
(2009) 09 CAL CK 0029
In the Calcutta High Court
Case No : F.A. No. 227 of 1999

Smt. Sushama Nath and Others

APPELLANT

Vs

Sri Tapendra Nath and Others

RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Citation : (2009) 09 CAL CK 0029

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Pratik Prakash Banerjee and Rakhi Shraff, for the Appellant; L.C. Behani and Hiranmay Bhattacharya, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This first appeal is at the instance of the defendants in a suit for partition and is directed against the judgment and decree dated 8th March, 1999 passed by the learned Civil Judge, Senior Division, Sealdah, Dist.-South 24-Parganas in Title Suit No. 5 of 1993 thereby passing a preliminary decree declaring 9/16th share of the plaintiffs in the suit property and 7/16th share of the defendants.

2. Being dissatisfied, the defendants have come up with the present first appeal.

3. The plaintiffs, five in number, being the first wife, one son and three daughters of one late Srischandra Nath filed in the Court of the learned Assistant District Judge, Sealdah a suit being Title Suit No. 5 of 1993 thereby claiming 9/16th share of the suit property as described in schedule of the plaint. The schedule "A" consisted of 6 cottahs 7 chittaks and 2 square feet of land with a four-storied building being Premises No. P-280, CIT Scheme IV(M) within police station of Pholbagan. Schedule "B" is 12 cottahs of land situated at Santiniketan in the District of Birbhum and schedule "C" is a Maruti Car bearing Registration No. WMC 9240 and all the monies and movables lying in the bank account and locker in the National Grindlays Bank at 6, Church Lane, Kolkata-1 in the name of the

Srischandra Nath. The plaintiff No. 1, the first wife of Srischandra Nath, died on 9th February, 1996 and on her death, her name was expunged with the note that all her heirs and legal representatives were already on record as the remaining plaintiffs.

4. The case made out by the plaintiffs may be summed up thus:

(a) The parties to the suit are Hindus by faith and governed under Dayabhaga School of Hindu Law. The properties described in the schedules stood in the name of the predecessor-in-interest of the parties, namely, late Srischandra Nath who was the husband of both the plaintiff No. 1 and the defendant No. 1, and the father of the rest of the parties.

(b) The husband of the plaintiff No. 1 was a displaced person from East Pakistan and at the time of marriage in the year 1939, the said Srischandra was a student of law and the plaintiff No. 1 supported him by serving as a schoolteacher in Chetla Girls' School, Calcutta and also at a school at Bhatpara, Naihati till 1941 when he started his career in Assam Govt. Civil Service.

(c) After resigning from Government service, he stated practising in Law Courts in Assam as an Advocate.

(d) Srischandra being incapable of maintaining his family, the plaintiff No. 1 had to join as Headmistress at Silliguri, West Bengal and Azimganj Girls' High School in the District of Murshidabad and she retired from the said school.

(e) In fact, the suit property had been acquired by the joint income of the plaintiff No. 1 and her deceased husband; however, to avoid controversy and as the property stood in the name of late Srischandra, for equitable distribution of family property to all his successors, the suit was filed.

(f) All the Immovable properties were purchased and acquired for the benefit of the family members of the deceased Srischandra and the second wife of the deceased, namely, the defendant No. 1 who happened to be the younger sister of the plaintiff No. 1 and who entered into the conjugal life of the deceased Srischandra Nath taking advantage of the temporary sickness of the plaintiff No. 1 and the weakness of the deceased.

(g) If any deed was made in the name of the defendant No. 1, that was a void one and outcome of fraud, undue influence and coercion. The defendant No. 1 cannot claim any extra benefit or advantage of any deed if discovered subsequently. The suit property mentioned in schedule "A", the property at Santiniketan and all other properties in suit were purchased for the benefit of all the family members though those were acquired and purchased by the major contribution of the plaintiff No. 1 who earned a lot as a Headmistress in a school and by private tuitions.

(h) Late Srischandra Nath died on 3rd February, 1991 as intestate leaving behind two wives, the plaintiff No. 1 and the defendant No. 1, who jointly inherited one

unit of share and the son and daughters, each acquired and inherited equal share. As such, the two wives, the plaintiff No. 1 and the defendant No. 1 acquired 1/8th share and other plaintiffs being plaintiff Nos. 2, 3, 4 and 5 each acquired 1/8th share and the defendant Nos. 2, 3 and 4 each acquired 1/8th share to the suit property.

(i) The property as described in the schedule "A" is partly residential and partly tenanted. The plaintiff Nos. 1 and 2 were residing in the ground floor and the plaintiff Nos. 3, 4 and 5 occasionally came and resided in the suit property with the plaintiff No. 1, their mother. The defendant Nos. 1, 2 and 3 also resided in a part of the "A" schedule property. There are tenants in the portion of ground floor and entire first floor of the "A" schedule property, namely, Sri Binani and Sri Poddar at the first floor and Sri Sinha in the ground floor and the monthly rental of the tenanted portion was Rs. 3,600/-. The deceased Srischandra Nath before his death inducted tenants in the first floor for which he received considerable amount of Rs. 2 lakh as advance and by dint of that money, he purchased a Maruti Car bearing registration No. WNC 9240, as described in schedule "C" property. The schedule "B" property is situated in Santiniketan and the other schedule "C" property i.e. money, is lying in the bank at Church Lane, Kolkata-1.

(j) After the death of Srischandra Nath, the defendants unilaterally misappropriated the entire income of the "A" schedule property without giving any share to the plaintiffs. The defendants also were enjoying and possessing the major portion and better part of the "A" schedule property. The plaintiffs further came to know that the defendants did not pay any tax and the statutory liability though they misappropriated the whole income. Thus, prayer for accounts was also made. Hence the suit.

5. The suit was contested by the appellants by filing written statement thereby denying the material allegations made in the plaint and the defence of the appellants may be summarised thus:

(1) It was denied that the plaintiff No. 1 maintained the family of the Srischandra Nath or that the properties were purchased for equitable distribution and beneficial enjoyment of all the successors of Srischandra Nath. Srischandra Nath married plaintiff No. 1 in the year 1939 but since marriage, the relation between them was not good and as such, the said Srischandra Nath married the defendant No. 1 in 1946 and lived together till his death. The plaintiff No. 1 was in the family till 1951 when she took service at Siliguri. Since then, she did not come back to live in the family. The said Srischandra Nath started practice as an Advocate in Assam in 1951 after he resigned from the service.

(2) The defendant No. 1 during her husband's lifetime gave gratuitous leave and licence to the plaintiff Nos. 1 and 2 in the year 1984 to occupy and reside in a portion of the ground floor of the "A" schedule property and it was agreed between the plaintiff No. 1 and the defendant No. 1 that upon the death of Srischandra Nath the said plaintiff Nos. 1 and 2 would vacate the said property

and deliver peaceful and vacant possession to the defendant No. 1. In any event, upon the death of the said Srischandra Nath on 3rd February, 1991, the defendant No. 1 revoked the leave and licence granted to the plaintiff Nos. 1 and 2 and they were bound to vacate the property. Notwithstanding such demand, the plaintiff Nos. 1 and 2 failed and neglected to vacate the property.

(3) As regards the right, title and interest in "A" schedule property, the defendant No. 1 had already filed a suit against the plaintiff Nos. 1 and others for declaration that she is the sole and absolute owner of the property and recovery of vacant and peaceful possession from the plaintiff Nos. 1 and 2. The said suit was pending.

(4) The "A" schedule property absolutely belonged to the defendant No. 1 and she had been regularly paying the tax and other liabilities of the suit property. The "A" schedule property was purchased by the defendant No. 1 in the name of her husband. The original purchase- deed all along remained in the possession of the defendant No. 1 and the husband by executing a deed of relinquishment disclaimed all his right, title and interest in the said property and admitted the defendant No. 1 to be the real owner and possessor. The suit was, thus, liable to be dismissed in respect of "A" schedule property but the defendants were ready and willing to partition the balance property.

6. At the time of hearing of the suit, Manoshree Lahiri, the plaintiff No. 3, alone gave evidence in support of the plaint case while the defendant Nos. 1 and 2 deposed in opposing the claim of the plaintiffs.

7. As indicated earlier, the learned Trial Judge by the judgment and decree impugned herein held that the plaintiffs had 9/16th share jointly in the suit property and the balance 7/16th share was held by the defendants. The learned Trial Judge turned down the objection of the defendants that the "A" schedule property was owned by the defendant No. 1 alone. According to the learned Trial Judge, the said property was really purchased by Srischandra Nath and he was the absolute owner of the property.

8. Being dissatisfied, the defendants have come up with the present appeal.

9. Mr. Banerjee, the learned advocate appearing on behalf of the appellant, has, at the very outset, submitted before us that his clients do not dispute the findings of the learned Trial Judge as regards the right of the parties in the suit properties other than the schedule "A" and he proposed to restrict his submissions only with regard to the schedule "A" property, situated at P-280, CIT Scheme.

10. The vacant land of the schedule "A" was purchased in the name of Srischandra Nath but subsequently, the said Srischandra himself during his lifetime executed a deed of nadabi in favour of his second wife admitting that the same was purchased with the money of his second wife and on that basis, the Calcutta Municipal Corporation changed the name of the owner from Srischandra

to that of the defendant No. 1, the second wife. Although the change of mutation in favour of the defendant No. 1 had taken place long back on the basis of the deed of relinquishment executed in the year 1961, Srischandra, during his lifetime never raised any objection to such mutation in favour of the defendant No. 1. By relying upon the aforesaid admitted position, Mr. Banerjee vehemently contended before us that the learned Trial Judge erred in law in holding that the said property was nevertheless owned by Srischandra by totally overlooking the admission of Srischandra contained in the deed of nadabi and also from his subsequent conduct. In other words, Mr. Banerjee contends that the plaintiffs having filed the suit as heirs and legal representatives of Srischandra cannot take any inconsistent stance from the one taken by their predecessor during his lifetime and thus, are bound by his admission. Mr. Banerjee, therefore, prays for modifying the preliminary decree only in respect of the schedule "A" property by dismissing the suit in respect of that property.

11. Mr. Behani, the learned senior advocate appearing on behalf of the plaintiffs-respondents, on the other hand, has disputed the aforesaid contention of Mr. Banerjee and has contended that the original deed of purchase having been made in the name of Srischandra, by a subsequent deed of nadabi, the title of the said property cannot pass in favour of the defendant No. 1 and the mere mutation in the records of Corporation of Calcutta does not affect the lawful title of the owner. Mr. Behani further contends that the person who alleges benami should prove such fact and produce sufficient amount of evidence showing the motive of benami and that the ostensible owner did not pay the consideration money. Mr. Behani contends that in this case, the defendant No. 1 having failed to discharge such burden, the learned Trial Judge rightly decreed the suit by describing Srischandra as the real owner of the property. He, therefore, prays for dismissal of this appeal by affirming the judgement and decree passed by the Trial Court.

12. Therefore, the only question that arises for consideration in this appeal is whether the learned Trial Judge was justified in declaring the share of the plaintiffs in schedule "A" by accepting the plea of the plaintiffs that the Srischandra was the real owner of the said property at the time of his death.

13. After going through the materials on record, we find that about 6 cottahs and odd area of land owned by the Calcutta Improvement Trust was apparently sold to Srischandra in the month of July, 1958 at the price of Rs. 20,000/- and odd and out of that amount, Rs. 18,000/- and odd were then paid and the land was mortgaged in favour of the CIT and subsequently, on payment of the balance amount of Rs. 2,000/-, the mortgage executed in favour of the CIT was redeemed in the selfsame year and thereafter, in the year 1961, Srischandra executed a deed of release admitting that he was the mere benamdar of the his wife, the defendant No. 1, who paid the amount of consideration money and after the title had been fully acquired, there being no further difficulties in holding the property at the instance of a lady, he executed the said deed. It was

pointed out that the reason of benami was that there might be difficulty in acquiring the title from a corporate body like CIT in the name of a lady and thus, it was purchased in his name although the amount of consideration money was paid by the defendant No. 1. On the basis of that deed of release, the property was freshly mutated in the name of the defendant No. 1 and since then the defendant No. 1 has been shown to be the owner of the property in the records of the Calcutta Municipal Corporation. It further appears that the defendant No. 1 had been from the middle of nineteen sixties realising rent from the tenants and the plaintiffs could not produce any materials showing collection of rent by the husband of the defendant No. 1 at any point of time during his lifetime. In the past, the defendant No. 1 claiming to be the absolute owner of the suit property filed a writ- application before this Court against the Calcutta Municipal Corporation challenging enhancement of the corporation tax and the said writ-application was moved on her behalf by her husband as her learned advocate (Vide Ext-F). There is no dispute that the original deed of acquisition of title from CIT and the deed of redemption of mortgage have been filed from the custody of the defendant No. 1.

14. From the aforesaid facts it is at least established that the apparent owner himself accepted the defendant No. 1 as the real owner by his explicit admission and also by his subsequent conduct and never tried to assert ownership during his lifetime till his death in the year 1991.

15. This is a case of benami taken by a second wife alleging the husband to be her benamdar which is to some extent unusual. In this case, there is no dispute that the defendant No. 1 was a school teacher and had retired as such a teacher and her husband was an advocate of this Court. We quite appreciate that it is for the person who alleges benami is to prove such fact and there are certain tests which are followed by a court of law for the purpose of ascertaining the real nature of the transaction.

16. Intention of the parties is the most vital factor to be considered for determining the real nature of the transaction. From the deed of release issued by the husband we get the idea behind the motive of the alleged benami. We do not find the apprehension disclosed therein to be baseless. It appears that the property was purchased without giving full amount of consideration money and for that reason, the property was mortgaged to the CIT till payment of the full amount. The CIT being a statutory authority might not be agreeable to transfer the property to a lady who was then unable to pay the full amount of money and a mortgage deed was required to be executed for that purpose. The husband being an Advocate, he undertook to figure as an ostensible owner to avoid this complication. After all, the transaction took place more than 50 years ago when even the ordinary people, not to speak of statutory body, was reluctant to make any transaction with a lady regarding transfer of immovable property.

17. At the same time, we must remember that although the onus to prove benami lies upon the person who alleges the same, it becomes easier to prove

benami once the apparent owner during his lifetime admits such transaction to be benami. The law authorises the Courts to pass decree even on the basis of admission without requiring formal proof of the case made out by the plaintiff provided such admission is genuine.

18. If admission is made by a party accepting the plea of the other side in writing and if it appears that such admission is acted upon by the party by its conduct, such party cannot get out of such admission unless it is established that such admission was obtained by practising fraud, undue influence, coercion etc. Such admission is equally binding upon the successor-in-interest of the person making such admission.

19. In the case before us, it is not the case of the plaintiffs that their predecessor-in-interest did not execute the deed of release. In the plaint, it was simply stated that if any deed was made in the name of the defendant No. 1 that was void ab initio and was the outcome of fraud, undue influence and coercion. However, no description of such fraud, undue influence or coercion was given in the plaint.

20. The PW-1, the sole witness for the plaintiffs, in her deposition uttered not a single word about either the fraud, or undue influence or coercion while executing the deed of nadabi by her father. Even no suggestion was given to the DW-1 regarding undue influence, fraud or coercion in obtaining the nadabi deed from her husband. Thus, in the absence of any challenge thrown to the DW-1 regarding the execution of the deed of nadabi, we are of the view that the admission of Srischandra in the said deed is binding not only upon him but also upon his successors. Thus, the plaintiff having claimed through Srischandra cannot take any plea which is inconsistent with the admission made by him during his lifetime and his subsequent conduct. We quite appreciate that by mere admission title does not pass but if there is admission that what is apparent is not the reality, the Court can accept such document as a piece of admission of the apparent owner and in such circumstances, the rigour of proving a benami transaction becomes easier. In this case, the original title deed and the redemption of the mortgage deed have been produced from the custody of the defendant No. 1 and the plaintiffs could not produce any material showing that after the execution of the nadabi deed, Srischandra at any point of time ever exerted any act of ownership of the said property.

21. We are also quite conscious that the relationship between the parties being that of wife and husband, the fact that Srischandra might have contributed some amount for purchase or for further construction of the building is inconsequential. It will be useful at this juncture to notice an old judgment of this High Court in K.K. Das, Receiver and Others Vs. Sm. Amina Khatun Bibi and Another, , wherein it was held that where a husband provides for the money for construction of a building on a land which is in the name of his wife, he did not intend to reserve any right in the structures raised thereon and the said decision has been approved by the Apex Court in a recent case of Binapani Paul Vs. Pratima Ghosh

and Others, (See paragraph 32). In the aforesaid decision of the Supreme Court, it has further been held that even if in a case the husband pays full consideration money but the deed stands in the name of the wife, it should be in the absence of any evidence to the contrary held that the husband purchased the property for the benefit of his wife alone. In the case before us, the husband admits in writing that he did not pay any amount and the wife purchased the property in his name and the wife has been proved to be a school teacher even at the relevant point of time and no evidence has been adduced by the plaintiff to show that she ever paid any amount to the husband as falsely alleged in the plaint. Her silence during the lifetime of her husband by never raising any dispute as to the title of the defendant No. 1 or mutation in the record of the Corporation itself suggests that she made out a false claim in the suit being conscious that the property belonged to the defendant No. 1. Even if the husband made contribution for the construction of the building on the land mutated in the name of the wife, it should be presumed that he incurred such expenditure for the benefit of the defendant No. 1. The realisation of rent from the tenants at the instance of the defendant No. 1 has also been proved by production of the rent receipts and no evidence to the contrary has been adduced. Therefore, the husband at no point of time ever asserted ownership over the suit property. In this case, the transaction took place in the year 1958 and thus, Benami Transaction (Prohibition) Act, 1988 has no application.

22. We, therefore, find that the learned Trial Judge erred in law in holding that the Srischandra was the real owner of the schedule "A" property by overlooking the aforesaid important aspect of admission and the post-admission conduct of the husband accepting the defendant No. 1 as the real owner.

23. We, consequently, modify the decree granted by the learned Trial Judge by dismissing the suit in respect of the schedule "A" property and maintaining the decree in respect of the other schedules than "A".

24. The appeal is, thus, allowed to the extent indicated above.

25. In the facts and circumstances, there will be, however, no order as to costs.

26. I agree.