

Shankar Nath Chatterjee,

Vs

Makhan Lal Chatterjee and Another

Civil Appeals Nos. 2407 of 1966 and 351 and 352 of 1967,

(J. C. Shah, K. S. Hegde, A. N. Grover JJ)

18.03.1970

JUDGMENT

SHAH, J. -

1. These appeals against the judgment by the High Court of Calcutta modifying the decrees passed in three suits Nos. 42 of 1955, 43 of 1955 and 56 of 1955 on the file of the 5th Subordinate Judge, Alipur, raise a common question. The appeals have been filed with certificate granted by the High Court.

2. Once Aghore Nath Chatterjee, a Hindu governed by the Dayabhaga School of Hindu Law died in 1908 leaving him surviving four sons-Debendra Nagendra, Probodh and Makhan. His estate which consisted of a house at Dakhineswar, P. S. Baranagore, and an agricultural land recorded as No. 488 C. S. Dag 1695/1819 was inherited by his sons in equal shares. Debendra died leaving him surviving his widow and daughter. Nagendra died leaving him surviving a sons Dashrathi. Probodh and Makhan were alive at the date when the suits our of which these appeals arise commenced. Makhan was married to Suhasini and he had four sons-the eldest being Sankar.

3. The shares owned by the four brothers in the estate of Aghore Nath were transferred by several deeds. They are set out in chronological sequence :

(1) On March 3, 1936 Makhan executed a sale deed of his one-fourth share in the house and the land in favour of his brother Probodh, for a consideration of Rs. 1,999;

(2) Shortly thereafter Dashrathi, son of Nagendra transferred his one-fourth share in the house and the land to one Sanat;

(3) On October 7, 1941 Probodh sold his one-fourth share to Suhasini wife of Makhan in the house and the land;

(4) On September 21, 1942 Debendra's widow and daughter sold their one-fourth share in the house and the land to Suhasini;

(5) On October 6, 1950 Sanat who had purchased the share of Dashrathi sold it to Probodh;

(6) On April 7, 1955 Probodh gifted his one-fourth share in the house and the land to Sankar;

(7) On December 5, 1956 Probodh gifted another one-fourth share in the house to Sankar;

4. Sankar filed two suits Nos. 42 and 43 of 1955 in the Court of the 5th Subordinate Judge, Alipur. In Suit No. 42 of 1955 Sankar originally claimed partition and separate possession of a fourth share in the residential house. By amendment of the plaint after the deed, dated December 5, 1956, he claimed a half share in the house. This suit was filed against Probodh, Suhasini and Makhan. By suit No. 43 of 1955 Sankar claimed a fourth share in the land relying upon the gift deed, dated April 7, 1955. He claimed to have purchased the interest of one Karimaneesa Bibi who was a tenant on the land. This suit was filed against Suhasini and Makhan. Makhan filed Suit No. 56 of 1955 for a declaration that the sale deed relating to a fourth share in the house and the land, dated March 3, 1936, executed by him in favour of Probodh was not intended to be acted upon and was never acted upon, and that he was at all relevant times the owner of that share. To the suit were impleaded as defendants Probodh, Suhasini and Sankar. The three suits were consolidated for hearing.

5. The Trial Court decreed Suit No. 42 of 1955 : it also decreed Suit No. 43 of 1955 subject to rejection of the claim in respect of a part of the land. The Court held that the sale deed, dated March 3, 1936 executed by Makhan was not sham. The Court further held that Probodh had and transferred his fourth share to Suhasini by the deed, dated October 7, 1941. Makhan's suit No. 56 of 1955 was on the finding recorded by the Trial Court dismissed.

6. Makhan appealed to the High Court of Calcutta. The High Court was of the view that Makhan had "apparently" transferred his fourth share in the land and building by deed, dated March 3, 1936, but the transaction was of a nature different from its tenor. They observed that Probodh had advanced to Makhan in 1936 the sum of Rs. 1,999 and that he had taken "a kobala" from Makhan in his name but the Kobala was never acted upon. We cannot therefore hold that the sum of Rs. 1,999 was paid as consideration for the Kobala; but the Kobala was taken, may be, with an idea that the repayment without interest may be facilitated by it. The owner did execute a deed of transfer but it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest; hence the transferee is to hold for the benefit of the vendor. I hold from the attending circumstances salted aforesaid that Probodh and his transferee Sankar held and hold the property for the benefit of Makhan. But Makhan has not paid that sum of Rs. 1,999. He claims the beneficial interest, Probodh being the transferee. If Makhan comes to equity he must also be subject to all equities. Hence Makhan will have his "interest in the one-fourth share state to have been transferred on 3rd March, 1936, provided he pays to Sankar Rs. 1,999 or property of equal value." On that view the High Court modified the decree in Suit No. 42 of 1955 declaring that Sankar had a four annas share in the house, Suhasini had in eight annas share and Makhan had the remaining four annas share. In Suit No. 43 of 1955 the High Court declared that Sankar had no share except that he was entitled to receive from Makhan Rs. 1,999 within three months from the date of the judgment and if there was default in making deposit, property worth Rs. 1,999 from the share of Makhan in the property shall be allotted to Sankar on partition. The Court further held that Makhan had a four annas share and Suhasini had twelve annas share in the properties in Suit No. 56 of 1955, and declared that Makhan had beneficial interest in four annas share in the house and Sankar held it for him subject to terms mentioned in the decree in Suit No. 43 of 1955, and that Makhan and Suhasini had sixteen annas share in the land. With certificate granted by the High Court Sankar has appealed to this Court.

7. The High Court has made out a case which was never pleaded by Makhan. It was Makhan's case that the sale deed, dated March 3, 1936 was "sham", for according to him it was not intended to be operative and had never been treated as operative, and that he had at all material times remained in possession of his share and Probodh had no interest which he could have transferred to Sankar. It was not his case that Probodh had given him a loan of Rs. 1,999 and that the house was

notwithstanding the transfer to remain his property though nominally transferred in the name of Probodh. It was the case of Makhan that he executed a nominal transaction and received no consideration; it was found by the High Court that Rs. 1,999 were in fact paid by Probodh to Makhan, but the amount was to be treated as a loan without interest, and in order to secure repayment of the money Makhan had transferred his share in the family property to Probodh in order that the repayment of the money without interest maybe ensured. There was no pleading, no issue and no evidence on this part of the case. The sale deed executed by Makhan clearly recites that Rs. 1,500 were received prior to the execution of the sale deed Rs. 25 as earnest money and Rs. 470 received in cash in 47 currency notes of Rs. 10 and "Rs. 4 in coins" were paid. But on the view that the sale deed was in the custody of Makhan and not of Probodh and also that the motive for payment of Rs. 1,999 was to help Makhan when he was being prosecuted and from the subsequent conduct of Probodh it appeared that it was not intended to convey Makhan's interest in the property to Probodh, the High Court declared contrary to the case of both the parties that there were two transactions one of a loan repayable without interest, and another of a nominal transfer of Makhan's share in the house and loan to ensure repayment of the loan.

8. The property was a residential house and land belonging as tenants in common to the members of the family and what was sought to be sold was the one-fourth share of Makhan in the undivided property. About the year 1936 Makhan was involved in a criminal case for causing grievous hurt to some person and he was tried and sentenced to rigorous imprisonment for six months. After he was convicted by the Trial Court and released on bail Makhan executed the deed, dated March 3, 1936 conveying his share. Even assuming that Probodh was willing to assist makhan in the proceeding against him, it is difficult to accept the view that the amount of Rs. 1,999 was merely advanced as a loan to Makhan and the transfer of his one-fourth share in the house and the land by Makhan to Probodh was merely to ensure repayment of the loan. The suggestion that the document, dated March 3, 1936, may have been executed in favour of Probodh on the advice of a lawyer lest the complainant might sue for damages in tort does not require any serious consideration. The finding of the High Court that the sale deed, dated March 3, 1936, was not intended to convey Makhan's interest to Probodh cannot be sustained. If the deed, dated March 3, 1936, be upheld as valid, it is clear that Makhan's share in the land passed to Probodh and from Probodh to Sankar.

9. Reliance was placed upon an entry in the registered deed executed by Kariman Bibi tenant of the land in favour of Sankar in which it was recited that the consideration of Rs. 1,400 was paid in the presence of the Sub-Registrar by Makhan to kariman Bibi. But no inference arises from that circumstance that Makhan purchased the interest of Kariman Bibi. Makhan is the father of Sankar and the dispute between them started shortly before 1955. On August 25, 1951, there was nothing unusual in Makhan's acting on behalf of Sankar in paying the consideration to Kariman Bibi.

10. The decree passed by the High Court will therefore be set aside in all the three suits and the decree passed by the Trial Court will be restored. Makhan will pay costs in all the three appeals in this Court to Sankar. There will be one hearing fee.

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