Kumar Harish Chandra Singh Das & Others

Vs

Bansidhar Mohanty and Others

Civil Appeal No. 304 of 1963

(K. N. Wanchoo, J. R. Mudholkar, J. C. Shah JJ)

05.05.1965

JUDGMENT

MUDHOLKAR, J. –

Two questions are raised before us in this appeal from the judgment of the Orissa High Court. One is whether the mortgage deed upon which the suit of the respondent no. 1 was based was validly attested. The other is whether the respondent no. 1 was entitled to institute the suit.

The mortgage deed in question was executed by the appellant in favour of Jagannath Debata, respondent no. 2 on April 30, 1945, for a consideration of Rs. 15,000. The appellant undertook to repay the amount advanced together with interest within one year from the execution of the deed. The appellant, however, failed to do so. Respondent no. 1 therefore instituted the suit out of which this appeal arises.

According to respondent no. 1 though the money was advanced by him to the appellant he obtained the deed in the name of the second respondent Jagannath Debata because he himself and the appellant were close friends and he felt it embarrassing to ask the appellant to pay interest on the money advanced by him. As the consideration for the mortgage deed proceeded from him he claimed the right to sue upon the deed. He, however, joined Jagannath Debata as the third defendant to the suit. He also joined Dr. Jyotsna Dei as second defendant because she is the transferee of the mortgaged property - which consists of a house, from the appellant whose wife she is. This lady however remained ex parte. The appellant denied the claim on various grounds but we are only concerned with two upon which arguments were addressed to us. Those are the grounds which we have set out at the beginning of the judgment. The third defendant Jagannath Debata disputed the right of respondent no. 1 to institute the suit and claimed that it

In our opinion there is no substance in either of the contentions urged on behalf of the appellant. It is no doubt true that there were only two attesting witnesses to the mortgage deed, one of whom was respondent no. 1, that is, the lender himself. Section 59 of the Transfer of Property Act, which, amongst other things, provides that a mortgage deed shall be attested by at least two witnesses does not in terms debar the lender of money from attesting the deed. The word "attested" has been defined thus in s. 3 of the Transfer of Property Act :

> "'attested' in relation to an instrument means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant

> a personal acknowledgment of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

This definition is similar to that contained in the Indian Succession Act. It will be seen that it also does not preclude in terms the lender of money from attesting a mortgage deed under which the money was lent. No other provision of law has been brought to our notice which debars the lender of money from attesting the deed which evidences the transaction whereunder the money was lent. Learned counsel, however, referred us to some decisions of the High Courts in India. These are Peary Mohan Maiti & Ors. v. Sreenath Chandra (1) 14 C. W. N. 1046; Sarur Jigar Begum v. Barada Kanta (2) I. L. R. 37 Cal. 526 and Gomati Ammal v. V. S. M. Krishna Iyer (3) A. I. R. 1954 Mad 126. In all these cases it has been held that a party to a document which is required by law to be attested is not competent to attest the document. In taking this view reliance has been placed upon the observations of Lord Selborne, L. C., in Seal v. Claridge. B. D. 516.

> "It (i.e. the attestation) implies the presence of some person, who stands by but is not a party to the transaction."

The object of attestation is to protect the executant from being required to execute a document by the other party thereto by force, fraud or undue influence. No doubt, neither the definition of 'attested' nor s. 59 of the Transfer of Property Act debars a party to a mortgage deed from attesting it. It must, however, be borne in mind that the law requires that the testimony of parties to a document cannot dispense with the necessity of examining at least one attesting witness to prove the execution of the deed. Inferentially, therefore, it debars a party from attesting a document which is required by law to be attested. Where, however, a person is not a party to the deed that is no prohibition in law to the proof of the execution of the document by that person. It would follow, therefore, that the ground on which the rule laid down in English cases and followed in India would not be available against a person who has lent money for securing the payment of which a mortgage deed was executed by the mortgagor b

> "In Seal v. Claridge (3) L. R. 7 Q. B. D. 516 much relied upon by the appellant's pleader the old case of Svire v. Bell (1793) 5 T. R. 371, in which the absolete rule was pushed to its farthest extent, was cited to the Court but Lord Selborne in delivering judgment said : 'What is the meaning of attestation, apart from the Bills of Sale Act, 1878 ? The word implies the presence of some person who stands by but is not a party to the transaction'. He then referred to Freshfield v. Reed (1842) 9 M & W 404 and said : 'It follows from that case that the party to an instrument cannot attest it.' Again in Wickham v. Marquis of Bath (1865) L. R. 1 Eq. 17 at p. 25, the remarks of the Master of the rolls imply that if the plaintiffs Dawe and Wickham had not executed the deed as parties but had only signed with the intention of attesting, the provision of the statute requiring two attesting witnesses would have been satisfied.'"

A distinction was thus drawn in this case between a person who is a party to a deed and a person who, though not a party to the deed, is a party to the transaction and it was said that the latter was not incompetent to attest the deed. This decision was followed by the Chief Court of Oudh. We agree with the view taken by the Bombay High Court.

As regards the second question a number of High Courts in India and taken the view that a benamidar could not maintain a suit for the recovery of property standing in his name, beneficial interest in which was in someone else. Benami transactions are not frowned upon in India but on the other hand they are recognised. Indeed s. 84 of the Indian Trusts Act, 1882 gives recognition to such transactions. Dealing with such transactions Sir George Farewell has observed in Bilas Munwar v. Desraj Ranjit Singh :

> "It is quite unobjectionable and has a curious resemblance to the doctrine of our English law, that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law, that where a feiffment is made without consideration the use results to the feiffor."

It must follow from this that the beneficial owner of property standing in the name of another must necessarily be entitled to institute a suit with respect to it or with respect to the enforcement of a right concerning the property of a co-sharer. It will follow that a person who takes benefit under the transaction or who provides consideration for a transaction is entitled to maintain a suit concerning the transaction. Thus where a transaction is a mortgage, the actual lender of money is entitled to sue upon it. Indeed, till the decision of the Privy Council in Gur Narayan & Ors. v. Sheo Lal Singh & Ors. the right of a benamidar to sue upon a transaction which is only ostensibly in his favour was not recognised by several courts in India. Relying upon this decision it was contended before us on behalf of the appellant that in view of this decision it must be held that it is the benamidar alone who could maintain a suit but not the beneficial owner. That, however, is not what the Privy Council decided. Inde

In this view we uphold the decree of the High Court and dismiss the appeal with costs.

Appeal dismissed.

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