismissing the suit and accordingly the Learned Lower Appellate Court allowed the appeal and set aside the judgment and decree passed by the Learned Munsif in the title suit No. 93 of 1970. The Lower Appeallate Court specifically held that plaintiffs are entitled to get a decree for a declaration that original defendant No. 1 Kiran Bala was Benamdar of Panchanan Karmakar in respect of the suit premises and further held that the deed of gift executed by the original defendant No. 1 in favour of the defendant No. 2 was invalid and not binding upon the plaintiffs. The Learned Lower Appellate Court also pasted a decree for permanent injunction restraining the defendants from interfering with the possession of the plaintiffs in the suit property.

11. Challenging the validity and or legality of the said judgment and decree passed by the Learned Additional District Judge, 4th Court, Alipore the instant second appeal has been filed on behalf of the defendant No. 2 Smt. Renubala Karmakar and her husband the added defendant Kalipada Karmakar.

12. It appears from the record that at the time of admission of the instant second appeal no question was formulated for the purpose of disposal of the appeal. However, at the time of hearing of instant second appeal, Mr. Sudhis Dasgupta, Learned Senior Counsel appearing on behalf of the appellants urged

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one additional ground apart from the grounds mentioned in the memorandum of appeal and sought for necessary permission of this Court to urge the said additional ground.

13. The additional ground urged by Mr. Dasgupta at the time of hearing is mentioned hereunder: "For that even assuming but never admitting that Panchanan Karmakar was the real owner of the property, the court of appeal below erred in law altogether overlooking that Late Kiron Bala Dasi inherited a share in the property on the death of her son Panchanan Karmakar." After hearing Mr. Dasgupta, on behalf of the appellant and Mr. Roy-chowdhury, on behalf of the respondent, I am of the view that the new additional ground urged by Mr. Dasgupta involves substantial questions of law which can be. considered without bringing any new fact on record and accordingly, I allow the appellants to urge the. aforesaid additional ground.

14. For the purpose of disposal of the instant second appeal following questions are formulated :

1. Whether legal tests of creating Benami has been properly considered by the Lower Appellate Court.

2. Eyen assuming but never admitting that Panchanan.Karmakar was the real owner of the property, whether the court of appeal below erred in law by altogether overlooking that Late Kiron Bala Dasi inherited a share in the property on the death of her son Panchanan Karmakar.

3. Whether the judgment of the Lower Appellate Court is a proper judgment of reversal.

15. It has been submitted on behalf of the appellant that none of the legal tests for creating Benami has been properly satisfied before the Lower Appellate Court. Mr. Dasgupta, Learned Senior Counsel appearing on behalf of the appellant submits that neither any evidence for payment of consideration money by Panchanan, predecessor in interest of the plaintiffs was available before the Learned Lower Appellate Court nor any evidence was produced in order to prove payment of maintenance in terms of the deed of maintenance executed in favour of Khiroda Bala out of the balance consideration money. According to Mr. Dasgupta predecessor in interest of the plaintiffs namely Panchanan might have means but the same ipso facto does not prove that consideration money was actually paid by him in absence of proper evidence in this regard. Mr. Dasgupta accordingly contended that Learned Lower Appellate Court wrongly held that since Panchanai had sufficient income so he purchased the suit land and raised the structure out of the said income.

16. Regarding possession of the property Mr. Dasgupta submitted that Kiran Bala purchased the property by registered kobala and accordingly all her sons including the predecessor in the interest of the plaintiffs namely Panchanan and added defendants Kalipada remained in possession of the said properly. On the

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aspect of the motive for the Benami purchase of the su:it property the Learned Counsel of the appellants submitted that no convincing ground in support of such motive for the Benami purchase of the suit property was narrated before the Learned Lower Appellate Court.

17. Mr. Dasgupta submitted that the Learned Judge of the Lower Appellate Court wrongly shifted the onus on the defendants to prove that Kiran Bala had means to purchase the property which according to Mr. Dasgupta should have been otherwise as onus lies on the plaintiffs to prove that Panchanan actually paid the consideration money.

18. It was specifically observed by the Learned Judge of the Lower Appellate Court that in ascertaining the question of Benami the most important factor is to decide who paid the consideration money. It was also observed by the said Learned Judge that the plaintiffs have proved that Panchanan had the financial capacity to pay the consideration money and to defray the expanses for raising the structure thereon.

19. But it is to be seen whether Panchanan had actually paid the consideration money or incurred the expenses for raising the structure on the suit property. Mr. Dasgupta referred to the specific findings of the Learned Munsif as recorded in the Judgement that there is absolutely no evidence to hold that Panchanan paid the considration money for purchase of the suit property.

20. The Learned Judge of the Lower Appellate Court did not refer to any specific evidence which may ultimately lead to a different finding to support the claim of the plaintiffs that the predecessor in interest of Panchanan had actually made necessary payment of the consideration money and incurred expenses for erecting structure on the suit land. According to Mr. Dasgupta, Learned Munsif came to the specific findings regarding non-payment of consideration money in respect of the suit property on the basis of materials on record but in absence of adequate evidence the Learned Judge of the Lower Appellate Court committed an error by rejecting the said finding of the Learned Munsif. Learned Counsel of the appellants submitted that the finding of the Lower Appellate Court is therefore not supported by evidence and accordingly is erroneous.

21. Learned Judge of the Lower Appellate Court however mentioned that plaintiffs produced a number of documents to show that Panchanan purchased the land and raised the structures but neither the documents were specified nor proper decisions were made in this regard.

22. The next point urged by the Learned Senior Counsel of the appellant that the declaration of the Learned Judge of the Lower Appellate Court in respect of the deed of gift executed by the defendants No. 1 in favour of the defendant No. 2 as invalid and not binding upon the plaintiffs is not supported by any evidence and decree passed in this regard is without any foundation. It has also been submitted on behalf of the appellant that the plaintiff never pleaded the particulars of fraud in the plaint. Mr. Dasgupta referring to a decision reported in

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Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, submitted that particulars of fraud should be specifically pleaded and proved referring to the judgment of the Trial Court. Mr. Dasgupta, Learned Senior Counsel of the appellant said that the Learned Munsif specifically recorded that there is no evidence to establish when and in what manner fraud was perpetrated or undue influence was exercised upon defendant No. 1 by defendant No. 2. So in absence of proper materials and or specific evidence on record Learned Judge of the Lower Appellate Court should not have declared that the deed of gift executed by defendant No. 1 in favour of defendant No. 2 was invalid.

23. Mr. Dasgupta also severely critized the decree for injunction restraining the defendants from interfering with the plaintiffs possession in the disputed property ignoring two vital aspects namely, no injunction can be issued against a co-sharer and also against a person in possession. Furthermore, plaintiffs did not file the suit for recovery of possession. According to Mr. Dasgupta appellants are in possession of the suit property and the added defendant is also a co-sharer. It is the specific contention of Mr. Dasgupta that the learned Judge of the Lower Appellate Court while granting permanent injunction never considered the aforesaid vital aspects of the matter and erroneously passed the decree for permanent injunction.

24. It has also been submitted on behalf of the Appellants that the Learned Judge of the Lower Appellate Court failed to deal with the judgment of the Learned Munsif in appropriate manner and thereby committed an error and according to the appellants judgment of the Lower Appellate Court is not a proper judgment of reversal.

25. According to Learned Counsel of the appellant. learned Judge of the Lower Appellate Court did not deal with the judgment of the Learned Munsif in the manner it should be dealt with. Mr. Dasgupta, Learned Counsel for the appellants cited following decisions of the Supreme Court in respect of his contention that in what manner the judgment of the Court of first instance should be dealt with.

1. Mehrunnisa vs. VishamKumari, para 13 and 17 AIR 1998 SC 427

2. Rajbir Kaur and Another Vs. S. Chokesiri and Co.,

3. Sarju Pershad Vs. Raja Jwaleshwari Pratap Narain Singh and Others,

4. Smt. Sawarni Vs. Smt. Inder Kaur and Others,

26. Learned Senior Counsel of the Appellants further contended that the Learned Lower Appellate Court erroneously shifted the onus on the defendants to prove that Kiran Bala, in whose name registered kobala was executed in respect of the suit property, had means to purchase the same. According to appellants onus exclusively lies on the plaintiffs to prove that their predecessor-in-interest Panchanan actually paid the consideration money in respect of the said suit property. On behalf of the appellants following decisions were cited to highlight the settled principles regarding burden of proof in a case of Benami transaction

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and also the tests laid down by the Courts for determining the Benami transaction.

1. Diwan Ran Bijai Bahadur Singh vs. Indarpal Singh, 26 1.A. 226

2. Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others,

3. His Highness Maharaja Pratap Singh Vs. Her Highness Maharani Sarojini Devi and Others,

Mr. Das Gupta contended that preponderance of probability cannot be a legal test in deciding whether a transaction is Benami or not.

27. Mr. S. P. Roy Chowdhury, Learned Senior Counsel on behalf of the respondents strongly opposed the contentions of the appellants herein. It is the contention of the respondents that though the Kobala was executed in the name of Kiran Bala admittedly on 29th June, 1938 but transaction in respect of the title of the property started curiously only after the death of Panchanan. Mr. Roy Chowdhury submitted that Learned Judge of the Lower Appellate Court rightly decided the appeal in favour of the plaintiffs reversing the judgment and decree of the Learned Munsif. The most important factor in deciding a dispute relating to Benami transaction, according to Mr. Roy Chowdhury, is the capacity to make payment in respect of the property. According to the respondents question of actual payment in respect of the suit property should be considered only after deciding the issue relating to the capacity to make payment and Mr. Roy Chowdhury contended that the Learned Lower Appellate Court rightly held on the basis of evidence on record that Kiran Bala in whose favour the Kobala was executed in respect of the suit property had no capacity to make the payment of consideration money. It has also been contended on behalf of the respondents that the predecessor in interest of the plaintiffs namely Panchanan had the capacity to make payment of the consideration money and the same has been established before the Courts below. Referring to the evidences as have been specifically recorded in the judgment of the Courts below, Mr. Roy Chowdhury submitted that no evidence was ever produced to show that Kiran Bala had the financial capacity to purchase the suit land and also to raise the structure thereon. My. Roy Chowdhury, Learned Counsel of the respondents further submitted that Learned Munsif while deciding the suit erroneously held that there is no evidence to hold that Panchanan paid the consideration money for purchasing the suit property. Mr. Roy Chowdhury referred to the said judgment of the Learned Munsif and submitted that the said finding of the Learned Munsif is not based on proper appreciation of the evidence on record.

28. It has been contended by the Learned Counsel of the respondent that the Learned Munsif in his judgment specifically recorded that the plaintiffs produced accounts and one sanction drawing plan in support of the contention that Panchanan made construction of the house on the suit land. It has also been mentioned in the said judgment of the Learned Munsif that a carpenter was also

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produced by the plaintiffs as witness who admitted that money was paid to him by Panchanan. Apart from the aforesaid documents electricity bills and rent receipts granted to the tenant Ananda Bazar Patrika were also produced and the same have also been duly recorded by the Learned Munsif in the judgment. According to Mr. Roy Chowdhury aforesaid documents have clearly established that Panchanan made payment of the consideration money.

29. Referring to the evidence of PW-1 MR. Roy Chowdhury submitted that plaintiffs have duly eatablished that their predecessor-in-interest Panchanan not only had the sufficient income but had purchased the suit property and erected structure thereon out of the said income and all the essential ingredients of Benami transactions have also been duly established. Mr. Roy Chowdhury referred to Section 51 of the Evidence Act and submitted that the question of Benami can be proved by oral evidence and it is the specific contention of the respondents that the evidence of PW-1 has established that the predecessor-in-interest of the plaintiffs namely Panchanan was the real owner in respect of the suit property and he purchased the suit land and is the real owner in respect of the suit property and he purchased the suit land in.the "Benami of his Teachther Kiran Etala/Mr. Roy Chowdhury cited following decisions in order '"" highlight the principles laid down by this Court as well as by tl"c Supreme Court in the case of a Benami transaction 28 CWN, 131 S. N. Holder vs. S. N. Mattik), Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, , Rebti Devi (Smt) Vs. Ram Dutt and Another, .

30. Mr. Roy Chowdhuiy, Senior Counsel of the respondents accordingly submitted that Learned Lower Appellate Court being the final Court of facts has correctly decided the issue relating to the Benami transaction the High Court cannot go into the questions of fact. Learned Counsel of the respondents referred to a decision reported in AIR 1959 SC 1204 (Paras Nath Thakur vs. Smt. Mohani Dasi and Ors.) Page . The relevant portion of the said judgment is quoted here under: "It is. well-settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on Second Appeal, cannot go into questions of fact, however erroneous the findings of fact recorded by the Courts of fact may be."

31. Learned Counsel of the respondents further submitted that the judgment of the Lower Appellate Court cannot be held erroneous on the ground that the Learned Judge of the Lower Appellate Court had not adverted to all the reasons given by the Trial court. Strong reliance was placed by the Learned Counsel of the respondents on the decision of the Supreme Court" reported in Arumugham (Dead) By Lrs. and Others Vs. Sundarambal and Another, Paragraphs 12, 13, 14 and 15. In the said judgment Supreme Court held that even assuming that burden of proof is relevant in the context of amended provision of Section 100 CPC, the same would not be relevant when both sides had adduced evidence.

32. On the point of validity of the deed of gift executed by deceased defendant No. 1 Kiran Bala in favour of defendant No. 2, Mr. Roy Chow-dhury, Learned

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Senior Counsel of the respondents contended that the said deed of gift should have been proved by the defendant No. 2. It was further contended by the Learned Counsel of the respondents that the defendant No. 2 also failed to prove that the deed of gift was genuine and the same was properly executed. Mr. Roy Chowdhury referred to decision reported in Subhra Mukherjee and Another Vs. Bharat Coking Coal Ltd. and Others, in support of his aforesaid contention and submitted that the Learned Judge of the Lower Appellate Court rightly held that Kiran Bala had no right, title and interest to execute the deed of gift in favour of the defendant No. 2.

33. Mr. Dasgupta, Learned Senior Counsel appearing on behalf of the appellants however contended that Lower Appellate Court erroneously reversed the judgment of the Trial Court without considering the material evidence and the decisions r"ted by Mr. Roy Chowdhury are also not applicable in the facts;and circumstances of the present case.

34. In this appeal most important question is to be determined is whether the legal tests of creating Benami has been properly considered by the Lower Appellate Court. It has been contended on behalf of the Appellants that settled legal tests in respect of Benami have not been satisfied. The Learned Munsif also held that there is no evidence to hold that Panchanan paid the consideration money for purchase of the suit property. Accordingly, it was contended on behalf of the Appellants that the plaintiffs have failed to prove that their predecessor-in-interest Panchanan paid the consideration money for purchase of the suit property and therefore, the plaintiffs cannot successfully contend that the suit property was purchased by their predecessor-in-interest Panchanan in the Benami transaction.

35. According to Mr. Dasgupta legal tests in respect of Benami transaction have not been proved. In deciding the question of Benami, Learned Judge of the Lower Appellate Court rightly held that the most important factor is to decide who paid the consideration money. There is no dispute regarding payment of consideration money for the purpose of purchasing the suit property. It has also been established before the courts below that predecessor-in-interest of the plaintiffs, Panchanan had the financial capacity to pay the consideration money and to bear the expenses for raising the structure thereon. The financial capacity of Kiran Bala has not been established. Appellants herein also could not establish before the Courts below that Kiran Bala had sufficient financial capacity to purchase the suit property and to erect the structures thereon. The Learned Munsif also held in the judgment that no accounts or other books were produced by the defendants to show that Kiran Bala had money to purchase the suit property.

36. The Learned Judge of the Lower Appellate Court being the final Court of fact has categorically held that plaintiffs have very well proved that Panchanan had sufficient income and with this income he purchased the land and raised the structure thereon. The Learned Judge of the Court below while coming to the

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aforesaid conclusion heavily relied on the evidence of PW-1 and the said Learned Judge of the Court below believed the evidence of the PW-1 and relying on the same came to the conclusion that the real purchaser was Panchanan Karmakar. The Learned Judge of the Lower Appellate Court has specifically referred to the deposition of Ranu Bala Karr nakar, PW-1 in his judgment and relying on the deposition of the said Ranu Bala Karmakar the Learned Judge held that the plaintiff Rami Bal a Karmakar satisfactoiily proved the case of the plaintiffs and also held that the Learned Munsif failed to appreciate the case of the plaintiffs and erred in holding that virtually there was no evidence to show that Pan chanan had paid the consideration money for the purchase of the suit property.

37. Considering the materi also on record Learned Judge of the Lower Appellate Court came to a de finite finding that plaintiffs have proved that their predecessor-in-interest Panchanan had not only sufficient income but with the said income he purchased the land and raised the structure. There is however slight contradiction in the evidence of PW-1 regarding the payment of exact amount of consideration money by Panchanan but actual payment of consideration money by Panchaan was however admitted by PW-1 in her evidence. The slight contradiction in the evidence cannot be seriouisly taken into consideration in the facts and circumstances of the present case. The decision cited by Sohrab and Another Vs. The State of Madhya Pradesh, is very much applicable in this context.The relevant portion from paragraph 8 of the said judgment is quoted here under:

8 ...It appears to us that merely because there have been discrepancies and contradictions in the evidence of some or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the Court comes to the conclusion that what can be accepted implicates the appellants and it will convict them. This court has held that falsus in uno falsus om omnibus is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to given some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered ....

38. While deciding the instant second Appeal I cannot go into the questions of fact particularly when the Learned Judge of the Lower Appellate Court on consideration of evidences adduced by both the sides arrived at a definite conclusion that the real purchaser of the suit property was Panchanan, the predecessor-in-interest of the plaintiffs herein and the said Learned Judge further held that the deceased defendant No. 1 Kiran Bala was the Benamdar of Panchanan and accordingly the said finding of fact in may opinion cannot be and

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should not be interfered with particularly in the instant Second Appeal. For the reasons stated hereinabove I hold that the deceased defendant No. 1 Kiran Bala was Benamdar of Panchanan Karmakar in respect of the suit premises.

39. Now the next point required to be answered in this appeal is whether the deceased defendant No. 1 Kiran Bala had any right, title and interest to execute the deed of lease in favour of his other son Kalipada and also the deed of gift in favour of the defendant No. 2 namely the wife of Kalipada Karmakar. Admittedly, Panchanan had died on 5th June, 1967 when his mother Kiran Bala was alive. On the death of Panchanan his mother Kiran Bala would also inherit the suit property as one of the heirs of Panchanan. Mr. Roy Chowdhury. Learned Senior Counsel of the respondents also did not dispute the aforesaid position. But Mr. Roy Chowdhury disputed the transfer of share of Kiran Bala in the suit property in favour of defendant No. 2 by executing the deed of gift as according to the plaintiffs aforesaid deed of gift is an outcome of fraud or undue influence exercised upon the defendant No. 1 by defendant No. 2.

40. The plaintiffs however did not plead the particulars of fraud in the plaint. Plaintiffs also failed to adduce evidence to establish how and in what manner fraud was perpetrated or undue influence was exercised by the defendant No. 2 upon the defendant No. 1. In absence of necessary pleadings and adequate evidence in support of the contention that the deed of gift was vitiated by fraud or undue influence no adverse inference could be drawn. Learned Munsif of the Trial Court held that the registered deed of gift executed by Kiran Bala is a valid document as she was having the legal capacity to execute the said deed in question. Appreciating the evidence adduced by the parties Learned Munsif came to the definite conclusion that the plaintiffs failed to establish that Kiran Bala had no right, interest to execute the lease deed of gift in favour of the defendants who are appellants herein.

41. Learned Judge of the Lower Appellate Court however held that deed of gift, executed by defendant No. 1 in favour of defendant No. 2 was invalid and not binding upon the plaintiffs. The aforesaid decision of the Learned Lower Appellate Court is not based on proper evidence. The Learned Judge of the Lower Appellate Court neither discussed the specific finding of the Learned Munsif in this regard nor referred to or relied upon any evidence while passing the decree declaring that deed of gift executed by defendant No. 1 in favour of defendant No. 2 was invalid and not binding upon the plaintiffs. The decree passed by the Lower Appellate Court in this regard cannot be allowed to sustain as the same is based on no evidence and even without any finding. The Learned Munsif while dismissing the suit rightly held that the plaintiff failed to establish that Kiran Bala had no right and interest to execute the deed of gift in favour of defendant No. 2.

42. Accordingly, I am constrained to hold that the Learned Judge of the Court below erred in holding that the plaintiffs are entitled to get a decree for a declaration that the deed of gift executed by the defendant No. I in favour for defendant No. 2 was invalid and not binding upon the plaintiffs

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43. The only other point regarding the decree for permanent injunction passed by the Learned Judge of the Lower Appellate Court restraining the defendants from interfering with the possession of the plaintiffs in the suit property is totally erroneous as Mr. Dasgupta rightly pointed out that the decree for injunction cannot be sustained as no injunction can be passed against a co-sharer and also against a person in possession. Mr. Roy Chowdhury also did not dispute the aforesaid contention of Mr. Dasgupta very seriously.

44. For the foregoing reasons, the decree of the Lower Appellate Court is affirmed only to the extent that the plaintiffs, are entitled to get a decree for a declaration that defendant No. 1 deceased Kiran Bala was Benamdar of Panchanan Karmakar, the predecessor in interest of the plaintiffs in respect of the suit property and the rest of the decree of the Lower Appellate Court are hereby set aside. However, on the death of Panchanan, his mother Kiran Bala would also inherit the suit property as one of the heirs of Panchanan along with other heirs.

45. I further hold that the deed of gift executed by defendant No. 1 in favour of defendant No. 2 is valid and binding upon the plaintiffs. 1 also hold that the rights and interest of deceased defendant No. 1 Kirna Bala in the suit property has been rightly transferred in favour of defendant No. 2 on the valid execution of the said deed of gift by defendant No. 1 in favour of defendant No. 2 on 13.12.1374 B.S.

46. The instant Second Appeal is, thus, disposed of in the manner indicated above. In the facts and circumstances of this case, there will be, however, no order as do costs.

Appeal allowed in part

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