

(1956) 06 CAL CK 0005
In the Calcutta High Court
Case No : A.F.O.D. No. 10 of 1950

Sm. Jabeda Khatun and Another

APPELLANT

Vs

Hazi Mohammed Ibrahim and Others

RESPONDENT

Date of Decision : 11-06-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 1, Order 41 Rule 22, Order 6 Rule 2
Evidence Act, 1872 — Section 3

Citation : AIR 1957 Cal 360 : (1957) 1 CALLT 320

Hon'ble Judges : Renupada Mukherjee, J; P.N. Mookerjee, J

Bench : Division Bench

Advocate : Atul Chandra Gupta and Bijan Behari Das Gupta, for the Appellant; Amal Kumar Mukherjee, for Jitendra Nath Guha, for the Respondent

Final Decision : Partly Allowed

Judgement

P.N. Mookerjee, J.—The suit out of which this appeal arises was a suit for partition in which the plaintiff also prayed for dissolution of certain businesses claimed to be joint and for accounts. The suit was instituted in the Court of the Subordinate Judge of Jalpaiguri on June 14, 1946, and it embraced (i) a number of immovable properties, (ii) certain shares in tea companies and (iii) four businesses, namely, a shoe business at No 23, Machuabadar Street, Calcutta, a stationery business at Cooch Behar, a hide business at No. 5, Cross Lane, Narkeldanga, Calcutta, and another hide business at Nilphamari (Rangpur). The plaintiff claimed a ten annas share in all the above properties and businesses and asked for partition, dissolution and accounts on that footing. The learned Subordinate Judge has found the plaintiff's share to be 9 annas 16 gandas 2 karas and 2 krantis and he has passed a preliminary decree for partition in favour of the plaintiff on that footing in respect of the above properties and businesses except in regard to the two hide businesses at No. 5, Cross Lane and Nilphamari, which were held by him to be separate and exclusive businesses of defendant No. 3 and defendants Nos. 1 and 3 respectively.

2. The plaintiff and the three defendants, defendants Nos. 1, 2 and 3, are closely related. Defendant No. 2 is the mother of the plaintiff and of defendant No. 1 and defendant No. 3 is the latter's husband. The plaintiff's father Abdul Gani died in or about February 1920, leaving behind considerable properties which, according to the plaintiff, included, inter alia, all the suit properties, shares and businesses. Abdul Gani left two widows, namely, the plaintiff's mother Julmat Bibi (defendant No. 2), a second wife Rejaki Bibi alias Buchi Bibi, one son, namely, the plaintiff Hazi Mohammad Ibrahim, and the daughter Jabeda (defendant No. 1). Jabeda had been married in or about the year 1314 B. S., that is, during the life time of her father, and her husband was defendant No. 3 Abdul Ali.

3. Shortly after her husband's (Abdul Gani's) death, the plaintiff's step-mother Buchi Bibi sold her entire share in the properties, inherited from her husband Abdul Gani, to the plaintiff and his sister defendant No. 1 by a kobala (Ext. 25-J), dated May 4, 1920. The plaintiff claimed two-thirds of this purchase and, upon that footing, he claimed a ten annas share in the suit properties.

4. The defence inter alia was that, of the suit properties, the hide businesses at No. 5, Cross Lane, Calcutta, and Nilphamari, were the exclusive properties of defendant No. 3 and defendants Nos. 1 and 3 respectively and that the plaintiff had no share therein. The defence also denied the plaintiff's claim to a two-thirds share in the kobala purchase (vide Ext. 25-J) from Buchi Bibi and asserted that the vendees, namely, the plaintiff and defendant No. 1, acquired equal interest thereunder, each getting a moiety share, in the said purchased properties. The defence further pleaded that, by a kobala (Ext. K), dated January 12, 1923, the plaintiff and defendant No. 2 had conveyed their entire interest in the joint properties, to defendant No. 1 so that the plaintiff had no share left in any of the suit properties and could not claim any interest in any of them and was not entitled to any relief in the suit.

5. This defence claim under the 1923 kobala, (Ext. K) was expressly set up in the defendants' answer to the plaintiff's application for inventory shortly after the filing of the plaint & long before the filing of the written statements, whereupon the plaintiff amended his plaint by incorporating in it a challenge to this kobala (Ext. K) in the added paragraph 14-A of the plaint which ran as follows:

"That the kobala, dated, 12th January, 1923 set up by the defendants Nos. 1 and 3 by their petition, dated 29th June, 1946, is a fraudulent document without any consideration created and obtained by defendant No. 3 in the name of defendant No. 1 on the representation that it was a document necessary for giving him an authority to manage the affairs without allowing the plaintiff and the defendant No. 2 to know or realise that it was a kobala or sale deed. It was never read out or explained to them and they never executed it knowing the same to be a sale deed.

The plaintiff was then a minor and neither he nor defendant No. 2 had any necessity or occasion to sell their properties including their homestead and they

never proposed or agreed to sell their properties to defendant No. 1 and neither had defendant No. 1 or 3 had any means to purchase the said properties which were worth more than rupees one lakh at that time. The defendants Nos. 1 and 3 never before asserted any right by virtue of the said kobala and never possessed or tried to possess the said properties as exclusive owners. On the other hand, the plaintiff and defendants Nos. 1 and 3 have been all along in joint possession of all the said properties according to their respective shares. The said kobala is fraudulent, without consideration and is void ab initio and has affected the plaintiff's right or title or possession of the disputed properties."

and this was fully traversed in defendant No. 1's written statement which was filed about two months after the above amendment of the plaint. On this kobala (Ext. K), issue No. 4 was framed before the hearing which stood as follows:

"Was the plaintiff a minor at the time of execution of the kobala in question in favour of the defendant No. 1? Is the said kabala vitiated by fraud and misrepresentation as alleged in the plaint? Can the plaintiff maintain the suit without asking for setting aside the same?"

and later on, it appears, the learned Subordinate Judge framed an additional issue (issue No. 8) in his judgment at the time of writing it out in the following terms:

"Is the kabala in question for consideration and has it been acted upon?"

6. Issue No. 4 in its first two parts was answered by the learned Subordinate Judge against the plaintiff but issue No 8 was answered in his favour and upon the further finding *inter alia* that the disputed kobala (Ext. K) needed no setting aside and that the suit properties, save the two hide businesses at No. 5 Cross Lane, Calcutta, and Nilphamari (which, belonged respectively to defendant No. 3 and defendants Nos. 1 and 3 exclusively) were the joint properties of the parties in which the plaintiff's share was 9 annas 16 gandas 2 karas and 2 krantis, the learned Judge gave him (plaintiff) a decree for partition, dissolution and accounts.

7. Defendants Nos. 1 and 3 have come up in appeal to this Court and their only grievance is that the learned Subordinate Judge was not justified in framing the new issue No. 8 in his judgment and in nullifying the kobala (Ext. K) upon the new case that it was a benami or sham or paper transaction without consideration, never intended to be acted upon, there being no such case in the pleadings or in the issues, framed before trial, where the plaintiff's only case against the said kobala (Ext. K) was that it was vitiated by fraud and misrepresentation and also by reason of the plaintiff's minority at the time of its execution. That case of fraud and misrepresentation and also of minority has been negatived by the learned Subordinate Judge and, accordingly, the above defendants submitted that the plaintiff's challenge to the kobala (Ext. K) should have been rejected by the learned Subordinate Judge and his suit should have been entirely dismissed in view of the said kobala (Ext. K), so far as the properties, covered by it, are concerned, and in view of the learned Judge's own

adverse finding against the plaintiff with regard to the remaining properties.

8. The plaintiff has not filed any appeal (cross-appeal) with regard to the dismissed portion of his claim, namely, as regards ,the two hide businesses at No 5, Cross Lane, Calcutta, and Nilphamari or with regard to the diminution of his share from 10 annas, claimed in the plaint, to 9 annas 16 gandas 2 karas 2 krantis nor has he filed any cross-objection in that behalf. The above dismissal (including the diminution of share) must, therefore, stand but the plaintiff, as respondent in this appeal, is clearly entitled to support the decree in his favour on grounds found against him & his learned Advocate Mr. Amal Kumar Mukherjee, has, accordingly attempted to support the decree not only by asserting the propriety of the issue of benami and the learned Sub-Judge's discussion of the same and supporting the learned Judge's finding on the said question but also by challenging the learned Judge's adverse finding against his client on the question of fraud and misrepresentation as vitiating the said kobala, Ext. K. On the question of the plaintiff's minority, however, at the date of the disputed kobala (Ext. K) Mr. Mukherjee has very fairly and frankly conceded that, on the materials before, the Court, he cannot successfully challenge the learned Subordinate Judge's adverse finding against his client,

9. It will be necessary, therefore, to consider first the propriety of the issue of benami and the learned trial Judge's discussion of the same in the facts and circumstances of this case and, if that is found to be justified, then it will be necessary to enter into the merits of his finding on the said question which, if upheld, would render further discussion unnecessary. If, however, it be found that the learned Subordinate Judge was not justified in raising the issue of benami or in framing it at the time of writing out his judgment, or if his finding on that point in the plaintiff's favour be not sustainable on the materials before the Court, the decree in the plaintiff's favour can be maintained only by reversing the learned Judge's finding on the other question of fraud and misrepresentation,

10. As to the propriety of the issue of benami and of deciding the case upon that issue, there appears to be some considerable difficulty in the facts and circumstances of this case. Neither the original plaint nor Its amendment contains any allegation on the point and naturally we do not find any traverse of it or anything said about it in the written statements. In the plaint the reference to the kobala came only in the amended paragraph 14(a) and there also the challenge to it was confined to grounds of fraud and misrepresentation and want of consideration, as supporting the same, and the plaintiff's minority. There was no allegation even remotely that the kobala represented a sham or paper transaction, never meant to be acted upon. The issues also which were framed before the hearing, namely, issues Nos. 1 to 7, do not raise any such case. It appears, however, that, in adducing evidence on the second part of issue No. 4 which raised the question of fraud and misrepresentation, the plaintiff spoke about the non-passing of consideration and also alleged that the kobala (Ext. K)

had not been acted upon and gave or purported to give some details in support of that allegation. There was some cross-examination on the point and some rebutting evidence on the defendants' side, but it seems to us that, all along, the parties' attention was fixed upon the question of fraud and misrepresentation as vitiating the kobala and the evidence and cross-examination were directed towards the proof or disproof of the same. In this way, no doubt, some materials were placed on the record which would be undoubtedly relevant on the question of benami also, but it is perfectly clear that that was done for an altogether different purpose, namely for supporting the case of fraud and misrepresentation as raised in paragraph 14(a) of the plaint and forming the subject-matter of issue No. 4 in its second part. That was something quite different from the issue of benami as framed by the learned Judge (vide Issue No 8) at the time of writing out his judgment. That this issue No. 8 was framed at that late stage is clear from the observations of the learned Judge himself, preceding the recording of that issue in the judgment itself and this was apparently done probably because some arguments were made before him upon that point in view of the evidence, already alluded to by us. We do not "think, therefore, that the defendants had any sufficient notice of this case of benami, nor any proper opportunity of meeting it or leading full evidence on the same and, in such circumstances, the learned Subordinate Judge should not have entertained the point or based his decision of the case upon it by raising it as an additional issue at the time of writing out his judgment. It was no doubt open to the learned Judge, if, on the facts before him, law permitted such a course,--to allow an appropriate amendment of the plaint so as to raise the case of benami and/or the proper issue at the proper time so as to give the defendants a fair notice of the plaintiff's case on this point and afford them sufficient opportunity to meet it by leading appropriate evidence, but it was certainly objectionable and highly prejudicial to the defendants to decide the suit on this new case or benami, not raised in the pleading nor in the issues before trial, and without giving them proper opportunity to lead full evidence on the point, simply because some evidence had already been led, in view of the other issues in the case, actually framed before the hearing, which may also be relevant on this question of benami. Such a course cannot be too strongly condemned. In the circumstances, the evidence on the point is bound to be partial and such partial evidence is no better than no evidence. To defeat a party on a case, of which he had no fair notice and on which he had no sufficient opportunity to adduce evidence, is an obvious denial of justice and should not be encouraged or supported. It is true that pleadings in this country are not as strictly construed as in England. It is true also that a case, made in the pleadings but not expressly or sufficiently raised in the issues or even not raised at all in the issues actually framed, or vice versa, may be entertained and lawfully decided to determine the rights of the parties provided they had fair notice of the same and adequate opportunity of meeting it, but, in all such cases, this proviso is an important and essential element which cannot be disregarded or dispensed with. The test of prejudice is the deciding factor in such cases and Courts of justice should not

lose sight of that. Not unoften some evidence is found to be common, that is, having relevancy on several points but, even then, such evidence cannot be legitimately used for finding upon a case, of which the affected party had no fair notice and which he had no proper opportunity to meet. That is what has happened in the present case and such action cannot be supported. The evidence that the disputed kobala (Ext. K) was not acted upon may be relevant both on the question that it was fraudulently obtained by concealing the real nature of the document from the plaintiff and also on the question of benami. Similarly, the evidence about the passing or non-passing of consideration may also be relevant under both the above heads. But such common evidence may only be a part of the full evidence on the question of benami and the other evidence on this point may not have been adduced by the defendants on that question as this point of benami was not the plaintiff's case to the defendant's apparent knowledge, or in other words, not in the pleadings or issues at or before the hearing except possibly during arguments, and as of it the defendants had no sufficient notice. So far as benami is concerned, the evidence on record would, therefore, be only partial evidence and such partial evidence as we have already said, is no better than no evidence. The common evidence having been obviously adduced with an eye to the other issues only, it is not unlikely that the full evidence on benami is not before the Court and, in such circumstances, the party or parties affected should not be held concluded by a decision on this question of benami upon such partial evidence, they having no proper opportunity to adduce evidence on this particular point.

11. In the above view, we are unable to uphold the decree so far as it rests on the learned Subordinate Judge's finding on the question of benami. At the same time, we do not think that the plaintiff should be non-suited by being held debarred from raising this question of benami in this suit and in our opinion, he is, in the circumstances of this case, entitled to an opportunity to raise this plea in a proper manner, namely, by suitably amending the plaint so as to include the case of benami as regards the disputed kobala (Ext. K). The defendants will then have a proper opportunity of making an appropriate defence to that case of benami and the Court will decide it after framing an appropriate issue on the point and giving the parties full opportunity to lead further evidence so as to place all available materials on the point before the Court.

12. Before, however, remanding the suit for the above purpose, we have to consider the plaintiff appellant's submission on the question of fraud and misrepresentation which has been found against him by the court below. We find, however, as already indicated above, that, some of the evidence on this point is also relevant on the question of benami and it is not possible to discuss it or pronounce upon it without affecting the consideration of the said other question, namely, of benami, which should be left -- and which we have decided to leave, for consideration and decision by the court below. We, accordingly, deem it proper to remit for consideration of the court below both the above questions of benami and fraud and misrepresentation. Which would obviously include also the

question of passing or non-passing of consideration as regards the disputed kobala (Ext. K). This, of course, must be done only after the necessary amendment of the plaint, as indicated above, and only after the framing of an appropriate issue or issues by properly recasting the present issue No. 8 and the second part of issue No. 4 to the extent necessary and by allowing the parties to adduce further evidence which, of course, must be confined only to the point of benami. The learned Subordinate Judge will fix a time within which the plaintiff will amend his plaint for the above purpose and, in case of default on the plaintiff's part, his suit will be dismissed. If the necessary amendment is made, the learned Subordinate Judge will raise appropriate issues on the questions, remitted to him hereunder, and will allow the parties proper opportunity to hear further evidence on the question of benami, as indicated above. The learned trial Judge will then decide the suit afresh in the light of his other findings which remain unaffected by this judgment and his fresh findings on the above two questions on the evidence, already on record, and such further evidence as may be adduced by the parties in pursuance of the leave, hereby granted. We would also like to add that, in making the final adjustment of accounts, if a preliminary decree for accounts be eventually passed the learned trial Judge will give due weight inter alia to the possession and management of a particular party or parties.

13. One other observation seems to be necessary. In allowing the plaintiff opportunity to raise the question of benami by an appropriate amendment of the plaint, we do not think we have transgressed any rule of law or principle. Some allegation of this benami is to be found in the previous application for amendment which is on the record, although the actual prayer in that application for the amendment allowed on the occasion does not refer to this aspect. We feel that, in the circumstances, there is some justification, and enough power in the Court too -- for allowing the opportunity to amend as otherwise, in endeavouring to do justice to the contesting defendants, the Court would be relegating the plaintiff to an unjust position. That injustice we have tried to avoid by adopting what seems to us to be the best possible course in the circumstances.

14. In the result, this appeal is allowed in part, the decree of the learned Subordinate Judge is set aside and the case is sent back to the court below for further hearing and an appropriate decision in accordance with law in the light of the observations, made above.

15. Costs of this appeal will abide the result.

Renupada Mukherjee, J.

16. I agree.