

PRIVY COUNCIL

Srimathi Nrityamoni Dassi and others

Vs.

Lakhan Chandra Sen

P.C.A.No. 70 of 1911

(Viscount Haldane, Lords Parmoor Wrenbury and Mr. Ameer Ali. JJ)

31.1.1916

JUDGMENT

Viscount Lords J.

1. The two suits which have given rise to the present appeals were instituted, one in November 1904 in the High Court of Calcutta, in its ordinary original civil jurisdiction, the other in the Court of the Subordinate Judge of the district of 24-Pergunnahs in Bengal.
2. The parties to this protracted litigation, with the exception of the appellant Nrityamoni Dassi and the other female defendants, are the descendants of one Guru Charan Sen, a Hindu inhabitant of Calcutta, who died in the year 1872, leaving him surviving three sons named respectively Baney Madhub Sen, Money Madhub Sen and Chuni Lall Sen, and a widow, Surat Kumari Dassi. The appellant is the widow of Baney Madhub who died in 1897.
3. Guru Charan Sen appears to have been at one period of his life a very wealthy man, and was possessed of considerable house property in Calcutta, besides some lands in the village of Panihati in the district of Nuddea. Among the house property were eight houses situated in Banstollah Street and its vicinity. Besides these and several others he owned 102, Cotton Street, and 27, Burtollah Street.
4. Between 1855 and 1857 Guru Charan Sen became heavily involved in debt, one of his principal creditors being James Church, Junr., and Co., to whom he had apparently been a banian. Early in 1857 he appears to have executed in their favour a bond by which he hypothecated, among other property, "the eight houses," subject to certain prior encumbrances created in favour of one Shama Charan Mallick, in whom also he

was heavily in debt; and in a suit brought immediately thereafter on the bond he confessed judgment. Thereupon, on the application of another creditor, Guru Charan Sen was adjudicated an insolvent and all his property vested in the Official Assignee. This was followed by a suit at the instance of Shama Charan Mullick in respect of his debt. The Official Assignee then brought his action to get the insolvent's properties into his hands. All three suits were referred to arbitration, and under the award made in those proceedings Shama Charan Mullick obtained priority. The Official Assignee, in accordance with the directions contained in the award, sold most of the houses belonging to the insolvent, inclusive of 102, Cotton Street, and 27 (now numbered 34), Burtollah Street. But for some unexplained reason the "eight houses" never came into the possession of the Official Assignee, and, although the award contained a direction to that effect, they were never brought to sale. These eight houses unquestionably belonged to Guru Charan Sen, subject to certain payments out of the rents and issues for the maintenance of two idols, and he appears to have retained possession of them until his death in November 1872, when his three sons succeeded to the same. No application, however, for the substitution in the Collector's Register of their names as owners in place of their father was made until 1877, when they were recorded as *shebait*s, the ordinary designation for a person holding property dedicated for, or charged with, the maintenance in any way of Hindu religious worship. But the income arising from the eight houses - save as to a small portion which was spent for keeping up the two family idols - was applied towards the general expenses of the joint family.

5. Chuni Lall, the third son, died in 1881, leaving a widow, named Kusum Kumari Dassi, and several sons, of whom Nemya Charan is the eldest. But his death made no difference in the mode of dealing with the income of the eight houses or in the general condition of the family, which was that of an ordinary Hindu joint family, of which Benoy Madhub, the eldest male member, was the karta.

6. The state of things continued until 1891, when the events took place which gave rise to the litigation of 1896 and also form the subject of the present dispute.

Mr. Ameer Ali :- (After stating facts as above, the judgment proceeded.)

7. As already stated, 102, Cotton Street, and 27, Burtollah Street, also belonged to Guru Charan Sen. These were put up to sale by the Official Assignee. One was purchased by Shama Charan Mullick, the other by one Heera Lal Seal for Shama Charan Mullick, and to whom Heera Lal appears to have afterwards transferred it by deed. Why this devious course was adopted in respect of these houses is a matter of

inference. Shama Charan Mullick is also stated to have bought up the claims of most of the other creditors. In 1861 he conveyed 102, Cotton Street, and 27, Burtollah Street, to Surat Kumari Dassi, the wife of Guru Charan Sen; and one of the main questions in the present litigation is whether she took them as absolute owner or merely benami for her husband and the joint family, of which he was the karta and the head.

8. Between 1888 and 1890 the two brothers Baney Madhub and Money Madhub found themselves heavily involved in debt; their banianship business had brought them no profit; Money Madub had already suffered imprisonment for debt, and evidently the creditors were pressing their demands. To add to these difficulties, differences and disputes had commenced in the family chiefly owing to the indebtedness of the two brothers; whilst the mother, Surat Kumari Dassi, in whose name, either as absolute owner or in trust for the family, some of the properties stood, was getting very old. The sons of Guru Charan Sen had before them the fate of their father who, though he had, no doubt, contrived to save some part of his possessions from the general wreck of his fortune, had died an undischarged bankrupt. It is easy in these circumstances to imagine why it was considered advisable by the principal adult members to devise some method to shelter the family properties remaining in their hands from their creditors. It is not clear whether Baney Madhub was the prime mover in evolving the scheme, as was alleged afterwards by Money Madhub, but both took an equal part in carrying it out. This was indubitably, it might be said admittedly, the motive cause for the execution of the documents, with the nature and effect of which their Lordships have to deal in these two appeals.

9. Early in 1891 a solicitor of the name of Netye Dass Dey was instructed to draw up certain deeds by which Baney Madhub, Money Madhub, and the representatives of Chuni Lal were to transfer absolutely the "eight houses" to Surat Kumari Dassi, who on her side, in consideration thereof, was to convey in three separate parcels the houses which stood in her name 102, Cotton Street, the large family residence of *Guru Charan Sen*, had by this time become divided into three separate premises bearing separate municipal numbers 115, 116 and 117, Cotton Street - the first being occupied as the joint family dwelling house. Another house, No. 111, had been acquired, in the name of Surat Kumari Dassi, and was added wholly or partly to the *baitak-khana*, or male reception room, of No. 115.

10. To resume the narrative of events, leading to the litigation in which the family has been involved since 1896, Netye *Dass Dey* carried out his instructions and drafted the

required deeds. Evidently these were not considered sufficient to answer the object in view, and another well-known solicitor of the Calcutta High Court, named Mr. Nemye Charan Bose, was consulted on the subject, and he appears to have been of opinion that the projected transfer of the "eight houses" to Surat Kumari could not be sustained against the claims of the creditors. He accordingly prepared another deed, which was approved, and on the 30th June 1891, Benoy Madhub and Money Madhub executed this document, called by the parties in these proceedings "the deed of covenant," by which they disclaimed all right to and interest in the eight houses and acknowledged that their mother, Surat Kumari Dassi, was the real owner, and that they had been realizing the rents of this property on her behalf. They further stated that, as she was desirous of taking over its charge herself, and in consideration of her not demanding the account from them of their stewardship, they were making this declaration in her favour. Nemya Charan Sen, the eldest son of Chuni Lall, who was *sui juris* at the time, did not join in the deed, though he witnessed it. There is no suggestion of any kind in the document that the "eight houses" were debutter.

11. On the same day, viz., the 30th June 1891, they executed another document, by which they substituted their mother as trustee in their stead in respect of a Government of India promissory note for a sum of Rs. 5,000 held by the Official Trustee, and of certain lands in the village of Agrapara and which had vested in them under a trust-deed executed by their grandmother, Surjamoney Dassi, the mother of Surat Kumari.

12. By the same deed they assigned or purported to assign to her the sole management of the ancestral lands at Panihati, over part of which their grandfather, Bissummer Sen, the father of Guru Charan, had erected a dwelling house and a *thakoor bari* (temple), where he had placed two family idols. This property was held by Guru Charan during his life, and on his death had devolved on his sons. In the document under reference it was recited that the management of the temple and of the worship was conducted by them until then in conjunction with their mother.

13. Contemporaneously with these two deeds, Surat Kumari executed three separate deeds of gift; by one she gave to Nrityamoni Dassi, the wife of Boney Madhub, in trust for herself and her sons, 116, Cotton Street; by the other, 117, Cotton Street, and 34, Bartollah Street, to Kusum Kumari Dassi, the widow of *Chuni Lall*, "and her sons and grandsons" in succession; and by the third, No. 111, Cotton Street, to Baney Madhub.

14. On the 27th July 1891, she executed in favor of Manjari Dassi, the wife of Money

Madhub, and of his two sons by a predeceased wife, and of Brajo Sundari Dassi, the wife of his eldest son, Lakhan Chunder Sen, a deed of gift in respect of 115, Cotton Street.

15. She thus allotted to the three branches of the family the property which under the transfer by Shama Charan Mullick stood in her name, and to which, according to the appellants' case, she was absolutely entitled. The reason why the gifts were made to the female members of the three branches is obvious. The object plainly was to avoid the possibility of the houses in question being attached and sold at the instance of the creditors of Guru Charan's sons.

16. It is to be observed that parts of all three houses appear to have been let out to tenants, and that although No. 115 was allotted to Money Madhub's branch, Baney Madhub's family, with Surat Kumari, continued to reside there for some time at least, though in 1892 Nrityamoni herself, with her mother-in-law, Surat Kumari, appears to have moved to Panihati.

17. On the 18th January 1892, Surat Kumari executed a deed of trust, by which she dedicated the "eight houses" to the worship of certain idols named therein, and appointed Baney Madhub, his wife Nrityamoni, and Saroda Sundari Dassi, the widow of one of his sons then deceased, as trustees of the endowment she purported to create by this document. From this time, it is clear, Baney Madhub began to collect the rents and issues of the "eight houses" to the exclusion of the other two branches. The rent receipts are headed "Estate of Surat Kumari Dassi," and are signed by him for himself and his co-trustee. Bitter disputes naturally sprang up in the family, which finally led to the institution of a suit in the High Court of Calcutta in its original civil jurisdiction on the 21st of December 1896 by the sons of Chuni Lall other than Nemya Charan Sen against Baney Madhub, Money Madhub, Nrityamoni Dassi and Saroda Sundari Dassi. As Nemya had attested the "deed of covenant" he was joined as a defendant. Their mother, Kusum Kumari, was made a party after the action was launched.

18. The plaintiffs charged that the statements in the "deed of covenant" of 1891 were wholly false, that Surat Kumari had no title or interest whatsoever in the properties to which it related, that it was concocted with the object of sheltering the "eight houses" from the creditors of Baney Madhub and Money Madhub, that said Surat Kumari had no right to dedicate the said houses, and that the "deed of covenant" together with the deed of trust of the 18th January 1892, were wholly inoperative against them and did not affect their rights in the properties in question. and they asked that their share and

the share of their brother, Nemya Charan, may be ascertained, and the "nature and extent of their right may be declared."

19. Money Madhub did not enter any defence, but in an affidavit relating to the discovery of documents in his possession, made on the 1st May 1897 he alleged that he had executed the "deed of covenant" under the undue influence of Baney Madhub and Surat Kumari Dassi, both of whom had assured him that under the arrangement, all the sons and representatives of Guru Charan Sen would remain in possession of the "eight houses," and that he had no intention of defrauding his creditors, or depriving the sons of Chuni Lall of their rights in the said properties.

20. Money Madhub died during the pendency of the suit, and his sons were substituted in his place, and Manjari Dassi was brought on the record as the mother and representative of her son Purno, who had died after Money Madhub.

21. The sons of Money Madhub, whilst repudiating the charges made against their father, associated themselves with the claim made by the plaintiffs in that suit, and asked that their rights and interests might also be declared in those proceedings. The contesting defendants, Baney Madhub, Nrityamoni and Saroda Sundari, filed a joint written statement in which they traversed the main allegations of the plaintiffs regarding the object with which the documents referred to were executed in 1891.' With respect to the property in dispute, they admitted that it belonged originally to Guru Charan Sen, but they alleged that it was assigned by him to James Church, Junr., and Co. in satisfaction of their claim, and that Shama Charan Mullick purchased the same from them with moneys belonging to and paid to him by Surat Kumari Dassi, that Shama Charan Mullick also bought at the Official Assignee's sale, 102, Cotton Street, and 27, Bartollah Street, and subsequently transferred all the houses to *Surat Kumari*, and held them ever since in her own right as absolute owner, consideration for the transfer, in this instance also, being paid by her with her own money.

22. Baney Madhub died before trial, and his sons were brought on the record as his heirs and representatives. Some of them filed separate written statements in which the allegation about the purchase of the "eight houses" is put somewhat differently, but the variation does not affect the real defence, viz., that the houses were the absolute property of Surat Kumari, acquired with her own money.

24. The suit came for trial before Mr. Justice Henderson, of the Calcutta High Court, who, after an exhaustive examination of the evidence, held in substance that the "eight houses" never belonged to the mother, that they all along remained the property of

Guru Charan Sen, and devolved, on his death, on his three sons, that the "deed of covenant" executed in 1891 was merely with the object of sheltering the "eight houses" from their creditors; and that neither that document nor the deed of trust of the 18th January 1892 affected the rights and interests of the plaintiffs or of the representatives of Money Madhub. He accordingly decreed the claims of the plaintiffs in that suit. He made a similar decree in favor of the sons of Money *Madhub*.

15. On appeal, the High Court in its appellate jurisdiction affirmed the findings of Henderson, J., so far as the "eight houses" were concerned, and affirmed his decree in favor of the plaintiffs in that suit, viz., the sons of Chuni Lal, other than Nemya Charan, but differed from him in the opinion, he had incidentally expressed regarding the right of Surat Kumari in 102, Cotton Street, and 27, Bartollah Street, which was not directly in issue in that case. With regard to the claim of Money Madhub's sons, the learned Judges considered that as they were defendants Mr. Justice Henderson's decree in their favour could not be maintained. They accordingly varied his decree in that respect, and relegated them to a fresh suit for the relief to which they were clearly entitled. It was unfortunate that the learned Judges did not exercise the power which they possessed under the Code of Civil Procedure, to transpose the sons of Money Madhub from the category of defendants to that of plaintiff's, and to maintain Mr. Justice Henderson's decree in their favour. Had they done so they would have spared this family another ten years' litigation. The mistake was purely technical and could have been set right by a small amendment without the party resorting to a fresh suit.

25. The appellate decree was made on the 22nd February 1904, and on the 14th November of the same year Lakhan Chunder Sen and his brothers the sons of Money Madhub, brought the present Suit No. 826 of 1904, in the High Court of Calcutta, in its ordinary original civil jurisdiction, for the assertion of their rights to a one-third share in the "eight houses" which had devolved on their father on the death of Guru Charan.

26. The allegations and charges in the plaint are, like the defence, substantially the same as in the previous suit. The appellant Nrityamoni Dassi, who was the real contesting defendant, raised a further plea that the suit was barred under the Statute of Limitation.

27. The case was heard in the first instance by Badilly, J., who upheld the defendant's objection, and dismissed the suit. On appeal, the High Court reversed the decree, and remitted the cause for trial on the merits with the following remarks:-

"The appeal must be allowed with costs both here and in the Court below, and the case must be remitted to be tried out on the merits if, after the contest which took place in the previous suit, the present respondents think that there are still any merits to be discussed."

28. The case then came before Chitty, J., who, in face of the judgment of the Appellate Court on the question of limitation, held that the plaintiff's suit was "out of time," as Surat Kumari's possession was adverse to their father Money Madhub from the 30th June 1891. He also held that they had failed to prove "the benami character of the declaration of trust." He accordingly dismissed the suit.

29. On appeal the decision of Chitty, J., was set aside, and the plaintiff's claim was decreed with costs. The present appeal before this Board is by Nrityamoni Dassi, who claims to hold the property under the trust deed executed by Surat Kumari on the 18th January 1892, and the plea in bar of the suit is again urged on her behalf.

30. As their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation, they do not wish to prolong the present judgment by dealing with the question at any length. They desire, however, to observe that if the property belonged in fact to Surat Kumari, and was held by her all along in her own right, as has been the defendants' contention throughout the various stages of this long-drawn litigation in India, obviously no question of limitation arises; neither their father nor the plaintiffs had or have any title to it, and their suit must fail on that ground.

31. If, however, the "eight houses" never belonged to Surat Kumari, as is now conceded at their Lordships' Bar, if they always remained the property of *Guru Charan Sen* and devolved on his sons by right of inheritance, then the declarations made by them in the "deed of covenant," which are now admitted to be wholly false, in no way altered the title. It did not purport to transfer any right: it was only an admission of a right which did not exist. There is no allegation, far less any evidence, that Surat Kumari pretended to exercise any right under that document adversely to the real owners until January 1892. It was after the execution of the trust deed of 1892 that Baney Madhub, purporting to act as one of the trustees, began to collect the rents and issues of the eight houses to the exclusion of the other co-sharers. Limitation would no doubt run against them from that time. But it would equally without doubt remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice. They had in the suit of 1896 before Mr. Justice Henderson associated themselves with the plaintiffs in that action, and had asked for an adjudication in those

proceedings of their rights. A distinct issue was framed in respect of their claim to which no objection seems to have been made by the appellant Nriyamoni; and the learned Judge who decided the case pronounced, with reference to their prayer, the following order :-

"The defendants, the representatives of Money Madhub, will be declared jointly entitled to a one-third share in the scheduled properties, and the Official Referee will make similar enquiries with regard to their share and the share of Nemye Charan Sen, as to *mesne profits* and the deeds, assurances, and other things which may be necessary. These defendants will be entitled to get possession of the shares to which they have been declared entitled."

32. It was an effective decree made by a competent Court, and was capable of being enforced until set aside. Admittedly, if the period during which the plaintiffs were litigating for their rights is deducted, their present suit is in time. Their Lordships are of opinion that the plea of limitation was rightly overruled by the High Court.

33. As regards the nature and effect of the deed of covenant of the 30th June, 1891, their Lordships have no hesitation in holding, in concurrence with the High Court, that it was wholly illusory; that it never operated to transfer any rights, nor in fact was it intended to do so; and that it was a mere device for deceiving the creditors of Baney Madhub and Money Madhub, and sheltering the property under their mother's name by making an acknowledgment of a right which never existed. All the fact and circumstances taken in conjunction with the statements in the document itself contradict the suggestion that it was part of a *bona fide* family arrangement.

34. Their Lordships are of opinion that the decree of the High Court in Suit No. 826 of 1904 is right, and should be affirmed.

35. Their Lordships have kept quite separate the question relating to the right to 102, Cotton Street, and 27, Bartollah Street, which is involved in the suit of *Madhu Sudan Sen*, brought in the Court of the Subordinate Judge of the 24-Pergunnahs. It arose only incidentally in the litigation of 1896, and in Suit No. 826 of 1904, mainly in consequence of the endeavour on the part of the defendants to confuse the issues by placing the "eight houses" in the same category as the other houses as property acquired by Surat Kumari Dassi with her own money from Shama Charan Mullick.

36. Madhu Sudan is a son of Baney Madhub, and he brings this suit for a declaration of his right as one of Baney Madhub's sons to a one-seventh share of 116, Cotton Street, and in the Panahati lands and in respect of the shebaitship of the Agarpara

property. He alleges that the deeds of gift executed by Surat Kumari only gave effect to a family partition under which his father received 116, Cotton Street, as his share in the Cotton Street property, and that the transfer to Nrityamoni was wholly nominal.

37. The Subordinate Judge dismissed his claim with respect to 111, Cotton Street, holding that that property was sold by Baney Madhub *bona fide* for the satisfaction of the debts of the joint family, for which purpose it was, in fact, transferred to him by Surat Kumari, in whose name it stood. He also held, in substance, that the transfer of 102, Cotton Street, and 27, Burtollah Street, by Shama Charan Mullick to Surat Kumari was really for the benefit of Guru Charan Sen, that she had no beneficial interest in the same, and that the allotments made in 1891 by the several deeds of gift as well as the document of the 18th January 1892 were executed "with the object of dividing the properties of the three brothers in such a way that their creditors might not seize them in satisfaction of their claims," and that Baney Mudhub took 116, Cotton Street, in the name of his wife. He accordingly decreed the plaintiffs' claim with reference to that property, the Panahati lands and the she-baitship, and his decree has been, with a slight modification, affirmed on appeal by the High Court of Calcutta.

38. Nrityamoni has appealed, and the sole-question for determination now left in this case is whether the two houses were conveyed to Surat Kumari by Shama Charan Mullick in her own right as beneficial owner, or, to use the Indian technical expression, *benami* for Guru Charan Sen and the joint family. Their Lordships have repeatedly laid down that in cases where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came. At this distance of time, it is hardly likely that evidence would be forthcoming on either side to establish or rebut conclusively the allegation. The case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. On the plaintiffs' side it is contended that 102, Cotton Street, was the family dwelling house, and that Guru Charan had the strongest possible motive to try to preserve it for the family. The Subordinate Judge finds, as a fact, a view which is affirmed by the High Court, that he had means, in spite of his insolvency, to buy it back. From this conclusion on the evidence as it stands their Lordships find it difficult to dissent.

39. On the defendants' side, it was urged in the written statements that Surat Kumari had bought these two houses, equally with the "eight houses," with her own money. There was absolutely no evidence in support of this allegation; no books of accounts showing payments, and no vouchers or receipts have been produced, nor is there any

suggestion that any such ever existed and were now lost. At a later stage of the case, the difficulties which surrounded the defendants' allegation were perceived, and it was then suggested that the conveyance by Shama Charan was a voluntary gift to Surat Kumari, who was a connection of his. If it was a gift, it might, as it is contended on behalf of the plaintiffs, as reasonably be a gift to the family in her name.

40. Guru Charan was an undercharged insolvent; a purchase by him in his own name, or a gift to him in his own name, would have been swept up by the Official Assignee for the benefit of his creditors. What more natural then, it is said, than that the conveyance should be in the name of the wife? In this connection it is to be noted that although Shama Charan Mullick acquired the houses in 1859, and the transfer to Surat Kumari was made in 1861, the possession all along appears to have remained as before with Guru Charan, for neither Shama Charan nor Heera Lal ever took possession of the properties.

41. It is unnecessary to discuss how far these probabilities and inferences, standing by themselves, would outweigh the ostensible title, for the books of accounts that were produced in the litigation of 1896 and are exhibited in the present suits, kept from 1872, coupled with the circumstances referred to above, leave little reason for doubt that the conveyance of 1859 in favour of Surat Kumari was in reality for Guru Charan Sen and his family. They show beyond any reasonable doubt that the rents and issues arising from these two houses were kept in exactly the same way as the rents of the "eight houses;" that they were entered in the books of the three brothers, for Surat Kumari had no books of her own, and were applied towards the expenses of the family. The inference is irresistible that she was not the beneficial owner of any of the houses.

42. The mortgages in respect of the houses in question, executed by her by way of security for the banianship of Baney Madhub and Money Madhub respectively do not militate, in their Lordships' opinion, with this conclusion. As the property stood in her name, the mortgages could only be made by her. It is to be remarked, however, that in almost every instance, Guru Charan Sen was also made a party. Nor do the dispositions she purported to make by her will in 1883 affect the position. Had she died without expressing her wishes as to how the property should be allotted, it would have, in all probability, given rise to a contest. It stood in her name and was open to the contention that it was her *stridhan* to which the two surviving sons were entitled, to the exclusion of the sons of Chuni Lal who had died in her lifetime.

43. For these reasons, their Lordships are of opinion that the judgment of the High Court is right and that both these appeals should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants will pay the costs, of the appeals.

Appeal dismissed.