

Smt. Surasaibalini Debi

Vs

Phanindra Mohan Majumdar

Civil Appeal No. 158 of 1964

(CJI P. B. Gajendragadkar, N. Rajapala Ayyangar, J. C. Shah JJ)

27.10.1964

JUDGMENT

SHAH J.

An action instituted by Phanindra Mohan Majumdar hereinafter called 'the plaintiff' on the original side of the High Court of Calcutta for a declaration that he "is the sole proprietor of and absolutely entitled to a boarding house business carried on in the name and style of International Home at 42, Harrison Road, Calcutta and for an order for delivery of possession of the boarding house business" was decreed by a single Judge of the High Court, and the decree was confirmed in appeal under cl. 15 of the Letters Patent by a Division Bench of the High Court.

Surasaibalini Debi a trustee appointed under a deed of settlement dated August 23, 1952 executed by the defendant Prabhendra Mohan Gupta her father, was impleaded as a party on the death of the defendant has appealed to this Court with special leave.

The case of the plaintiff set out in his plaint was that in or about the year 1941 he took a lease of No. 42, Harrison Road, Calcutta and had started a boarding house business in the premises under the name and style of International Home, that he conducted the business with his own funds which belonged to him absolutely from the date of its inception, that he was personally managing the business and utilising the profits thereof for his own purposes, that when he started the business he was in the employment of the Court of Wards and by the service rules governing the said employment he was not permitted to start or carry on any trade or business of his own and on that account it was arranged with the defendant Prabhendra Mohan Gupta - hereinafter called 'Gupta' - that the latter be held out as the nominal owner of the said business and pursuant to that arrangement the lease of the premises for the business was taken in the name of Gupta and licences from the police and the municipal authorities were also taken in the name of Gupta, that from the very inception he was in possession and management of the business and exercised all rights of ownership over the same being absolutely entitled thereto, that Gupta had never made a claim to title in the business, that towards the end of the year 1948 he - the plaintiff - suffered a serious illness and was advised to leave Calcutta temporarily, that on or about December 8, 1948 he entrusted the management of the business of the boarding house to Gupta with all its assets on the understanding that upon his return to Calcutta, Gupta would hand over to him possession and management of the said business and of all papers, documents and books of account relating thereto and render accounts of the receipts and disbursements during the period of his management, that in or about December 1949 he returned to Calcutta and occupied one of the rooms in the boarding house and called upon Gupta to hand over possession and management of the business, and to return all papers, documents, books of account relating thereto and to render accounts of the management

of the business by Gupta during his absence but the latter wrongfully and in breach of the trust and confidence reposed in him refused to hand over possession and management of the business and moreover wrongfully denied the plaintiff's right, title and interest in the premises and in the business.

Gupta by his written statement submitted that the business was started by him with his own funds in premises obtained on lease by him and that he had appointed the plaintiff as his manager or agent in respect of the business. He asserted that he was the real owner of the business, and denied that the management of the business was entrusted to him by the plaintiff when the latter left Calcutta on account of his illness on December 8, 1948 or at any time. He also denied that there was any understanding that Gupta would hand over the management or possession of the business to the plaintiff as alleged.

On these pleadings the only substantial issue raised by the Trial Court was about the plaintiff's title to the Boarding House known as International Home. A subsidiary issue about a claim for accounts of the business from Gupta was given up to at the trial and need not be considered.

On a review of the evidence the Trial Judge held that the plaintiff had started the business of International Home with his own funds and that the defendant Gupta was held out as an ostensible owner of that business. In coming to that conclusion the learned Trial Judge relied upon the following circumstances. The plaintiff Majumdar was carrying on business as owner of "Sunny lodge" a boarding house business between the years 1938-41, and that business was closed in or about February 1941 because the landlord of the premises in which it was conducted obtained a decree-in-ejectment against the plaintiff and compelled him to vacate the premises. Thereafter tenancy was obtained of 42, Harrison Road on May 1, 1941 and in July the International Home was started and the furniture and utensils which were used in the Sunny Lodge were used in the new business. The case of Gupta that he had purchased the furniture and the utensils from the plaintiff for a sum of Rs. 900 and had started the business for himself was disbelieved for the reason that Gupta was always in straitened circumstances and had often to borrow small sums of money from the plaintiff who was at all material times gainfully employed. At the commencement of the business, for diverse purposes such as deposit with the landlord towards rent, provision for furniture, utensils and other things for the boarding house Rs. 4,000 were needed and this Gupta who was in impecunious circumstances could not have procured. The defendant's sons Dwipendra and Samaren were boarders in the boarding house and had to pay charges to the boarding house for service rendered to them, whereas the members of the plaintiff's family boarded and lived in the boarding house and no charges were levied from them. The plaintiff was till December 1948 managing the boarding house exclusively and all the earnings were taken by him. The defendant's story that payments were made to him by the plaintiff when he visited Calcutta was unreliable. There were between the years 1941 and 1948 no letters from the defendant to the plaintiff which supported his case that he was the owner or that he was claiming either to receive the profits of the business or even asking for accounts. The defendant was in the year 1941 a man of about 70 years of age and he had no means to start a business. The books of accounts of the business which admittedly were maintained had been removed by the defendant and he had failed to produce the same before the Trial Court. The letters written by the defendant after December 8, 1948 when the plaintiff was away from Calcutta due to his illness gave detailed information to him about the business and its progress. From time to time the defendant had written letters asking the plaintiff to return to Calcutta and take over the management of the business.

The Trial Court recognised that the lease of the premises in which the business was carried on stood

in the name of Gupta, that the licences from the police and municipal authorities for conducting the business were also in the name of Gupta, that in the staff register of the business the plaintiff's name was shown as manager, that the plaintiff submitted the returns for the purposes of income-tax of the profits of the business in the name of Gupta and he dealt with the authorities as if he was the manager and not the owner of the business. But these circumstances were, in the view of the Trial Judge, consistent with Gupta being a nominal owner of the business, whereas the other circumstances were consistent with the plaintiff alone being the owner of the business of International Home. In his view the motive for holding out Gupta as owner was the existence of the service rules which governed the plaintiff when he was employed with the Court of Wards between the years 1941 and 1944 and by virtue of which he was not permitted to conduct any business of his own. The appellate Court agreed with the view of the Trial Court.

In this appeal with special leave this Court normally does not seek to re-appreciate the evidence, and concurrent findings of the Courts below are not allowed to be re-opened unless there are special circumstances justifying a departure from that course. Counsel appearing on behalf of the appellant has not seriously attempted to challenge the finding of the Courts below on the first issue. But counsel submitted that assuming that on the evidence it was established that the real owner of the business was the plaintiff, his suit must still fail, for the plaintiff had with a view to circumvent the service rules of the Court of Wards, entered into an unlawful agreement with Gupta and had held out the latter as owner of the business, it being settled law that the Court will not countenance the claim of the plaintiff who was on his own admission guilty of an act prohibited by law and assist him in obtaining possession of the business. In addition, counsel submitted that the arrangement for holding out Gupta as a nominal owner was made between the plaintiff and Gupta to evade liability to pay income-tax and thereby to defeat the provisions of the Income-tax Act and on that account also the agreement under which the business was to be held by Gupta as a nominal owner was invalid and the plaintiff was not entitled to claim possession of the business relying upon his own unlawful conduct.

Before the Trial Court neither of these two pleas was raised. In appeal the High Court pointed out that the object of the arrangement whereby Gupta was held out as the owner was to avoid the service rules of the Court of Wards, but there was no evidence to prove that the service rules which prohibited an employee of the Court of Wards from carrying on business belonging to himself were statutory rules. Disregard of the rules did not therefore necessarily taint the arrangement with immorality or illegality and that the plaintiff in suing to recover possession of his business was not seeking to enforce an illegal arrangement. In the view of the High Court evasion of income-tax was again not the object or the consideration for the arrangement.

The service rules were not tendered in evidence. It is not disputed however that the service rules did not prohibit an employee of the Court of Wards from carrying on a business as a manager or agent of another. What was prohibited was carrying on business as an owner. An arrangement which facilitated conduct of a business, contrary to the rules, by holding out a third person as a nominal owner of the business, was in the view of the High Court not illegal, and no argument has been advanced before us challenging that view. But the legality of the arrangement between the plaintiff and Gupta was challenged on the ground that it was intended or designed to circumvent the provisions of the Income-tax Act. In support of this plea, there was no pleading, no issue was raised about it, and this part of the appellant's case was not even relied upon before the Trial Court. In this appeal Mr. Hazara for the appellants submitted that on the admissions made by plaintiff in his evidence the Court was bound to non-suit him. In his evidence before the Court the plaintiff admitted that he had submitted returns of income earned in the business for the years 1943, 1944,

1945 and 1946 and assessment of tax was made in the year 1947 and on demand by the Income-tax Officer he had filed an affidavit stating that he was a manager of the business. Plaintiff also admitted that when called upon he had submitted a separate personal return for the salary earned by him, but that income was not taxed and tax was assessed on the business income as if it belonged to Gupta. The plaintiff also admitted that his object in filing the affidavit was to get rid of tax liability on his personal income.

By the device of making an untrue statement the plaintiff has undoubtedly evaded tax. The plaintiff was earning salary as an employee of the Court of Wards and had presumably some other income which in the aggregate amounted to Rs. 1,800 per annum. If the business of International Home was disclosed as belonging to the plaintiff, the aggregate of the personal and business income was liable to be charged to tax under the Income-tax Act, 1922. By the expedient of holding out the defendant as an ostensible owner of the business the plaintiff evaded liability for payment of tax on his personal income and even tax on the business income was charged at a lower rate. But on that account we are unable to hold, disagreeing with the High Court, that the object in entering into the arrangement for holding out Gupta as owner of the business was to evade payment of income-tax. As found by the Courts below the purpose of the arrangement was to circumvent the service rules. It is true that having started the business in the name of the defendant, the plaintiff was able to evade payment of tax, which if the true state of affairs was known, he would have been liable to pay. The plaintiff might have incurred penalties by failing to disclose the true state of affairs, he may also be liable for that conduct to be proceeded against under the provisions of the Income-tax Act or under the Indian Penal Code. We are, however, unable to hold that from the inception the object of the arrangement was to enter into an unlawful arrangement.

The plaintiff's case was that he was in management and possession of the business as owner till December 1948 when he left Calcutta after entrusting the management of the business to Gupta, subject to the understanding that the possession and management of the business was to be restored to the plaintiff when he returned to Calcutta and sought to resume management. There is nothing illegal in such a contract. The plaintiff's cause of action as set out in the plaint was that he sought to obtain possession of the business which belonged to him, and which he had entrusted to his agent or trustee. Gupta denied that he was an agent or trustee of the plaintiff, and set up title to the business and claimed that he was not liable to return the business. Once the plea of Gupta that he was the owner of the business failed, there was no other defence which could be held out against the plaintiff's claim. It is true that if the plaintiff seeks the assistance of the Court to effectuate an unlawful transaction, the Courts will refuse to assist him. Where, however, the plaintiff is seeking to enforce his title to property and it is not an integral part of his pleading which he must prove to entitle him to relief that there was between him and the defendant an unlawful transaction or arrangement which he seeks to enforce, the plaintiff will be entitled to the assistance of the Court, even if the initial title of the plaintiff is rooted in an illegal transaction.

On the finding of the High Court the proved object for the arrangement to hold out Gupta as owner of the business, is not shown to be in fraud of the public administration, and the alternative object suggested by counsel for the appellant is not proved. It is unnecessary therefore to enter upon a discussion of the authorities which make a distinction between claims in which a party to an action has to rely essentially upon a conspiracy to effectuate an illegal or fraudulent purpose, to support his claim to the property transferred to or held out in the other party's name, and claims in which the unlawful or unworthy object is fulfilled, the property is owned by the claimant, and the claimant, seeks the assistance of the Court not to effectuate his unlawful purpose, but in substance to enforce his title by a plea in detinue under a transaction which is not tainted by illegality. A. R. P. L.

Palanianna Chettiar v. P. L. A. R. Arunasalam Chettiar (L.R. [1962] A.C. 294) illustrates the former principle. In that case the Judicial Committee declined to assist the enforcement of a claim in fraud of the public administration in Malaya, because the plaintiff had of necessity to disclose before he could obtain a decree for restoration of his property transferred to the defendant that he had practised deceit on the public administration. Sajan Singh v. Sardara Ali (L.R. [1960] A.C. 167) illustrates the other principle. In that case the Court's assistance was given to the plaintiff to restore to him his property of which he was wrongfully dispossessed by the defendant, even though title to the property was acquired by the plaintiff by an unlawful transaction, between the defendant and the plaintiff.

In the present case as we have already observed, it was not the object of the parties at the time when the transaction which is called in the High Court benami was entered into to circumvent or to defeat the provisions of the Income-tax Act by taking advantage of the fact that the business stood in the name of Gupta. It is true that the plaintiff obtained benefit of a lower rate of tax for the business income and his personal income escaped taxation. But it cannot on that account be held that the transaction on which he founded his claim was unlawful. In claiming a decree for possession from the defendant the plaintiff did not plead any invalidity of the transaction under which possession of the business was entrusted to Gupta. He merely pleaded his title to the business, entrustment thereof to Gupta and refusal on the part of the latter to deliver possession when demanded. On the findings recorded by the Trial Court as well as by the High Court the plaintiff's title is proved. Entrustment of the business when the plaintiff left Calcutta in 1948 is also established by the evidence, and Gupta has admittedly refused to deliver possession when demanded. The plaintiff as the owner of the business was in the circumstances not prevented from enforcing that title against Gupta, there being no taint attaching to the entrustment.

The appeal therefore fails and is dismissed. Having regard to the circumstances of the case, we make no order as to costs.

AYYANGAR J.

I agree with the order proposed by my learned brother Shah J. that the appeal fails and should be dismissed as also in regard to the order for costs. As, however, I am unable to agree with certain of the findings recorded by my learned brother I propose shortly to state my reasons for the decision.

The facts of the case have all been set out in the judgment just now pronounced and it is needless for me to repeat them. The main point in controversy in the suit was as to whether Phanindra Mohan Majumdar the respondent, who was the plaintiff in the suit out of which this appeal arises, had established that he was the proprietor of the Boarding House carried on in the name and style of "International Home" at 42, Harrison Road, Calcutta. That property admittedly stood under the registered conveyance in the name of his father-in-law, defendant Gupta and that business was also conducted by the defendant. The case set up by the respondent was that the purchase of the property was with his funds and that the defendant - Gupta was merely a benamidar. The evidence on this point was examined elaborately by the learned Single Judge at the trial and by the Division Bench on appeal and they concurrently found that the defendant - Gupta was merely a benamidar for the respondent and that the purchase of the property in the name of the defendant and the carrying on of the hotel business by the defendant was really on behalf of the respondent. That finding was not challenged before this Court and does not, therefore, require any examination.

Accepting that finding, however, two questions were raised by the learned Counsel for the appellant.

One was that the purpose for which this benami transaction was entered into by the respondent was, on his own case, to circumvent the Service Rules of the Court of Wards of which he was an employee. Though no argument based upon the effect of this admission was urged before the learned trial Judge, the question whether the respondent was entitled to maintain the suit for the recovery of possession from the defendant having regard to this object of the benami transaction viz., to evade the Service Rules of the Court of Wards and in view of the circumstance that that object had been achieved, was raised before the Division Bench. The learned Judges, however, rejected the contention by pointing out that those Rules were not shown to be statutory and, in fact, the Rules themselves were not before the Court. In those circumstances, they considered that a breach of the rule or an attempt to evade it would not necessarily make the transaction unlawful so as to preclude the respondent from recovering the property title to which he had established. Learned Counsel for the appellant repeated this argument before us but I agree that it is not tenable having regard to the state of the evidence and to the fact that the Rules were not statutory.

There was, however, another illegality which came out in the course of the evidence of the respondent and which, it was submitted, was another object for which the property was purchased in the name of the defendant - Gupta which requires more serious attention. This relates to the claim of the appellant that it had been established that the object of putting the property benami in the name of the defendant - Gupta was to evade income-tax and that as a matter of fact, the tax liability for certain of the years of assessment had thereby been successfully evaded by the respondent.

The evidence in relation to this matter was this : The suit property was purchased and the Boarding House business was started in 1941, so that from the calendar year 1942 onwards i.e., from the assessment years 1943-44 onwards the respondent if the beneficial owner would have been liable to income tax on the income derived from the hotel business. During this period the respondent was also employed in the Court of Wards, so that he would have been liable to income tax on the aggregate of the incomes he was receiving from these two sources. In respect of the assessment years 1943-46 he received in 1947 a notice calling upon him to submit returns on the basis that he was the real owner of the International Home, 42, Harrison Road. The respondent then asserted that the property and the business did not belong to him, but to the defendant Gupta and that he was merely a manager under Gupta. In connection with this assertion to the Income-tax department he swore two affidavits one in December 1947 and the other in January 1948, before the Presidency Magistrate, Calcutta which contained these representations. In his cross-examination respondent's attention was drawn to the affidavits and to their contents and his answer was this :

A. "Then I was charged with the amounts as I was asked by the Income-tax Officer to file an affidavit. Then I made the first affidavit which is here in the file. I showed him my first affidavit whereupon the Income-tax Officer told me something. Pursuant to that I told him, 'I rejected the first affidavit and made a second affidavit which was accepted by them'. - (In the second affidavit dated January 31, 1948 he stated 31, 1948 he stated : 'I am an employee under Gupta - proprietor of International Home, 42, Harrison Road, Calcutta. I have been working there as manager since July 1941 and my monthly salary varied from Rs. 25 to Rs. 150 from my last appointment to this date) '..... Then I stated that my money was not taxable because it amounted only to Rs. 1,800 and I asked them to exempt me and accordingly I was exempted from paying the income tax.

Court Question : Do I understand that in 1947 and 1948 your object of filing this affidavit was to get rid of the income-tax liability if possible so far as you are personally concerned ?

A : That is so."

On the basis of this clear admission it was urged before the learned Judges of the Division Bench that the respondent made the purchase in the name of the defendant - Gupta really to evade income tax which he would have been liable to pay if the property and business had stood in his own name and that as he had successfully evaded the payment of income tax and had thus achieved his unlawful object, the Court would not permit him to assert title to the suit property and would not lend its aid to enable him to recover possession of his property. The learned Judges, however, rejected this submission for two reasons : (1) that the defendant had not pleaded this illegality in the written statement and was not therefore entitled to urge this as a ground for non-suiting the plaintiff; (2) That the evidence and the admission I have extracted, did not establish that the object of the respondent in effecting this purchase benami in the name of the defendant was, at its inception, to evade income-tax. In other words, the learned Judges considered that it had not been proved that at the inception of the purchase the object was to evade income tax, but that the respondent merely availed himself of the opportunity afforded by the benami purchase to evade tax when the same was sought to be levied on him some 5 or 6 years after the date of the original purchase.

Learned counsel for the appellant challenged this reasoning and submitted that the learned Judges had not approached the question correctly.

First as to the point that in the absence of a pleading the defendant was not entitled to rely on the taint of illegality in the transaction for persuading the Court to refuse relief to the plaintiff; I see force in the submission of learned Counsel for the appellant on this question. The law on this point as to pleading is quite clear and has been stated in decisions of the highest authority on several occasions and it is sufficient to summarise the underlying principles. Where a contract or transaction ex facie is illegal there need be no pleading of the parties raising the issue of illegality and the Court is bound to take judicial notice of the nature of the contract or transaction and mould its relief according to the circumstances. The case before us is, not however, of that type. Even where the contract is not ex facie legal "if the facts given in evidence clearly disclose the illegality the Court is bound to take notice of this fact even if not pleaded by the defendant" Per Lindley L.J. in *Scott v. Brown* ([1892] 2 Q.B. 724 at 729). The enunciation of the law on this point by Devlin J. in *Edler v. Auerbach* ([1950] 1 K.B. 359, at p. 371) though more elaborate and summarising the principles formulated by the House of Lords in *North-Western Salt Company Ltd. v. Electrolytic Alkali Company Ltd.* ([1914] A.C. 461) does not contradict the statement by Lindley L.J. In the case on hand there is a clear admission by the respondent himself of the facts on which illegality is sought to be made out. The affidavits which he swore for the purpose of evading the liability to tax are before the Court and in the circumstances I consider that it is clearly established that the object of the respondent was to evade the payment of income-tax.

The other ground on which the learned Judges rejected this plea of illegality was that there was no proof that the object which the respondent sought to achieve by the benami was not proved to have been the evasion of income-tax. Counsel for the appellant contended that the approach of learned Judges of the High Court to this question was not realistic and that their finding was not correct.

I see considerable force in this submission also. It was really an accident that the notice in respect of income-tax as regards the income from this property and business came to be issued to the respondent in 1947 or thereabouts. Unless one proceeded on the assumption that the respondent was not aware that income-tax was payable on income from property or business, he could obviously have acted only on the footing that the defendant - Gupta as the apparent owner of the property would alone be made liable for the payment of the tax. In these circumstances it appears to me to be clear that the object of the transaction of benami was even in its inception to ensure that there was

no aggregation of the income from the property and the hotel business with the salary or other remuneration which he was getting from the Court of Wards.

The question next to be considered is the effect of the object of the benami being to evade the provisions of a revenue law like the Income Tax Act. Now s. 23 of the Indian Contract Act enacts that the consideration or object of an agreement is lawful "unless it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law". On what I have stated earlier, the object of the agreement being to defeat the provisions of the Indian Income Tax Act would certainly not be lawful.

In this connection I might briefly refer to the decision in *Emery v. Emery* ([1959] 1 Ch. 410). It was an action by the husband seeking to recover from the wife one half of certain securities which the husband had purchased in the name of the wife. The finding was that the bonds, a moiety of which was sought to be recovered were held in the name of the wife as trustee for the wife and husband in equal shares so far as the beneficial interest was concerned. Wynn-Parry J. considered the evidence as to why the securities were purchased in the name of the wife and why there was a complete absence in the documents of any reference to the husband having any beneficial interest in those securities. The evidence led before the Court disclosed that under the law of the United States, where the dividends on the bonds were payable if the payment was to a non-resident alien the recipient would be liable to a withholding tax. The husband was a non-resident alien and if his beneficial interest was disclosed the dividend payable in respect of this investment would have protanto suffered the deduction of tax, while the wife being an American would not have been so liable. The question that was raised before the learned Judge was whether in those circumstances the husband could assert his title to the moiety of the securities to which he claimed beneficial interest. The learned Judge dismissed the action holding that as the securities were put in the name of the wife in order to evade the law the husband who did not come before the Court with clean hands could not claim his title and that the property should lie where it was. The main argument raised was that a breach of a Revenue law of a foreign country stood on a footing different from an attempt to evade a law of the United Kingdom and this was negatived. We are not, however, concerned with that problem, because here what was intended to be circumvented by means of this device was the Indian Income Tax Act. That an agreement to defraud Revenue is manifestly illegal is beyond dispute but if authority were needed I might refer to *Miller v. Karlinski* (62 T.L.R. 85) and *Alexander v. Rayson* ([1930] 1 K.B. 169) - (see *Cheshire and Fifoot on Contract*, 5th ed. 286).

No doubt, for the purpose of deciding whether property could be recovered by the assertion of a real title there is a clear distinction between cases where only an attempt to evade a statute or to commit a fraud has taken place and cases where the evasion or the fraud has succeeded and the impermissible object has been achieved. The leading decision upon this point is that of the Privy Council in *Petherpermal Chetty v. Muniandi Servai* ([1908] L.R. 35 I.A. 98) where Lord Atkinson dealing with the effect of benami conveyances which are motivated by the design to achieve an illegal or fraudulent purpose, quoted from *Mayne's Hindu Law* (7th ed. p. 595, para 466) the following as correctly setting out the law :

"Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider

whether A has actually cheated X or not. If he has done so by means of his alias, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reasons why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own For instance, persons have been allowed to recover property which they had assigned away where they had intended to defraud creditors, who, in fact, were never injured But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, 'In pari delicto potior est conditio possidentis'. The Court will help neither party. 'Let the estate lie where it falls'."

I might point out that later decisions both of the Indian High Courts and of the Privy Council have all proceeded on the acceptance of the principles which Lord Atkinson formulated in Petherpermal's case. ([1908] L.R. 35 I.A. 98)

Pausing here, it might be pointed out that exactly the same conclusion has been reached by the Courts in England where a benami transaction was entered into for the purpose of defrauding creditors. It is hardly necessary to add that the position in England under which a resulting trust is deemed to arise when a purchase is made in the name of another with one's own money and without an intention of conferring on him a beneficial title is identical with the law as to benami in India. In *Gascoigne v. Gascoigne* ([1918] I ch. 410) a husband took a lease of lands in his wife's name and built a house upon it with his own money. The reason why he entered into this type of transaction was that he was in debt and was desirous of protecting his property from his creditors. He then brought an action against the wife for a declaration that she held the property as trustee for him. The husband succeeded in the County Court. On appeal to the Divisional Court, Lush J. allowing the appeal stated that it was proved that the plaintiff was guilty of a fraud upon the law to evade and disappoint the provision of the legislation and he could not come in equity to be relieved against his own act, though the defence also was dishonest, and in the circumstances, the Court would say, "Let the estate lie where it falls".

Learned Counsel for the respondent submitted that the English decision just now referred to as well as *Emery v. Emery* ([1959] I ch. 410) proceeded upon the peculiarity of the English law in which there is a presumption of an advancement but that as there was no such presumption in India the position would be different where the Court has to deal with the effect of benami transactions brought about in order to effectuate a fraud or to evade the provisions of a statute. I do not, however, think that that could make any material difference. We start with the position that the Court will presume an ostensible title to be the real title unless a plaintiff who seeks to assert the contrary pleads and proves that the ostensible owner is not the real owner. In other words, the onus is on the person who alleges a transaction to be benami to make it out. Of course, the source of the funds from which the purchase is made coupled with the manner of its enjoyment would be a very material factor for establishing the case of benami but the mere proof of the source of the purchase money would not finally establish the benami nature of the defendant's title. Even where the plaintiff purchases property with his own funds in the name of 'B' the surrounding circumstances, the mode of enjoyment might still indicate that it was intended to be a gift to 'B' and it would then not be a case of benami notwithstanding that the purchase money did not proceed from the defendant. Therefore as observed in *Mayne's Hindu Law* (Eleventh Edn.) page 956.

"While the source from which the money came is undoubtedly a valuable test, it

cannot be considered to be the sole or conclusive criterion. For, the question whether a particular transaction is benami or not, is one of intention and there may be other circumstances to negative the prima facie inference from the fact that the purchase money was supplied by or belonged to another. The position of the parties, their relation to one another, the motives which could govern their actions and their subsequent conduct may well rebut the presumption."

Even where the benami is established effect will not be given to the real title if the result of doing so would be to violate the provisions of a statute or to work a fraud upon innocent persons - Gur Narayan v. Sheo Lal Singh ([1918] L.R. 46 I.A.I). On this reasoning it would prima facie appear to follow that the respondent having adopted this device of purchasing the property benami in the name of his father-in-law for the purpose of evading the provisions of the Indian Income Tax Act would not be entitled to recover the property on the basis of his title.

Two points were made by the learned counsel for the respondent for avoiding this result. In the first place, he submitted that the respondent had instituted the suit and was seeking relief on the basis of his proprietary interest in the property and that as he did not, in fact, plead nor was it necessary for him to plead the illegality of the transaction in order to sustain his title to the property, he was not precluded by reason of the illegality established from succeeding in the suit. For this purpose learned Counsel relied upon the principle laid down by the Court of Appeal in *Bowmakers v. Barnett Instruments* ([1945] 1 K.B. 65) and of the Privy Council in *Sajan Singh v. Sardara Ali* ([1960] A.C. 167). It is not necessary to narrate the facts of *Bowmakers'* case ([1945] 1 K.B. 65) in detail and it would be sufficient to extract the head-note for the purpose of understanding the ratio of the decision :

"No claim founded on an illegal contract will be enforced by the court but as a general rule a man's right to possession of his own chattels will be enforced against one who without any claim of right, is detaining them, or has converted them to his own use, even though it may appear from the pleadings, or in the course of the trial, that the chattels in question came into the defendant's possession by reason of an illegal contract between himself and the plaintiff, provided that the plaintiff does not seek, and is not forced, either to found his claim on the illegal contract, or to plead its illegality in order to support his claim."

It is perhaps not irrelevant to notice that the illegality which was there pleaded as a defence to the claim for damages for conversion of certain machine tools which was the property of the plaintiffs was the contravention of an executive order under the Defence Regulations regarding the maximum price that might be charged. There was besides a finding that neither the plaintiffs nor the defendants had any knowledge of the order, so that if they erred the error was involuntary. These form the background in which the decision has to be appreciated. The defendant, however, contended that the ignorance was immaterial and that as the order of the Minister rendered any violation of its provisions criminal the parties must be deemed to have been engaged in a criminal conspiracy and that the defendants were therefore entitled to retain the machine tools which were with them on hire without returning them to the bailor. *Du Parcq L.J.* who delivered the judgment of the Court, after quoting the maxim "*In pari delicto*" on which the defence was based, observed :

"The Latin maxim must not be understood as meaning that where a transaction is vitiated by illegality the person left in possession of good after its completion is always and of necessity entitled to keep them. Its true meaning is that, where the

circumstances are such that the Court will refuse to assist either party, the consequence must, in fact, follow that the party in possession will not be disturbed. As Lord Mansfield said, the defendant then obtains an advantage 'contrary to the real justice', and, so to say, 'by accident.'" and finally added :

"We are satisfied that no rule of law, and no considerations of public policy, compel the court to dismiss the plaintiff's claim in the case before us, and to do so would be, in our opinion, a manifest injustice."

In view of these observations, I am unable to hold that the decision is authority for the position that a suit for possession on the basis of title could never be dismissed even if the object for which the transfer was effected was illegal and that object has been achieved. The maxim *ex turpi causa non oritur actio* is still a rule of law and property transferred under a contract which is illegal or to achieve an illegal object where the object has been achieved cannot be recovered for the reasons that the court will not lend its aid to such a plaintiff. In other words, I do not read the decision in Bowmaker's case ((1945) 1 K.B. 65) as contradicting what was stated by Lord Atkinson in Petherpermal's case ([1988] L.R. 35 I.A. 98) extracted earlier.

There is one feature regarding the facts in Bowmaker's ((1945) 1 K.B. 65) case to which attention might be drawn. The plaintiff there had delivered the machine tools to the defendants under three hire purchase agreements which were illegal. The defendants had sold the tools delivered under two of the agreements and refused to redeliver those under the third which were still in their possession. So far as the claim related to those covered by the two agreements wherein the defendants parted with the goods Cheshire & Fifoot on the Law of Contract (Fifth Edn. p. 397) explain the decision thus :

"The significant feature of the wrongful sales was that they constituted an act of conversion that ipso facto terminated the bailment. The plaintiffs might therefore argue that, unlike the case of pledge in Taylor v. Chester which was still in existence at the time of the action, there was here no longer any existing contract upon which the defendants could found a possessory right. The right to immediate possession had automatically reverted in the plaintiffs. Could it not thus be said, as in the case of an illegal but expired lease, that owing to the termination of the bailment the plaintiffs had an independent cause of action in virtue of their admitted ownership ? It was completely irrelevant that the chattels had originally come into the possession of the defendants by virtue of the illegal contract. That contract was now defunct. It formed no part of the cause of action. Thus, with the disappearance of the only transaction that could restrict their rights, the plaintiffs could base their claim to possession solely upon their ownership of the chattels."

As regards the other agreement where the goods were still with the defendant the same authors say :

"In the case of this agreement the cause of action was the refusal of the defendants to comply with the demand for the return of the chattels. Since effective possession had passed to the defendants by virtue of the contract, the sole justification for this demand was their failure to pay the agreed instalments. The plaintiffs, therefore, were inevitably driven back to the contract in order to prove the amounts of the instalments, the dates at which they were due and the agreed effect of their non-payment. This part of the case would therefore seem to be on all fours with the action

by a lessor to enforce the forfeiture of the lease for condition broken.

This difficult decision turned upon the effect of a bailment. It would seem, however, that if the ownership of a chattel, as distinguished from a mere possessory right, were to be transferred under an illegal contract, it would remain perpetually irrecoverable. In such a case the transferor would have no title irrespective of the illegal transaction. His only mode of obtaining relief would be to terminate the contract under which he purported to transfer title to the defendant, and he could not take proceedings for this purpose without showing that he was *particeps criminis*."

I consider these remarks correctly set out the difficulties created by the decision and its true ratio.

Sajan Singh's case ([1960] A.C. 167) was concerned with the right of the plaintiff who was a lorry driver who could not, under the then existing regulations of Malaya, obtain a lorry. The defendant, on the other hand, was one who was qualified to purchase a lorry and accordingly an arrangement was entered into between the plaintiff and the defendant under which a lorry was to be acquired by the plaintiff to be registered in the name of the defendant with a permit in his own name but the intention being that it should belong to the plaintiff and to be used by him on his own account. The result was that the lorry belonged to the plaintiff but was operated in the name of the defendant. After the parties fell out and correspondence was passing between them, the defendant, one day, entered to plaintiff's house when the latter was absent and took away the lorry which he refused to return claiming that it belonged to him. The plaintiff then brought the suit out of which the appeal before the Privy Council arose, for a declaration that he was the owner and for return of the lorry and for damages etc. The claim, thus, before the Court was in *detinue* and Lord Denning who spoke for the Board emphasised this aspect observing :

"In *detinue* their Lordships think he succeeded. Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out : and on that account it was effective to pass the property in the lorry to the plaintiff The plaintiff had actual possession of the lorry at the moment when the defendant seized it. Despite the illegality of the contract, the property had passed to him by the sale and delivery of the lorry. When he commenced this action, he had the right to immediate possession. Their Lordships think that in these circumstances he had a claim in *detinue*."

It would thus be seen that besides the claim based on his title to the lorry, the plaintiff had also established that while the chattel was in his possession, the defendant had unlawfully taken it away, without his consent. Insofar as his claim was based on this deprivation of possession, it was really an independent cause of action wholly separated from the original purchase of the lorry which was to circumvent the law, and as to this claim in *detinue* there was no question of its being tainted with any illegality.

Besides this, Lord Denning himself pointed out that there were many cases which showed that where a transfer of property was effected in order to achieve an illegal purpose and that purpose was achieved, the plaintiff was disabled from recovering the property for the reason that the Court will not assist him in that endeavour.

Pausing here, I need only add that there is no question here of the legislation whose avoidance or contravention stamps the transaction as illegal being one enacted for the protection of persons like

the plaintiff. Such was the case of *Amar Singh v. Kulubya* ([1963] 3 W.L.R. 513) where the principle explained in *Kearley v. Thomson* (24 Q.B.D. 742) by Fry L.J. :

"In these cases of oppressor and oppressed, or of a class protected by statute, the one may recover from the other, notwithstanding that both have been parties to the illegal contract."

as an exception to the rule in *pari delicto potior est condition possidentis* was applied.

Two questions thus arise which have to be separately considered : (1) If nothing more had happened in this case than that the respondent had purchased the property benami in the name of the defendant - Gupta can the respondent lay claim to possession of the suit property based upon the fact that the purchase money came from him notwithstanding the illegal and unlawful purpose which he sought to accomplish by that transaction and which he succeeded in achieving; (2) Whether the respondent can rest his claim to recover possession of the property on a title wholly independent of the benami purchase which is tainted with illegality. The answer to the first question would depend upon whether he can assert title to the property, dehors the illegal object which he achieved by purchasing the property benami in the name of the defendant - Gupta. Prima facie the answer would appear to be in the negative on the principle laid down by Lord Atkinson in *Petherpermal v. Muniandi* ([1908] L.R. 35 I.A. 98) already cited. Learned Counsel for the respondent, however, submitted that under the Indian law though the onus of establishing that a transaction is benami is on the person who so asserts it and that unless this is strictly made out the ostensible title would prevail, but when once the plaintiff establishes that the consideration proceeded from him, the onus shifts to the defendant to establish that the transaction was not benami and that a beneficial interest was intended to pass to him. I do not consider it necessary to finally decide this point on which turns the question as to whether the respondent is entitled to succeed on the basis of his title notwithstanding the illegality attending the transaction, though it must be pointed out that if the object which the parties have in view cannot be carried out unless a real title passed to the defendant the presumption arising out of the consideration proceeding from the plaintiff would be over-borne. I say it is not necessary to pronounce upon this difficult question because in the present case the respondent's claim to possession is based not merely on the basis of his title emerging from the source of purchase money for the acquisition of property but also on an alternative ground and this is the second of the grounds on which the respondent rested his claim to recover possession, and that was as follows.

While the respondent himself was in physical possession of the property he had to leave Calcutta on medical advice in or about December 8, 1948 and at that date he put the defendant Gupta into possession on the understanding that on the respondent's return to Calcutta the defendant would hand over to the plaintiff possession of the premises and the management of the business. The respondent further stated that he returned to Calcutta in or about December, 1949 and occupied one of the rooms of the suit property and made demands on the defendant to hand over possession and management which he failed to do. This case of the respondent has been concurrently found to be true case of the respondent has been concurrently found to be true by both the Courts. It would be seen that the basis of the respondent's claim to possession is independent of and wholly dissociated from the illegal transaction of the original benami purchase and falls into line with *Sajan Singh's* case ([1960] A.C. 167). Not being tainted with illegality, the respondent's claim on this footing is not open to objection and as it has been upheld by both the Courts I agree that the appeal should stand dismissed and also to the order for costs proposed by my learned brother.

Appeal dismissed.

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