(1939) 03 PAT CK 0002

In the Patna High Court

Sahdeo Karan Singh and Others APPELLANT

Vs

Usman Ali Khan and Others RESPONDENT

Date of Decision : 09-03-1939

Acts Referred:

Citation : AIR 1939 Patna 462

Hon'ble Judges : Harries, C.J;Chatterji, J

Bench : Full Bench

Judgement

Harries, C.J.—First Appeal No. 175 of 1935 is a defendants'' appeal from a decree of the learned Subordinate Judge of Gaya decreeing the plaintiff-respondent''s claim for a declaration that he was the owner of certain property. Miscellaneous Appeal No. 16 of 1938 is an appeal by the plaintiff against an order of the Court below awarding him certain mesne profits. The plaintiff being dissatisfied with the amount of mesne profits awarded has asked this Court to grant him a further amount. The suit out of which this appeal arises was brought by the plaintiff against defendants 1 and 2 who are respondents in the appeal and defendants 3 to 17 who are the appellants in the appeal. The plaintiff is a minor and is the son of defendants 1 and 2. Defendants appellants are purchasers of the property in question in an execution sale.

2. The facts of the case can be shortly stated as follows: The property in dispute consists of a 1 anna 12 dams odd share in village Jawania and 53.78 acres bakasht land in village Singhpore. These two properties originally belonged to Mt. Alimunnissa. Defendants 1 and 2 had carried on litigation with Mt. Alimunnissa which had ended in their favour in this Court. The result of such litigation was that defendants 1 and 2 held a decree for costs against Mt. Alimunnissa for a sum of Rs. 1500 odd. In due course defendants 1 and 2 proceeded to execute this decree and the properties now in dispute were attached.

3. On 26th July 1926, Mt. Alimunnissa executed a sale deed of the properties in dispute in favour of the plaintiff who was then five or six years of age. By the terms of, that deed Mt. Alimunnissa sold the property for a sum of Rs. 2201-9-3.

No part of the consideration money was paid because it was arranged that defendants 1 and 2 would give Mt. Alimunnissa a complete discharge in respect of the decree for costs which they held against her amounting to Rs. 1576.9-3 and further defendants 1 and 2 undertook to pay off a mortgage upon this property held by one Wajid Khan amounting to a sum of Rs. 625. In this manner the whole consideration of Rs. 2201-9-3 was accounted for. After the sale deed was executed defendant 1 did pay off the mortgagee and further it is clear that mutation was obtained in the name of the minor plaintiff. It also appears that for some considerable time defendant 1 managed the property and gave receipts in the name of his minor son. Later, it will be seen that defendant 1 also dealt with this property as his own and executed a number of mortgages in which he describes this property as having been purchased benami in the name of his son.

4. Defendants 3 to 17 obtained a money decree in Suit No. 95 of 1928 against defendants 1 and 2 and in execution case No. 16 of 1930 the properties now in dispute were attached upon the allegation that they belonged not to the plaintiff-respondent but to defendants 1 and 2. The present appellant made a claim under Order 21, Rule 58, Civil P.C., but this claim was rejected upon the merits after investigation. The property in question was thereupon sold and later an application was made to set aside the sale under Order 21, Rule 90, Civil P.C., but this application was also dismissed. Accordingly the plaintiff brought the present suit under the provisions of Order 21, Rule 63, Civil P.C., to establish his title to the property. It was the plaintiff''s case that the property was purchased in his name in order solely to benefit him. It was said that Mt. Alimunnissa had great love and affection towards the minor plain, tiff and that she only agreed to transfer this property in satisfaction of the decree, held against her on condition that the property should be given to the minor plaintiff. In short the plaintiff''s case was that the transaction amounted to a gift by his parents to him in order to provide for his maintenance and education.

6. The main defence was that this transaction was a benami one and that the beneficial owners of the properties were defendants 1 and 2. Accordingly, it was contended that the property could be validly attached and sold in execution of the decree which the appellants held against defendants 1 and 2. After hearing the evidence in the case, the learned Subordinate Judge came to the conclusion that this property was purchased by defendants 1 and 2 in order to benefit the plaintiff and that the plaintiff was the owner thereof. Accordingly, he decreed the claim as prayed. It has been argued on behalf of the defendant-appellants that the findings of the learned Subordinate Judge cannot possibly be sustained upon the evidence adduced in this case. In the first place, it has been urged that the onus of establishing that this transaction amounted to a gift in favour of the plaintiff rests upon the plaintiff. With that view I agree. It must be remembered that the plaintiff sought to claim this property in proceedings under Order 21, Rule 58, Civil P.C., and in those proceedings evidence was called and the present plaintiff''s claim was rejected upon the merits. That being so, the onus is upon the plaintiff to show that he is the owner of this property. Further in the present

case it is common ground that the plaintiff provided no part whatsoever of the consideration. It is an admitted fact that the consideration was entirely provided by defendants 1 and 2, the parents of the plaintiff. In short this is a case where property was transferred to the plaintiff in consideration of money provided entirely by his parents.

7. It has been frequently held by their Lordships of the Privy Council that there is no rule in India corresponding with the presumption of advancement which is in existence in England as in India. If A purchases property and takes a conveyance or transfer in the name of B, B is not a beneficial owner of the property but holds it in trust for A. There is what has been described as a resulting trust in favour of the person who provided the consideration. In England, however, if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, then no resulting trust arises. If the transaction is wholly unexplained, the law in England presumes an intention to benefit the wife or child in India no such rule exists. That has been clearly laid down in a number of cases, the earliest of which is Moulvie Sayyud Uzhur Ali v. Bebee Ultaf Fatima (1869) 13 M.I.A. 232. That case has been followed in a number of later cases: see Kerwick v. Kerwick AIR (1921) P.C. 56, Guran Ditta v. Ram Ditta A.I.R (1928). P.C. 172 and Lakshmiah Chetty V. Kohandrama Pillai These cases lay down that if A provides the consideration and the conveyance or transfer is made in favour of B, prima facie A is the beneficial owner of the property and B is merely a benamidar. If B alleges that it was the intention of the parties that ho should be the owner of the property by reason of the transaction then the onus rests on him to establish that such is the case.

8. In Lakshmiah Chetty V. Kohandrama Pillai cited above, this is clearly laid down. In that case property was purchased in India by an Indian out of his own money and the transfer was made in the name of his wife. The latter alleged that she was the owner of the property by reason of the fact that the transaction was entered into in pursuance of an ante-nuptial arrangement between her husband and herself. Their Lordships of the Privy Council held that the onus of establishing such an ante-nuptial agreement lay on the wife. In that case their Lordships came to the conclusion that such an agreement was not proved and accordingly held that the husband was the real owner of the property.

9. Applying the principle laid down, in the Madras case to the present case, the onus clearly rests upon the plaintiff. Here the property was purchased by defendants 1 and 2 in the name of the son. If the latter, claims the property as his own, he must show that his parents intended that the property should be his. In the present case it is said that defendants 1 and 2 intended to make a gift of the property to the plaintiff, and in my view the onus rests upon the plaintiff to establish such a gift. The learned Subordinate Judge came to the conclusion that this transaction did amount to a gift in favour of the plaintiff. The most important witness in the case was Kurban Ali, defendant 1, who, it is to be observed, gave evidence in favour of his minor son, the plaintiff. Nowhere in his evidence does

he state in terms that he intended to make a gift in favour of the minor plaintiff. In examination-in-chief he said:

I and my wife had obtained a decree against Alimunnissa for costs. We executed it and then compromise was made. Under the compromise Alimunnissa sold the property in suit to the plaintiff and it will be in satisfaction of our decree. The incumbrance was payable by the plaintiff. We accepted the compromise. Rs. 2201-9-3 was fixed as consideration for the property in suit. It was satisfied by credit of Rs. 1576-9-8 as our decree money and Rs. 625 was left to be paid to Wajid Khan. Alimunnissa treated Usman Ali as her nati (daughter''s son).

10. He then mentions that he paid what was due to Wajid Khan by mortgaging his own property and that he realized this money from the income of the property in suit. He then says:

Neither I nor defendant 2 ever acquired title in the property in suit. Plaintiff had got possession of this property. Neither I nor defendant 2 ever got possession as maliks. I collected rents for four years as guardian of plaintiff. Bisar Ali made collection for one year. He did this as he adopted plaintiff as his son.

10. It is true that in his evidence Kurban Ali suggests that his son was the owner of the property; but as I have stated he never said positively that it was his intention to gift the property to his son. Other witnesses who depose to this transaction give an entirely different version. For example, Faiz Mohammad Khan (P.W. 4) stated that in the execution proceedings instituted by defendants 1 and 2 against Alimunnissa a compromise was arrived at. Alimunnissa is alleged to have said that she would give the property in suit to the plaintiff on condition that the decree be declared to be satisfied and that the encumbrance on Jawania be paid. This was accepted by defendants 1 and 2 and the sale deed was accordingly executed. The same version is given by Basar Ali (P.W. 7) plaintiff''s uncle, who is now his next friend in the suit. According to him, during the discussions leading up to the compromise Alimunnissa stated that she would compromise only if the property was purchased for Usman Ali. This condition was accepted by defendants 1 and 2 and the sale deed was accordingly executed. Faiz Mohammad Khan (P.W. 3) stated that he was present when a compromise was discussed and that the talk then was that the property would be purchased for Usman Ali to meet his education.

12. The learned Judge appears to have thought that some such arrangement must have been made. In his view Alimunnissa must have been kindly disposed towards the plaintiff and it is reasonable to think that she wished to benefit him. At one time there can be no doubt; Alimunnissa was very kindly disposed towards defendant 2, the plaintiff''s mother, and many years ago she appears to have given her property. It must be remembered however that this sale took place in execution proceedings as a result of the decree for costs held by defendants 1 and 2 against Alimunnissa.

13. There had been long and bitter litigation between the parties culminating in

the attachment of the properties in question. In those circumstances it is somewhat difficult to believe that Alimunnissa would still be kindly disposed towards the minor plaintiff. Further, the witnesses who speak of this compromise seem to suggest that Alimunnissa refused to transfer the property except on condition that the transfer should be made for the benefit and in the name of the plaintiff. I cannot understand how Alimunnissa was in a position to lay down any conditions whatsoever. The property in dispute had been attached in execution of a decree and would undoubtedly have been sold unless Alimunnissa had come to some arrangement. She was in no position whatsoever to dictate her terms, and it is very difficult to accept this part of the plaintiff''s case.

14. What is more strange is, that if such a discussion and arrangement took place, how is it that defendant 1 makes no reference to it in his evidence. All he says is that Alimunnissa treated the plaintiff as her nati; but nowhere does he say that this arrangement was made as a result of conditions imposed by Alimunnissa. The evidence of defendant 1 and the other witnesses is not consistent, and I find it impossible to hold that the plaintiff has established that the transfer was made in his name by reason of an arrangement made with Alimunnissa that he should be the owner of the property and that it should be for his maintenance and education. Had such an arrangement been arrived at, it is reasonable to assume that defendant 1 would have given evidence about it. It has been suggested that defendant 1 is hostile to the plaintiff; but there is no sign of that in his deposition. His interests in this case are not adverse to the plaintiff, and if the suit was decreed in favour of the plaintiff it would obviously be for the benefit of defendant 1.

15. It has been further urged on behalf of the plaintiff that the subsequent conduct of defendant 1 clearly establishes that a gift was intended. After this sale deed was executed in the plaintiff''s name, his father as his guardian obtained mutation of names in the plaintiff''s favour. Thereafter the plaintiff''s name appeared as the owner of the property and receipts were granted in his name. It is urged that this clearly shows that defendant 1 recognized that there had been a gift in favour of she plaintiff and that he was merely managing the property on behalf of his infant son. Obtaining mutation of names and granting receipts and acts of that kind do not establish a gift, as such acts are entirely consistent with the transaction being a purely benami one. Had the intention of the parties been that the plaintiff should be a mere benamidar, mutation in his name would have followed and rent receipts would have been given in the name of the recorded proprietor. Such acts, as I have said, are not inconsistent with the benami nature of a transaction, and indeed such acts inevitably follow a benami transaction. This matter was considered in Moulvie Sayyud Uzhur Ali v. Mt. Bebee Ultaf Fatima (1869) 13 MIA 232. , Sir James Colvile referring to such acts says:

Again, when we come to the evidence which has been given in the suit, it appears to their Lordships to be all on one side. As we have said before, the evidence or acts of ostensible ownership prove nothing; but we have proof, so far as there is any proof in the suit, of the source from which the money proceeded, that the money was the father''s.

16. The subsequent conduct of defendant 1, on the other hand, tends to show that the transaction was a benami one and that no gift in favour of the plaintiff was ever intended. On 25th May 1929, defendants 1 and 2 actually mortgaged the property in dispute and in the deed it is recited that all other properties belonging to the executants, defendants 1 and 2, were already mortgaged and accordingly the property now in dispute was mortgaged. This property is described as having been purchased in the farzi name of the plaintiff. There are two earlier mortgages dated 12th February 1929 and 15th April 1929 by which this property is also mortgaged, and in these bonds it is stated that the property was purchased farzi in the name of the plaintiff. Another mortgage was entered into on 13th February 1930, and again the property is described as having been purchased farzi in the name of the plaintiff. These transactions require explanation and all that counsel for the plaintiff-respondent cam urge is that defendant 1 must have turned1 dishonest. The learned Judge does not attach much importance to these transactions, because in his view defendant 1 was in all probability compelled to make these statements by reason of the fact that he had fallen into the clutches of the defendants, appellants. Further, he seems to be of opinion, that certain of these mortgages were never given effect to as alleged by defendant 1.

17. I find it difficult to understand why the defendants-appellants should in the year 1929 have compelled defendant 1 to mortgage this property which was note his own and why they should have insisted that the property should be described in the mortgage deeds as property purchased farzi in the name of the plaintiff. It is true that at this time defendant 1 was heavily indebted and the probabilities are that he was driven eventually to mortgage this property which he had previously hoped to save. In my view, there is no real basis for the suggestion that these mortgages were the result of the machinations of the defendants-appellants. The fact that the property in dispute is described in these mortgages as property purchased by defendants 1 and 2 farzi in the name of the plaintiff is very strong evidence that defendants 1 and 2 never intended the transaction in question to be a gift in favour of the plaintiff. In my view these mortgages-clearly negative any intention on the part of defendants 1 and 2 to make a gift.

18. The learned Subordinate Judge appears to have been impressed by the fact that there was no motive for this being a benami transaction. Experience has shown that frequently benami transactions are entered into in this country for no apparent reason and this has been commented upon frequently by their Lordships of the Privy Council. Time and again cases appear in these Courts where benami transactions have been entered into for no known reason. However, in this case, there was in my view a reason why this sale should be a benami one. The learned Judge appears to have thought that at the date of this sale, namely 26th July 1926, defendants 1 and 2 were not financially

embarrassed. It must be remembered that there had been long and bitter litigation between them and Alimunnissa; and even before this transaction was entered into defendant 1 had been compelled to mortgage a part of his property. On 11th April 1925, he mortgaged certain property for Rs. 700 which he required to repay previous debts on hand notes and the costs of the appeal. On 1st August 1926, he executed another mortgage [Ex. B (7)] for Rs. 300 which was due for household expenses. On 8th January 1927, he again mortgaged his property for Rs. 2500 to pay various debts; and on 19th June 1927, he executed an ijara deed for Rs. 937, Rs. 500 of which was required for payment of earlier debts. As I have stated, in the year 1929 defendant 1 recited in a mortgage of 25th May of that year that all other properties belonging to himself were already mortgaged except the property now in dispute; and he proceeded to execute in quick succession other mortgages upon the property in dispute.

19. Having regard to the fact that a long and expensive litigation had taken place and to the fact that immediately after this sale deed was executed defendant 1 was compelled to execute a number of mortgages, it seems pretty clear that on 26th July 1926, defendants 1 and 2 were financially in a low state. That being so, the transaction may well have been carried out in the name of the son with a view to protecting the property in case of attachments and sales occurring later on. That defendants 1 and 2 had no money at the time of the sale deed in question is clear, because they had to raise by mortgage the sum necessary to pay off Wajid Khan. In my view the situation existing at the time of this transaction was just such a one as might induce defendants 1 and 2 to obtain this conveyance benami in the name of their infant son.

20. Having regard to the financial condition of defendants 1 and 2, it is difficult to believe that they were in a position to make a gift in favour of their son. Nothing is suggested as to why they should have desired to make a gift at this particular time. It is urged on behalf of the respondent that he was the only son of defendants 1 and 2 and therefore it was only natural that the parents should have desired to benefit him. He had been their only son for five or six years, and there is no reason suggested why his parents should have suddenly decided to make this gift in his favour. Further it is urged that this gift was made in order to provide for the boy''s education and maintenance. Parents usually make provision for the education and maintenance of their children, but they do not as a rule make gifts of property to children for such purpose. They may set aside property for such a purpose, but they do not as a rule gift the property to the child. The suggestion that in these circumstances the transaction was in fact a gift is, in my view, a most improbable one.

21. In the present case the only facts that have been satisfactorily established are that the property was transferred to the plaintiff as a result of his parents paying the consideration money. As I have stated, prima facie the plaintiff is a benamidar, and in my view he has wholly failed to prove that his parents intended to make a gift of the property to him. The conduct of the parents, on

the other hand, suggests strongly that they never regarded this transaction as a gift and always regarded the property as their own and which they could mortgage in order to raise money for their own purposes. In my view the plaintiff has failed to show that he is the owner of this property and accordingly his claim should have been dismissed. In the result therefore I would allow First Appeal No. 175 of 1935, set aside the decree of the learned Subordinate, Judge and dismiss the plaintiff''s claim.

22. The appellants are entitled to their costs in this Court and in the Court below. As I have stated earlier in this judgment, Miscellaneous Appeal No. 16 of 1938 is an appeal by the plaintiff who was dissatisfied with the amount awarded to him as mesne profits. As I have held in First Appeal No. 175 of 1935 that the plaintiff is not the owner of this property, it follows that he is entitled to no mesne profits. Miscellaneous Appeal No. 16 of 1938 is, in the circumstances, not pressed and I would dismiss it and make no order as to costs,

Chatterji J.

I entirely agree.

