

(2009) 04 CAL CK 0079

In the Calcutta High Court

Case No : F.A. No. 136 of 1999 and C.A.N. 549 of 2009

Sri Sudhangsu Sekhar Ghosh

APPELLANT

Vs

Manindra Nath Ghosh and Others

RESPONDENT

Date of Decision : 06-04-2009

Acts Referred:

Citation : (2010) 1 CALLT 344

Hon'ble Judges : Tapan Kumar Dutt, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Tapan Kumar Banerjee, for the Appellant; Durga Prasad Majumdar, Sambhu Nath Chatterjee and Debabrata Chakraborti, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—property there are two different properties being Item No. 1 and Item No. 2. Item No. 1 is premises No. 28/10, Mahendra Banerjee Road, Calcutta-700060 admittedly standinThis first appeal is at the instance of the defendant No. 1 in a suit for partition and is directed against the judgment and decree dated 25th June, 1998, passed by the Civil Judge, Senior Division, Seventh Court, Alipore, in Title Suit No. 63 of 1986, thereby passing a preliminary decree and declaring one-fourth share of each of the parties to the proceedings including that of the appellant.

2. Being dissatisfied, the defendant No. 1 has come up with the present first appeal.

3. There is no dispute that the plaintiff and the defendants are the children of one Surendra Nath Ghosh who used to reside at 28/10, Mahendra Banerjee Road, Behala. The said Surendra Nath Ghosh died in the month of February, 1986. In the month of May, 1986, the plaintiff, the younger son of Surendra Nath Ghosh, filed the suit being Title Suit No. 63 of 1986 thereby claiming one-fourth share in the list of movable and immovable properties allegedly left by Surendra Nath Ghosh.

4. In the schedule of immovable g in the name of Surendra Nath Ghosh. However, Item No. 2 is a property being premises No. 89/6, Goalapara Road, Calcutta-700060 which stood in the name of the defendant No. 1. The specific case of the plaintiff and the defendant Nos. 2 and 3 is that although the property stood in the name of the defendant No. 1, he was a benamder and the property was purchased through the consideration money paid by their father. Therefore, in the said premises No. 89/6, Goalapara Road all the parties have one-fourth share each. Similarly, in the list of movables, several bank accounts were jointly held by Surendra Nath Ghosh with the defendant No. 1 or the son of the defendant No. 1 and the plaintiff claimed one-fourth share in the total amount of money lying in those accounts.

5. The suit was contested by the defendant No. 1 by filing written statement thereby opposing the prayer of the plaintiff and the specific defence of the defendant No. 1 was that he purchased the house property at Goalapara Road with his own money and therefore, he was the absolute owner of the property. He also tried to maintain that money lying in the several bank accounts jointly with his father also belonged to him.

6. The learned Trial Judge on consideration of the materials on record overruled the defence of the defendant No. 1 and held that the defendant No. 1 failed to prove that the house at Goalapara Road was purchased with his own money. Similarly, the learned Trial Judge further held that money lying in various joint accounts with the father also belonged to the said father and, therefore, the parties had one-fourth share each therein.

7. Being dissatisfied, the defendant No. 1 has come up with the present first appeal.

8. Mr. Banerjee, the learned advocate appearing on behalf of the appellant, strenuously contended before us that simply because the house property at Goalapara Road was found to have been purchased by the money advanced by Surendra Nath Ghosh, such fact does not necessarily prove that the father was the real owner. According to Mr. Banerjee, even if it is proved that the consideration money was supplied by the father, in the fact of the present case, the learned Trial Judge should have held that the father supplied the money for the benefit of the defendant No. 1 and, therefore, in the absence of any motive of making a benami, the learned Trial Judge should not have passed any direction for partition of the said house. In support of such contention Mr. Banerjee relies upon a decision of the Supreme Court in the case of Binapani Paul Vs. Pratima Ghosh and Others, . Mr. Banerjee, however, restricted his submission only as regards the house property situated at Goalapara Road.

9. Therefore, the only question that arises for determination in this appeal is whether the house property situated at Goalapara Road should be treated to be the exclusive property of the appellant before us.

10. In this case, it has been established from the evidence that the consideration

money for purchasing the property at Goalapara Road was paid partly from the Bank Account of the father of the parties and partly by cash. The learned Trial Judge found that the appellant could not prove that he even paid the cash money. The father of the parties retired from his service in the year 1972, purchased the said property in the year 1975 and died in the year 1986. We accept the proposition of law referred to by Mr. Banerjee, the learned advocate appearing on behalf of the appellant, that if the money is paid by the father for purchasing a property in the name of the son, in the absence of any evidence showing that the father had no intention to retain any control over the property as an owner and in the absence of any motive behind creation of any benami, it should be presumed that the father really gifted the money to the son for acquisition of the said property. But in the case before us, the appellant first tried to show that he himself paid the money which he miserably failed to prove. Secondly, he wanted to assert that he all along realised rent from the tenants of the property. But in cross-examination, he admitted that till the death of his father, it was the father who realised the rent. It does not even appear that till the filing of the suit, long eleven years after the purchase, he mutated his name in the register of the Kolkata Municipal Corporation as the owner. Even he could not produce the original deed of purchase of the said property from his custody. All these facts prove that the father not only supplied the money but had also all along realised rent from the tenants till his death indicating that the appellant did not exercise his right of ownership during the lifetime of the father. Before this Court, an application for accepting additional evidence was filed by the appellant for taking into consideration some counterfoils of the rent receipt alleged to have been granted by him even during the lifetime of his father. In view of the admission of the appellant in cross-examination that his father realised rent till his death, we are not inclined to accept such evidence in the appellate stage by which he sought to wriggle out of the admission made in cross-examination. Similarly, the document showing that he withdrew from provident fund a total sum of about Rs. 9,000/- from 1978-79 till 1983-84 does not prove that those were spent for repairing this house. Similarly, the certificates showing withdrawal of money for repairing house property for a period after filing of the suit out of which the present appeal arises is of no assistance to him as by this time, the dispute has already been raised and he tried to create evidence in support of his claim that the same was his own property. We, therefore, dismiss the said application for additional evidence.

11. At this stage, it will not be out of place to refer to the following observations of the Supreme Court in the case of Jaydayal Poddar (Deceased) through L.Rs. and Another Vs. Mst. Bibi Hazra and Others, which has been quoted with approval in the case of Binapani Paul v. Pratima Ghosh and Ors. (supra) relied upon by Mr. Banerjee which would, however, go against his client:

It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal

evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances: (1) the source from which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive, if any, for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1, viz. the source whence the purchase money came, is by far the most important test for determining whether the sale standing in the name of one person, is in reality for the benefit of another.

12. If we apply the above tests to the facts of the present case, we find that it has been proved that the money was paid by the father, the father dealt with the property by realising rent from the tenants during his lifetime, the property is in possession of not only the appellant but also of the plaintiff who is in possession of three rooms whereas the appellant is in possession of only two rooms as admitted by him. The original deed could not be produced by the appellant although he claims to be the real owner and at the same time, within 11 years of purchase till the filing of the suit, there is no mutation in the name of the appellant. No evidence has been adduced indicating that the appellant ever asserted the property to be his own during the lifetime of his father or even spent any amount for improvement.

13. All those factors, if taken together, indicate that the father was the real owner of the property and thus, we do not find any reason to disturb the finding of the learned Trial Judge on the aforesaid question. In the case of Binapani Paul (supra), it was proved that the intention of the husband was to purchase the property for the benefit of the wife as at that point of time, the widow had merely life interest in the property left by her husband according to the then Hindu law. In that case, the property was also mutated in the name of the wife

and she was in full control. Therefore, in the facts of the present case, there is little scope of application of the said decision in order to give benefit to the appellant therefrom. The principles laid down in the said decision if applied to the facts of the present case would go against the appellant.

14. The only point pressed by Mr. Banerjee having failed, we find no merit in this appeal and the same is dismissed. In the facts and circumstances, there will be, however, no order as to costs.