

(1980) 07 CAL CK 0024
In the Calcutta High Court
Case No : F.A. No. 566 of 1963

Sunil Bose and Others

APPELLANT

Vs

Sefali Bose

RESPONDENT

Date of Decision : 16-07-1980

Acts Referred:

Citation : 85 CWN 321

Hon'ble Judges : Chittatosh Mookerjee, J;B.N. Maitra, J

Bench : Division Bench

Advocate : Bhupendra Kumar Panda and Joyindra Nath Nanda, for the Appellant; Surendra Narayan Sarkar (not present), for the Respondent

Final Decision : Dismissed

Judgement

B.N. Maitra, J.—The plaintiff has alleged that the disputed property at 7 Mullen Street, Ballygunj, belonged to her father-in-law, Siddheswar Bose, who was governed by the Dayabhaga School of Hindu Law. He died leaving his widow, Hari Dassi Bose and five sons, Sushil Bose (Defendant No. 1), Sudhir Bose (plaintiff's husband), Sunil Bose (defendant no 2), Suravi Bose and Saroj Bose (defendant no. to 3) and his five sons inherited the property. Subsequently Hari Dassi and Sudhir expired. Thus the plaintiff acquired one-fifth share in the property. Then Suravi Bose died unmarried and his one-fifth share in the property devolved upon defendant nos. 1, 3. The plaintiff's allegation is that the four-fifths share in the property belongs to defendant nos. 1 to 3. She called upon the defendants to effect a partition, but they declined, to comply with her request. Hence the suit for partition and accounts. The defendants have filed a written statement. The defence is that Sudhir Bose was a drunkard. On the 22nd August, 1941, he sold his one-fifth share in the property in favour of his four brothers, i. e., defendant nos. 1 to 3 and Suravi Bose because he had personal debts and for carrying on his business. After the sale the defendants are in exclusive possession of the property. The plaintiff has no possession. The suit is barred by time and adverse possession.

2. After the written statement was filed the plaintiff has amended the plaint and stated that her husband Sudhir Bose became wayward. With a view to preventing his one-fifth share in the property from being wasted and alienated, he was prevailed upon by his relations to execute a sham and benami kobala dated 22nd August, 1941, in favour of his brothers. No consideration passed and Sudhir Bose retained his one-fifth share of the property till his death.

3. Thereafter the defendants also filed an additional written statement alleging that the sale was a genuine one and consideration did pass.

4. The learned Subordinate Judge rejected the defendants contention and held that there was no bar of limitation or of adverse possession. The kobala dated 22nd August, 1941, executed by Sudhir Bose was a sham and benami one and no interest passed by that document. The plaintiff was in possession of the property. The suit was decreed in a preliminary form. Hence this appeal by the defendants.

5. It has been argued on behalf of the appellants that the registered kobala, Ext. 3, shows that Sudhir Bose transferred his one-fifth share in the property to his four brothers, Suravi and defendant nos. 1 to 3. After that sale the plaintiff cannot claim any interest in the property. Moreover the plaintiff did not exercise possession and hence her right, if any, is barred by limitation as well as by adverse possession. The other owners of the property, viz., the defendants, filed an ejectment suit against the tenants occupying a portion of the disputed property. The plaintiff was not made a party to that suit. That also shows that the plaintiff was ousted. The learned Subordinate Judge made a mistake in passing a decree for partition. The plaintiff has no bona fides because in the original plaint there is no averment that Sudhir Bose executed a benami kobala in favour of his brothers. That is an after-thought and hence the decision of the learned Subordinate Judge cannot be accepted.

6. The main hurdle in this case centers round the execution of the kobala on the 22nd August, 1941, Ext. 3, by Sudhir Bose in favour of his four brothers. The law in this respect is well settled. In the well-known case of Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, , at pages 66 & 67 Venkatarama Ayyar, J. has stated that there are two classes of benami transactions. One is in the benamdar's name and that is a real transfer. In that case there is an operative transfer intending that title should pass. The other class of benami transaction is incorrectly called benami because it is a sham transaction in which the transferor retains title. In the first class of cases the question arises, who paid the consideration and in the second one the point is, whether any consideration was paid. This decision was followed by E. S. Vankataramiah, J. in the of Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, .

7. The original kobala. Ext. 3, has been produced by the plaintiff. There is an explanation by P. W. 1, Sefali Bose, plaintiff, that after written statement was filed, she made a thorough search and found out that original kobala.

8. The defence is that the original kobala was lost. But no such information was given to the police. In this respect the evidence given by D.W. 3, Saroj Bose and D.W. 5, Manilal, regarding the loss of the original kobala is contradictory. DW 7, Sunil, defendant no. 2, says that Sudhir was not in possession of that kobala. The learned Subordinate Judge considered this aspect of the case. So the point of custody of the original deed is in the plaintiff's favour.

9. The further defence is that the sale had to be made by Sudhir Bose because he wanted to carry on his business in motor repairing. DW 1, Adhir Dey, says that he was an employee of Sudhir and the latter borrowed money from time to time from defendants nos. 2 and 3 to run his motor repairing garage at Mohini Mohan Road. Calcutta. But DW 3, Saroj, defendant no. 3, has given a completely different story by saying that his brother Sudhir started his business in 1936-37. DW 4, Gunendra Nath, maternal uncle of the defendants, has stated that Sudhir opened the motor repairing garage late in 1936. There is no evidence worth the name to show that Sudhir knew motor mechanism. There is no scrap of paper to show that he had any motor repairing business at any time on for the matter of that in 1941, when that kobala, Ext. 3, was executed. No licence or papers of the Corporation were filed to show that Sudhir had in fact any licence for carrying on his alleged motor repairing business.

10. Then about the, alleged payment of consideration, as stated by the D. Ws. D. W. 4, Gunendra Nath, maternal uncle of the defendants says that Sunil, defendant no. 2, began to earn only from 1937. D. W. 3, Saroj, says that he was a student till 1941 and he first began to earn in 1942. In such circumstances, the learned Subordinate Judge rightly stated that it could not be believed that the defendants 2 and 3 had any means to make any payment to Sudhir in 1941.

11. The defence is that Sudhir took loans from his brothers. D. W 7, Sunil, is defendant no. 2. He does not say that he advanced any money to Sudhir. Hence the testimony of D. W. 1, Adhir, D. W. 2, Ramdhony and D. W. 3, Saroj, that Sudhir took loan from defendant nos. 2 and 3 from 1938-40 cannot be believed. In such circumstances, it cannot be believed that defendants 2 and 3 were possessed of any joint fund from which loan could be given to Sudhir Bose. Sushil, defendant no. 1, did not advance any loan, though that kobala, Ext. 3, was executed in his favour as well.

12. Then about the valuation of the property. It appears that Sudhir Bose acquired the disputed property on the 10th October, 1923, for Rs. 7901/- and at that time it was a one-storeyed house. It is common ground that subsequently he constructed the first and second floors thereon and considerable money was spent for that purpose. But the kobala, Ext. 3, shows that the sale was made for Rs. 1500/- with regard to Sudhir's one-fifth share in the property. The gross undervaluation given in the kobala, Ext. 3, also shows that the kobala was not a genuine one. We therefore held that the kobala was executed without payment of any consideration.

13. There is a motive for executing that sham deed. The plaintiff's case is that Sudhir was given to drinks and intoxicants. D. W. 3, Saroj, denies it. But the death certificate, Ext. B, filed by the defendants that Sudhir died of taking opium and alcohol. This goes in the plaintiff's favour.

14. Sudhir exercised possession in the property for he possessed it till his death. This point also supports the plaintiff's version.

15. In the normal course it would be expected that after the death of Sudhir the plaintiff should have lived in the house. The application Ext. 1 dated 12-12-1952 for admission of Shyaniali Bose daughter of Sudhir Bose, which had been sent to St. Marry's Sishu Bidyalaya, shows that the plaintiff was residing in the disputed house with her daughter. The suit was filed in 1959.

16. Thus from the aforesaid discussion the appellants contention in this behalf is not accepted. We, therefore, hold that the kobala, Ext. 3, executed by Sudhir Bose is a sham and benami transaction, that no title passed thereby and even after the execution of that sham kobala, Sudhir retained his one-fifth share in the property. After his death his one fifth share will devolve on his heirs.

So it has now to be seen whether there was any ouster and if there is any question of limitation.

17. Of course the ejectment suit was filed against tenants of the property by the defence and then possession was often in execution of the decree. The plaintiff was not made a party thereto, vide Exts. C and D. But there is no cogent evidence that the plaintiff had any knowledge that any such ejectment suit was filed against the tenant. Of course the municipal tax receipt and the cost of repair of the building were put in by the defendants. But those items of evidence, themselves are not sufficient to prove ouster. Law in respect of ouster of a co-sharer is well settled. It would be sufficient to refer to the Supreme Court decision in P. Lakshmi Reddy Vs. L. Lakshmi Reddy, , at pages 317 and 318. It has been stated that adverse possession should be nec vi, nec claim, nec precario, that is, adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. For this it is not enough to show that one of the heirs is in sole possession and enjoyment of the profits of the property. Ouster of non-possessing co-heirs should be made out. The law is that possession of one coheir is possession of all co-heirs and he is presumed to have joint title. He cannot render his possession adverse to others merely by a secret hostile anumus on his part in derogation of the other co-heirs title. There must be an open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute buster. The onus of making out such ouster is on the person claiming to displace the title of the lawful owner. This test has not been satisfied in this case. The defendants have not been able to prove by cogent evidence that the plaintiff's one-fifth share in the property is barred by the law of adverse possession. It has already been indicated that the defendants came with a false case, which was

rightly disbelieved by the learned Subordinate Judge. Hence the submissions made on behalf of the appellants cannot be sustained. We, therefore, find that the plaintiff has one-fifth share in the disputed property and the preliminary decree for partition was rightly passed.

The appeal is accordingly dismissed Without any order as to costs.

Chittatosh Mookerjee, J.

I agree.