

## **PRIVY COUNCIL**

Misri Lal Nayak

Vs.

Mt. Surji

P.C.A.No.38 of 1948

(Lord Greene, Lord Oaksey and Sir John Beaumont JJ.)

22.11.1949

### **JUDGMENT**

#### **SIR JOHN BEAUMONT J.**

1. This is an appeal by special leave from a judgment and decree of the High Court of Judicature at Patna dated 15th May 1946, reversing in second appeal the judgment and decree in first appeal of the Additional Subordinate Judge of Darbhanga dated 24th August 1943, and dismissing the appellant's suit
2. The contention of the appellant is that the learned Judge who heard the second appeal in the High Court reversed decisions of fact arrived at by the lower Appellate Court, and that in so doing he acted contrary to the provisions of Section 100 Civil P. C. It is settled law that in view of that section a High Court has no power in second appeal to question findings of fact reached by the first Appellate Court which there was evidence to support.
3. The property in suit originally belonged to one Bihari Paswan, who, on 24th February 1908, by a sale deed, Ex. A, sold the property to Mukh Lal. The deed provided that part of the purchase money should be applied in remitting a mortgage held by Mangni Ram. By deed dated 13th July 1911, Ex. A (2), Mukh Lal purported to sell the property to the wife and two minor sons of Mangni Ram. In the year 1928 one Santi Nayak, father of the appellant, obtained a money decree against Mangni Ram and Mukh Lal on a promissory note signed by them. In execution of this decree, the property in suit was sold by the Court and was purchased by Santi Nayak on 16th November 1928. The purchaser took no steps to obtain possession of the property which he had purchased.
4. In the year 1929 Mukh Lal applied under Rule 13, Order 9, Civil Procedure Code,

to get the decree obtained against him by Santi Nayak, which had been obtained ex parte, set aside. This application was dismissed by the Judge in execution, and Mukh Lal lodged an appeal against the order for dismissal.

5. On 29th March 1930, Mukh Lal and Santi Nayak presented to the Appellate Judge an application for recording a compromise of the appeal. It was signed by Mukh Lal in person and by Santi Nayak by his attorney, and was in the following terms:

"The appeal has been compromised between the appellant and the respondents. According to the terms of the laid compromise, it has been settled that this appeal may be allowed and the decree dated 7-7-28 may be set aside and the title suit may be restored to its original number and Mukhlal Prasad appellant may be removed from the category of defendants because the petitioner respondents have now come to know on enquiry and investigation that in fact the appellant has no connection with Mangar Ram and recently Magni Ram has had in full the entire decretal amount with cost to the respondent consequently the auction sale will be set aside. Hence this petition is submitted and it is prayed that the auction sale and the decree may be set aside and the appeal may be decreed. The parties will bear their own costs of the appeal. In attestation hereof the signatures of the respondents and the lawyers of the appellants and the respondents are affixed herein below. The petition of Mukhlal Prasad appellant and Shanti Nayak respondent, dated 29-3-30."

6. The learned Judge who heard the petition was not satisfied with the *bona fides* of the compromise and made an order in the following terms:

"The pleader B. B. K. Biswas was permitted to sign the vakalatnama to-day and he signed it. I am not inclined to decree this appeal in terms of the compromise. I cannot set aside an ex parte decree in an old suit simply because the parties want me to do so. I must be satisfied as to the correctness and *bona fides* of the allegations made in the petition for setting aside the ex parte decree. If the parties want to compromise they must settle the whole dispute including the original suit. Put up on 15-5-30 for bearing of the appeal."

7. Thereafter the parties did not appear on the days fixed for hearing the appeal which was consequently dismissed for non-prosecution.

8. On 16th October 1937, the wife and sons of Mangni Ram purported to sell the property in suit to Ramphal Poddar deceased, who is now represented by respondents 1 to 4. The vendors based their title on the deed of 19th July 1921, which was

described, not as a kebala or sale-deed, but as a bajinama ladavi or deed of relinquishment

9. On 18th November 1940, which was the last day before the period of limitation expired Santi Nayak filed the suit out of which this appeal arises in the Court of the First Munsif at Samastipur, claiming possession of the property and mesne profits. The learned Munsif who tried the case decreed the plaintiff's suit for possession but refused to give him mesne profits, holding that he had lost such profits by his own laches in not obtaining possession, a view which seems clearly right.

10. The defendant appealed and the appeal was heard by the learned Additional Subordinate Judge at Darbhanga. The learned Judge dismissed the appeal. He arrived at the following findings, which on their face appear to be findings of fact. First that the sale to Mukh Lal in 1903 was a benami transaction, Mukh Lal being benamidar for the joint family comprising himself and Mangni Ram; secondly that the conveyance of 13th July 1921 was also benami, being no more than a transfer from one benamidar to three other benamidars; thirdly that in 1938 when the court sale took place the property in suit belonged to the family of Mangni Ram, who was the karta of the family, from which it followed that the property in suit was rightly seized in execution; fourthly that on the application to record the compromise in 1930, there was an agreement between Mukh Lal and Santi Nayak that Mangni Ram would pay the decree money and the sale would be set aside, but there was actually no payment of the decree money and the sale was not set aside; fifthly that the defendants, respondents 1 to 4, on their purchase of the property in the year 1937 were not purchasers for value without notice. As to this last point, it may be noted that the defendants never claimed to have purchased without notice of the plaintiff's title; their claim, as appearing in para, 15 of their written statement, was that before they purchased they had learned that the plaintiff had realised the entire purchase money from the wife and sons of Mangni Ram and for that reason had taken no steps to recover possession of the property, and had no title left in him. Prudence should have suggested to the respondents to confirm by enquiry from Santi Nayak the fact that he had no claim to the property.

11. From the appellate decision of the learned Subordinate Judge, an appeal was brought to the High Court at Patna and such appeal was heard by Manohar Lall, J. The learned Judge differed from most of the foregoing findings of the Subordinate Judge. He held that the title to the property in suit passed under the deed of 13th July 1921, which was not benami, and that accordingly at the date of the court order the

judgment-debtors had no interest in the property in suit. The reason which the learned Judge gave for differing on this point from the finding of the Subordinate Judge was that the Judge had omitted to consider the deed of 13th July 1931. This is clearly an error since the deed was discussed at length in the judgment of the Subordinate Judge. Their Lordships are satisfied that there was ample evidence to support the findings of the Subordinate Judge that the transactions of 1908 and 1921 were benami, and that these findings cannot be challenged in second appeal.

12. Manohar Lall, J. then held that the decretal amount had been paid. In reaching that conclusion he accepted the evidence of Moti Singh, whom the lower Courts held to be an unreliable witness. It is plain that in differing from the view taken by the lower Appellate Court upon appreciation of oral evidence Manohar Lall, J. exceeded his powers under Section 100, Civil P. C. Having held that the whole decretal amount had been paid to Santi Nayak, Manohar Lall, J. considered that this afforded an equitable defence to the plaintiff's claim for possession. Although the sale had not been set aside, this conclusion might be justified if based on sound premises. Their Lordships, however, are unable to hold that there was no evidence to support the conclusions of the learned Subordinate Judge that the decretal money was not paid. Apart from the evidence of Moti Singh, who, as noted, was disbelieved, there was no evidence that the money had been paid. No attempt was made to prove the occasion on which, or the manner in which, the money had been paid. The petition for compromise did not profess to be a receipt for the money. It acknowledged payment, but only as part of the compromise, and it is on the face of it improbable that the money would have been paid before the compromise was accepted. The proposed compromise was of a singular character, since it apparently contemplated that the suit would proceed after Mukh Lall's name as defendant had been removed, though clearly if the decretal money had been paid the compromise should have provided for restoring the properties to the judgment-debtors. Their Lordships agree with the views of the High Court and the Judge in first appeal that the real truth at the back of this petition for compromise has not been disclosed.

13. Their Lordships appreciate the strong element of suspicion which attaches to the plaintiff's case from the failure of his father to apply for possession until the very last moment, a matter which naturally weighed heavily with Manohar Lall, J. but such suspicion does not amount to proof that the decretal money was paid. There may have been other grounds for the delay, and it is as difficult to understand, if the money was paid, why the judgment-debtors did not get the sale set aside, as it is to understand

why, if the sale was valid, the judgment-creditor did not at once apply for possession.

14. In their Lordships' view, there was no ground upon which the High Court could reject the findings of fact arrived at by the first Appellate Court, and on those findings the plaintiff's suit must succeed.

15. One other point was raised by Mr. Parikh for respondents 1 to 4, namely, that the appeal to the Board was not properly constituted. At the time when the appeal to the High Court was lodged respondent 1 was Santi Nayak, but he died before the hearing of the appeal and his heirs, who seem to have been his grandsons, were brought on record. The present appellant is the eldest of such heirs. Very probably he is the karta of a joint family, but, apart from this point, upon which there is no evidence, all the heirs of Santi Nayak have exactly the same interest and one of them can appeal under Order 41, Rule 4. Their Lordships think that there is no force in this contention.

16. Their Lordships will therefore humbly advise His Majesty that this appeal be allowed; that the order and decree of the High Court at Patna dated 15th May 1945, be set aside and that the judgment and decree of the Court of the Additional Subordinate Judge of Darbhanga dated 24th August 1943, and the judgment and decree of the Court of the First Munsif at Samastipur dated 25th January 1943, be restored. Respondents 1 to 4 must pay the costs of the appeal to the High Court and of this appeal.

Appeal allowed.