

(1972) 11 OHC CK 0016
In the Orissa High Court
Case No : First Appeal No. 155 of 1966

Sri Madan Mohan Das Babaji (and after him Bhikari Sahu
alias Bishnu Das)

APPELLANT

Vs

Brundaban Pal

RESPONDENT

Date of Decision : 03-11-1972

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 145

Citation : (1972) 38 CLT 1323

Hon'ble Judges : R.N. Misra, J

Bench : Single Bench

Advocate : K.C. Jagadeb Ray and C.R. Das, for the Appellant; S.S. Sasu and Y.S.N. Murty, for the Respondent

Judgement

R.N. Misra, J.—Both the first appeals are directed against a common judgment and separate decrees of the learned Subordinate Judge of Berhampur passed in two separate suits and the, the appeals on the application of the parties were made analogous in this Court. Their were heard together and are disposed of by this judgment.

2. First Appeal No. 155 of 1966 is directed against the decree in Title Suit No. 62 of 1963 while First Appeal No. 267 of 1967, is directed against the decree in Title Suit No. 1 of 1964. The facts of each of the suits may he separately indicated:

First Appeal No. 115 of 1966:

3. The Plaintiff is the Appellant. He and the Defendant were two step-brothers. Their father who was a temple pujari died when the Defendant was young. The Plaintiff alleged that be looked after the Defendant as also his mother, educated the Defendant and looked after them. Plaintiff's father sold him to late Sri Sitaram Das Babaji, Mahant of Babaji Radhakanta Muth and in due course the Plaintiff became the Mahant of the said Muth. There is no clear material on record to show. as to when the Plaintiff became Mahant, but from Ext. F

(deposition of p.w. 12 in an O.T.R. case) it appears that the Plaintiff assumed charge as Mahant in 1929 or 1930. The Plaintiff alleged that he purchased Ac. 7. 97 of land in village Raghunathpur and Ac. 3. 94? of land in village Gobindpur as also two houses one titled and the other a thached one from one Adikanda Jena and his sons and grand-sons under a registered sale deed dated 24-9-1952 for Rs. 10,000/-. He, however, took the document in the name of the Defendant as he was anxious that his private acquisitions may not be mingled with the Muth's property and he may be left with sufficient personal assets to raise funds as and when necessary. Accordingly out of his personal funds he advanced Rs. 1,000/- under an agreement dated 20-5-1952 (Ext. 11); paid Rs. 3,000/- under a receipt dated 17-9-1912 (Ext. 12) and Rs. 6, 000/- at the time of registration on 24-9-1952 (Ext. 13). Though these documents were taken in the name of the Defendant, the Plaintiff was the real owner. The documents were in his custody he was in possession and enjoyment of the property and at his behest the Defendant had made a sale and a mortgage of portions of this property. Subsequently the Plaintiff and the Defendant fell out and the Defendant started claiming, title in himself. That led to a proceeding u/s 145 of the Code of Criminal Procedure and the property was attached and put under a receiver. Thereupon the Plaintiff filed the suit for declaration that he was the true owner of the property and the sale was only a benami transaction.

4. The Defendant denied the allegation of benami and contended that the property was his. According to him, the Plaintiff had acknowledged the Defendant's title in a civil litigation (Title Suit No. 12 of 1959) and in other litigations as well. Even before the Commissioner of Endowments in a Scheme proceeding, the Plaintiff took the stand that the property was of the Defendant and he had no connection with it. The mortgage referred to by the Plaintiff was admitted by the Defendant, but it was contended that it was a transaction of his own. The sale referred to by the Plaintiff was explained away by the Defendant as being a sham transaction and it was alleged that it had been brought about so that the vendee Bishnu Das (p.w. 12) may be found eligible to marry one Saria. Debt, who is a co-vendee with him under the Bale deed dated 7.5.1956. No consideration actually passed under the transaction. The Defendant claimed that he was in possession of the property as a true owner, had paid rent and the Plaintiff had no right, title or interest in the property.

First Appeal No. 267 of 1967.

5. This Emit was by the purchasers from Brundaban Pal, the Defendant in the connected suit. They alleged that under the sale deed dated 7.5.1956, for a consideration of Rs. 2,500/- they purchased Ac. 3.94? cents of land in Gobindpur along with the house in Berhampur and had obtained title to the property. They claimed that they were in enjoyment of the property in their own right and denied the allegation that it was a sham transaction.

6. The Defendant on the other hand took the plea that the transaction was a sham one and no title passed under it in favour of the Plaintiffs.

7. The two suits were heard together and one set of evidence was received. By the time the suits were instituted, p.w. 12 (Bishnu Das) - one of the purchasers under the subsequent sale deed of 1956 was already acting as the Power-of-Attorney holder of the Mahant. The Mahant as Plaintiff in one suit and the two subsequent purchasers as Plaintiffs in the other examined in all 15 witnesses. Bishnu examined himself as p.w. 12 and the Mahant as p.w. 15. Some of their witnesses came forward to support the contention of the Plaintiffs that the Defendant was so poor that he could not have purchased the property under Ext. 13 by paying the heavy consideration. p.w. 3, 8. deed writer, came forward not only to prove the documents, but stated about the personal assets of the Mahant and even as to proceedings in the suits p.w. 4, an ex karnam of the village and at present postmaster also supported the Mahant's case. On the side of the Defendant 13 witnesses in all were examined including the Defendant as d.w. 13. Voluminous documentary evidence was produced on both sides.

8. The learned trial Judge rightly indicated that the main question for consideration in both the suits was as to whether Ext. 13 was benami purchase- though the sale deed was in the name of the Defendant, the Mahant was the real owner. The other material question for consideration was if the sale deed of 1956 (Ext. 15) was a sham transaction. On a consideration of the evidence both documentary and oral, the learned trial Judge came to find that the Mahant had failed to establish that Ext. 13 was a benami transaction. Accordingly the Suit brought by the Mahant was dismissed. The learned trial Judge found that Ext. 15 was a sham transaction and accordingly the suit by the purchasers under Ext. 15 was also dismissed. These two appeals have been filed by the Plaintiffs of the respective suits impugning the decree of the trial Court by which their claims have been dismissed.

9. Mr. Jagdeb Ray for the Appellants contends that the learned trial Judge has clearly gone wrong in holding that the case of benami has not been established. According to him the Mahant is a man of substance and in fact the trial Court has found him to be so. He had paid the consideration for Ext. 3 a fact which has been, (it is contended) well established by evidence of several witnesses. The documents of title have been produced by the Plaintiff. It must, therefore, be assumed that he had custody of them. As against this, the Defendant was a man of no means and it was impossible for the Defendant to have paid the heavy consideration of Rs. 10,000/- for Ext. 13. The Mahant and the Defendant are close relations (step-brothers) and the Mahant was anxious to keep his personal acquisitions separate from the Muth's assets and that is the motive for entering into the benami transaction. At the instance of the Mahant the property has been dealt with and the Defendant must, therefore, be taken to be a mere name lender. Until 1962, when dispute started, Mr. Jagdeb Ray contends, the Mahant was in possession. That is why rent receipts or any other documents evidencing possession have not been forthcoming from the Defendant's side until 1962. The Mahant has produced documents to justify his claim of possession.

On the other hand, it is contended by the Defendant Respondent that heavy burden lay on the Plaintiff to establish that the Appellant. was the real owner and the transaction under Ext. 13 was really benami. According to counsel for the Respondent both the Plaintiff and the Defendant came from a poor family and the Plaintiff has not been able to show that he had personal assets out of which the consideration money could have been paid. Custody of the documents has been explained away according to counsel for the Respondent, by the fact that for the disputed property there have been previous litigations and the Mahant, and the Defendant as also p.w. 12 were co-Defendants in such litigations. They had contested such litigations by filing joint written statements and engaging common counsel. The documents were with the Defendant, had been produced in the said litigations and taking advantage of the relationship as also the common defence, the Mahant had taken back the documents and has produced them in the present litigation. The alienations a sale and a mortgage - were negotiated and entered into by the Defendant himself as owner of the property and not at the instance of the Mahant. There could be no motive as alleged because even after being Mahant, he was acquiring personal properties. Therefore, there could be no basis in the contention that the Mahant was attempting to secrete his personal assets and had resorted to make a benami purchase. As regards possession, it is contended, there is direct evidence to show that the Defendant was in possession and enjoyment of the property all by himself. Emphasis is laid on several admission of the Mahant that the property belonged to the Defendant and he had nothing to do with the said property.

10. In dealing with a case of banami, the Court takes into consideration the following facts and circumstances:

- (1) the source from which the purchase money was delivered;
- (2) Possession of the property.
 - (a) the party in possession of and not the nature and character of his possession;
 - (b) Whether possession was taken after the purchase;
- (3) the position of the parties and their relationship.
- (4) the circumstances of the parties.
- (5) the motive for resorting to the benami transaction.
- (6) custody and production of the title deeds.
- (7) previous and subsequent conduct of the parties.

While ordinarily these are the features which enter into the arena of consideration in deciding whether a transaction is benami or not, right conclusion can only be reached by adopting a cumulative appreciation of the entire evidence. A combination of some or all of them and a proper weighing and

appreciation of their value may in a given case go a great way towards indicating as to where the real title lies.

11. Mr. Jagdeb Ray did not dispute the approach of the learned trial Judge that heavy burden lay on the Mahant to establish his claim of benami transaction. In fact the two decisions which have been referred to by the learned trial Judge are of undisputed authority. In the case of AIR 1949 88 (Federal Court) , Mahajan J. (as his lordship then was) in clearest terms indicated:

It is settled law that the onus of establishing that a transaction is benami is on the Plaintiff and it request be strictly made out. The decision of the Court cannot rest on mere suspicion, but must rest on legal grounds and legal testimony. In the absence of evidence, the apparent title must prevail.

This Court in the case of Chanchal Devi and Others Vs. Puri Bank Ltd. and Others, , also indicated:

When a plea of benami purchase is raised, the ostensible title cannot be displaced except on clear and cogent proof of the benami character of the purchase....

In the case of Po Kin v. Po Shein St C.W.N. 252 (P.C.), the Judicial committee also indicated that the burden of substantiating an allegation of benami is a difficult one to discharge, but still the person alleging the property conveyed to another belonged to him must prove his allegation and prove it beyond reasonable doubt. I shall now proceed to deal with the various tests. The first in importance is the question of consideration money. The consideration for Ext. 13 is Rs. 10, 000/- As already indicated one thousand rupees was paid by way of evidence under Ext. 11 on the date of agreement (20th of May, 1952), three thousand rupees was paid under Ext. 12 (receipt dated 17.9 1952) and the balance of Rs. 6000/- was paid at the time of registration of Ext. 13 on, 24.9.1952. In his capacity as Mahant, the Plaintiff of title suit No. 62 of 1963 was certainly a substantial person. But he has been contending that he never used any Muth funds for the acquisition of the property under Exit. 13. The learned trial Judge, therefore, rightly looked for evidence to show that the Plaintiff was possessed of sufficient personal assets. Side by side he tried to see if the Defendant was capable of paying the consideration money. He relied upon the evidence of p.w. 2 and p.w. 12 who had indicated that a pujari in the Muth also could be a man with property of substantial proportion. On a consideration of the evidence of p.w.s. 2, 3, 4, 12 and d.w.s. 10 to 13 the learned trial fudge has come to the conclusion that the Defendant was in a position to pay the consideration under Ext. 13. Mr. Jagdeb Ray has read the evidence in Court and furnished an analytical note on such evidence. On perusing the note and the evidence itself, I am not in a position to take a view contrary to that which has been adopted by the learned trial Judge. Yet, it cannot be forgotten that the Plaintiff was also a substantial man and as the evidence shows he had assets apart from those of the Muth from out of which he could have paid the money.

Mr. Jagdeb Ray laid emphasis on the fact that the evidence showed that the money had really been paid by the Mahant. The two receipts - Exts. 11 and 12 - go to show that the Defendant had paid the money. Ext. 13 shows that the resume of the consideration was paid by the Defendant at the time of registration. To counteract this evidence, cogent and clear proof was necessary that the money had really been paid by the Mahant. The evidence regarding payment of the consideration money by the Mahant comes from p.w.s. 3, 4, 12 and 15. p.w. 12, one of the Plaintiffs in the connected suit on his own showing is the authorised agent of the Mahant. He and the Plaintiff p.w. 15 are, therefore, vitally interested in the litigation particularly after their relationship with the Defendant has become strained. p.w. 3 is the scribe of several documents. On his own showing, he is connected with the Muth for many years and he even known Mahant's personal affairs. He was a tenant of the Muth. In cross-examination he has also stated that he knew about the vendor of Ext. 13 Adikanda to have been summoned in the suit as a witness for the Plaintiff. He even seems to be very much interested in the Mahant and much reliance cannot be placed on his evidence. p.w. 4 is the ex-karnam and at present postmaster of local post office. As the local karnam, he was associated with the Muth for many years as his evidence shows. He appeared on behalf of the Mahant in the proceeding u/s 145 of the Code of Criminal Procedure in regard to the disputed property and had given an affidavit supporting the Mahant's claim. He claims association with the Muth for a long time. This therefore, is the entire evidence to support the claim of the consideration money having been paid by the Mahant. It appears the Mahant maintains the accounts. No such accounts have been produced to show that on the three dates indicated above from out of the Mahant's personal funds payment had been made. I am not in a position to attach any importance to the contention of Mr. Jagdeb Ray that the consideration money had been paid from the Mahant's funds.

12. Coming to the custody of title deeds, admittedly Exts. 11, 12 and 13 have been produced by the Plaintiff. The Defendant has explained the position by saying that Sri T.N. Sahu and Sri S.N. Padhi, advocates, were the common lawyers in some oases relating to the very property and the Mahant, the Defendant and p.w. 12 were co-Defendants in the said suits. Those litigations were being contested on a common footing and documents had been produced in those cases. p.w. 12 had admitted these facts. The learned trial Judge in this background has accepted the evidence of the Defendant (p.w. 13) that the documents of title had been filed by him in the said suits and have been taken return of by the Mahant. I am not in a position to take a different view. Custody of the title deeds by the time of the present litigation cannot, therefore, be taken as a feature supporting the Mahant's claim.

13. In regard to the allegation of motive, the learned trial Judge has found that the Mahant has personal properties. In fact in the year 1955, the Mahant had purchased lands to the tune of sixty acres in his own name. In 1951, the Mahant had also purchased some property for himself. There is evidence to show that the

Mahant was buying and selling property now and then. In that view of the matter, there can be no force in the contention that the property was acquired in the name of the Defendant as the Mahant was anxious to keep away the property separate from the Muth's assets. If he was holding substantial property in his own name both before and after the transaction in question, he could as well have kept the property in his own name. The motive put forward by the Mahant, therefore, must be repealed.

14. Coming to the question of possession both parties led evidence. p.ws. 7 to 11 support the claim of possession on the side of the Plaintiff while d.ws. 3 and 5 to 9 support the Defendant's claim of possession. D.w. 3 is a village Level Worker, who has come forward to support the Defendant's possession. But as rightly pointed out by Mr. Jagdeb Ray, his evidence is in regard to possession during the year 1962. Disputes started sometime that year or in the latter part of 1961. This suit was filed in August, 1963. Mr. Jagdeb Ray, the fore, contends that no importance can be attached to the evidence of this public servant. While there is some force in his contention, I do not think the evidence of this witness can be completely discarded. The Mahant is certainly a very influential person in the locality and has a lot of people to support him. If the Defendant was not in possession from before, it would have been very difficult for him to get into possession suddenly. The fact that in 1962, the Defendant had really raised the crop goes to show that he was already in possession and in fact as the vendee under Ext. 13, he must be assumed to have been in possession from the date of purchase and not for the first time in 1962 as established by evidence of d.w. 3. The evidence on the side of the Mahant regarding claim of possession is discrepant. In paragraph 21 of his judgment, the learned trial Judge has indicated the discrepancies. Mr. Jagdeb Ray does not dispute those facts, but contends that notwithstanding these discrepancies and defects the evidence on the side of the Mahant is superior to that of the Defendant's. Both sides have also produced some rent receipts. Some of them are subsequent to the suit. The Account No. 13 shows the Plaintiff and the Mahant in different years to be in possession. The learned trial Judge has rightly, therefore, not attached any importance to such entry. The evidence is such that it does not lead me to hold that the Mahant has been able to show that he was in possession of the property and not the apparent title holder.

There is some evidence that p.w. 4 negotiated the transaction under Ext. 13 on behalf of the Mahant with the vendor Adikanda. In another part of the judgment I have indicated why p.w. 4 should not be relied upon. Adikanda is admittedly alive and Mr. Jagdeb Ray concedes that he would have been the best witness to support the Mahant's plea of benami, if the facts were true. It is not known as to why he has not been examined. There is no material on record to corroborate the statement of p.w. 3 that he was summoned for examination on the Mahant's behalf. The suggestion from the Bar that he may have been won over has rightly been discarded by the learned trial Judge as a conjecture without any footing in the record. In fact, adverse inference has to be drawn against the Mahant for

with holding the above evidence. Besides, the Mahant had claimed that the sale and the mortgage of a part of the property acquired under Ext. 13 by the Defendant was at his behest. p.w. 12 is one of the vendees under the sale. But he is vitally interested in the Mahant. It is not known why the mortgage has not been examined. His evidence was of material importance to show as to who it was that dealt with the property when it was mortgaged in his favour the Mahant or the Defendant.

15. Parties are admittedly brothers. It is true, they are step-brothers, but the Plaintiff's own case was that he had taken pity upon the Defendant and his mother because they were in strained circumstances. Accordingly he had maintained them. looked after the Defendant's education and Even provided the Defendant with service in the Muth. The Plaintiff became very well-placed after he became the Mahant of the Muth. It may have been that the Plaintiff intended to benefit the Defendant and to see that he was well provided for. Therefore, he may have helped the Defendant to acquire the property under Ext. 13 and it is possible that he had a role to play in the acquisition. It cannot, however, be said that it was his purchase in the name of the Defendant.

Ordinari, such a conclusion would have been more conjecture. But the admissions of the Mahant on several occasions in Judicial proceedings that he had no interest in the property cannot be lost sight of. In Title Suit No. 12 of 1959 brought by one Khalli Dasiani for maintenance against the Mahant on the ground that she and the Mahant lived as wife and husband respectively, the Mahant filed a written statement (Ext. W) wherein it was asserted:

This Defendant has nothing to do with the suit properties (Admittedly property under Ext. 13) and the third Defendant (the Defendant in the present suit) was free to deal with the properties as he chose. In other connected proceeding of the said suit, the Mahant had also taken the same stand. In an enquiry before the Endowment Commissioner, the Mahant had taken the same stand. These admissions of the Mahant that the property was that of the Defendant cannot be taken to have been explained away by the statement of the Mahant or of p.w. 12 that they were made because the Mahant found it necessary to make such statements to protect himself. It has been held by their Lordships of the Supreme Court in the case of Narayan Bhagwantrao Gosavi Balajiwale Vs. Gopal Vinayak Gosavi and Others, , that an admission is the best evidence that an opposing party can rely upon and though not conclusive is decisive of the matter unless successfully withdrawn or proved erroneous. Again in the case of Bharat Singh v. Bhagirath 1966 S.C.D. 155, their Lordships indicated:

The admissions duly proved admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether such party when appearing as witness Was confronted with those statements in case it made a statement contrary to those admission is substantive evidence of the fact admitted....

Notwithstanding the fact that these documents were not confronted to the Mahant, therefore, previous statements containing the admissions even if not confronted to the Mahant are admissible against him in the suit and the learned trial Judge has rightly relied upon them. The evidence of p.w.s. 12 and 15 does not explain away those admissions and the learned trial Judges has rightly relied upon those admissions against the Mahant. On these considerations, I must hold in agreement with the learned trial Judge that the Mahant has failed to establish that the transaction under Ext. 13 was a benami purchase in the name of the Defendant and that the Mahant was the true owner. His appeal, therefore, must fail. It is accordingly dismissed with costs.

(First Appeal 267/67).

16. The two Plaintiffs who purchased the property under Ext. 15 for a consideration of Rs. 2, 500/- from the Defendant are the Appellants. Admittedly the consideration money was paid before the Sub-Registrar at the time of registration and that fact has been enforced by the Sub Registrar. From the endorsement of the Public Officer, it would, therefore, appear that the consideration money had actually passed. The title deed had come from the purchasers. There is no evidence to show that the title deed had not been made over to the purchasers and had been taken by the Defendant himself from the Sub-Registrar's Office. The sale deed is said to be a sham transaction and it is contended that no title was ever intended to pass, the sole purpose was to satisfy the father-in-law of p.w. 12 that he was eligible to be given in marriage to the co-purchaser under Ext. 15 being a man owning property. If that was so, it is clearly not understood as to why both p.w. 12 and his would be wife were shown as co-purchasers. In the case of Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, , their Lordships indicated the distinction between the transactions which are benami and sham and according to them:

The fundamental difference between these two classes of transactions is that whereas in the former (benami) there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B (the real purchaser) to enquire into the question as to who paid the consideration for the transfer.

The evidence on record clearly shows that the sale deed had been made over to the purchasers. I do not find any justification for the learned trial Judge to have come to the conclusion that the transaction was a sham one. Four circumstances were catalogued in paragraph 28 of the trial Court's judgment to justify the conclusion. They are: (1) the low valuation of the suit land, (2) inclusion of the house property in Ext. 15, (3) at the time of execution of Ext. 15, the marriage proposal of the Plaintiff No. 1 with Plaintiff No. 2 was finalised (4) the Plaintiff has not led any evidence to show that he owned any other immovable property prior

to the impugned purchase. None of these circumstances. I think really is very material In 1952 under Ext. 13, about 11 acres of land and two houses were purchased for Rs. 10,000/-. Out of it about 4 acres of land and one house were transferred under Ext. 15 for Rs. 2,500/- Ed. 15 is of the year 1956. There is no evidence to show as to what would be the price of the lands and house left out. Admittedly the remaining land is almost double of what was sold under Ext. 15. The condition of the house is not borne out by evidence. Because the Defendant failed to lead evidence to show that the lands were of the same superior quality, it was not open to the learned trial Judge to infer that the land in question which was sold under Ext. 15 was not of inferior quality. The price is not so very low as to improbabilise a bona fide transaction under Ex. 15. The learned trial Judge is wrong in holding that it was common ground that Defendant had no title to the house included in the sale deed Ext. 15. Admittedly it was one of the houses conveyed under Ext. 13. Therefore, that ground has also to fail. Merely because marriage proposal between p.w. 12 and the co-purchaser under Ext. 15 had been finalised or there was no evidence to show that p.w. 12 was possessed of immovable properties from before no strength can be gathered for the defence case. Heavy burden lay on the Defendant to show that Ext. 15 was a sham transaction. The Defendant has really failed to discharge such burden. Consideration money having been passed at the time of registration and the title deed having come from the custody of the transferees it must be held that title had really passed and the Defendant has failed to show that it was a sham transaction not intended to be given effect to. The Plaintiffs in Title Suit No. 1 of 1964 are, therefore, entitled to a decree as prayed for. For these reasons, I must reverse the decree of the trial Court and direct that a decree as prayed for shall be passed. The Plaintiffs who are Appellants shall be entitled to costs throughout.