

Dr. Prem Chand Tandon

Vs

Krishna Chand Kapoor

Civil Appeal No. 769 of 1967

(K. S. Hedge, A. N. Grover, D. G. Palekar JJ)

09.08.1972

JUDGMENT

GROVER, J. -

1. This is an appeal by special leave form a judgment of the Rajasthan High Court arising our of a suit filed by the appellant for possession of property known as 'Krishna Bhavan' at Ajmer which was decreed by the trial court but has been dismissed by the High Court.
2. The facts may be stated : Rai Bahadur Mool Chand Kapoor a retired officer of Railways who died on September 9, 1918, married three wives. He had no issue form the first wife but the respondent Krishna Chand Kapoor is his son from the second wife. The third wife Smt. Dhanta Devi had a daughter Chanda Devi and the appellant is her son. Dhanta Devi died in 1948, and the present suit was filed in January 1949. It appears that Mool Chand Kapoor left considerable amount in case and securities apart form the property in dispute. Mool Chand Kapoor after retirement had started doing business on the Stock Exchange at Bombay. That business seems to have been continued by the respondent entered. The respondent into several transactions after the death of his father. He purchased 25 equity shares and 34 preference shares of Tata Power Co., Bombay, during the years 1919 and 1920. In April 1919 he purchased land at Ville Parle, Bombay, for Rs. 4,067. He purchased a car in April 1920, for Rs. 8,000/-. He also purchased some jewellery in the shape of diamonds in August 1920 for Rs. 6,924/-. Towards the end of the year 1920, as suit was filed by one D. S. Madan of Bombay against the respondent in Bombay High Court for a sum of Rs. 9,393/12/0.
3. The respondent started transferring properties held by him favour of Smt. Dhanta Devi, his step-mother in the year 1921. In February 1921, he claimed to have transferred 50 shares of E. D. Sasoon & Co. in her favour. On April 4, 1921, admittedly he transferred the car in favour of his step-mother vide Ext. 255. It would appear from the copy of the judgment Ext. A-279 that a debt of Rs. 3,000/- due in favour of the respondent against Kalyan Mal V. Dhanda was transferred to Smt. Dhanta Devi by making the debtor execute a pronote for Rs. 3,200/- in her favour on the basis of which she filed a suit against the debtor which was decreed. On May 20, 1921 the respondent executed a usufructuary mortgage deed for Rs. 25,000/- in favour of Dhanta Devi mortgaging two properties : (1) Krishna Bhavan and (2) the land at Ville Parle, Bombay. The consideration for the mortgage was stated in the deed to be the debt on the basis of two pronotes, one for Rs. 15,000/-, date December 10, 1919, and the other for Rs. 10,000/- dated March 17, 1920. These amounts were said to have been advanced to the respondent by Smt. Dhanta Devi. The mortgage Ext. 7 was for a period of 60 years and the present disputed arises out of the said transaction of usufructuary mortgage. It may be mentioned that the facts which have been stated by us about the previous transactions made by the respondent in favour of Dhanta Devi and the facts which are next stated relating to the transactions

subsequent to the execution of the usufructuary mortgage deed are necessary for deciding the real point in controversy, namely, whether a usufructuary mortgage deed was executed fictitiously by the respondent and was just a sham transaction for which no consideration was received by him and which had apparently been entered into for the purpose of defeating the creditors of the respondent.

4. On September 1, 1921, Tata Power Co. Ltd., Bombay, demanded first call of Rs. 100/- per share from the respondent which was not paid. On January 13, 1922, the Bombay High Court decreed the suit of D. S. Madan against the respondent for about Rs. 9,400/- with costs and future interest. On April 1, 1921, the second call was made by Tata Power Co. in respect of the shares. This was followed by a third call on October 16, 1922. Finally a suit was filed on January 27, 1922, by Tata Power Company which was decreed for Rs. 42,227-5-0 on January 72, 1925. On November 23, 1925, the respondent executed a sale deed, Ext. 8, of the equity of redemption of the two mortgaged properties together with a small plot of land allegedly situate at Delhi in favour of Harchand brother of Tata Chand who was father of the appellant and son-in-law of Dhanta Devi for a consideration of Rs. 5,000/-. It may be mentioned that it has been found by the majority of the judges of the High Court that there was no plot in Delhi and that plot was included in the sale deed with the object of getting registration done in Delhi. On April 8, 1926, Har Chand filed an objection petition under Order 21, Rule 58 C.P.C. in the executing court that the equity of redemption had been sold to him on November 24, 1925, and it should not be sold in execution of the decree of D. S. Madan. This objection was accepted by the execution court in May 1927, and the attached properties were released from attachment. On July 14, 1928, Har Chand executed a lease deed in favour of Smt. Dhanta Devi stating that the consideration for the sale deed Ext. 8, dated November 23, 1925, executed by the respondent in his favour was in fact paid by Smt. Dhanta Devi to the respondent and not by him and that his name had been mentioned as purchaser in Ext. 8 falsely and fictitiously and that he had no right or interest whatsoever in the three properties, namely, 'Krishna Bhavan' at Ajmer, the Ville Parle land at Bombay and the plot at Delhi and that Smt. Dhanta Devi was the real owner of the three properties covered by sale deed. In August 1928, the Tata Power Company adjusted satisfaction of the decree for Rs. 42,200 odd against the respondent by forfeiture of the shares.

5. Smt. Dhanta Devi died in April 1948. The suit out of which the present appeal has arisen was filed on January 14, 1949, by the appellant against the respondent for possession of the suit house 'Krishna Bhavan'. It was alleged in the plaint that Smt. Dhanta Devi owned and was possessed of the aforesaid property having acquired the same by the usufructuary mortgage deed, dated May 20, 1921, and the sale deed, dated November, 23, 1925, executed by the respondent herein in favour of Har Chand benami for Smt. Dhanta Devi and the deed of release, dated July 14, 1928, executed by Harchand in favour of Smt. Dhanta Devi. The appellant herein being the daughter's son was the sole heir and was entitled to the property of Smt. Dhanta Devi. Hence the suit. In the written statement all the circumstances under which the usufructuary mortgage deed in favour of Dhanta Devi, the sale deed in favour of Harchand and the release deed by him in her favour were executed, were set out. It was asserted that the aforesaid three documents were nominal, without consideration and were executed by the respondent herein at the suggestion and dictation of Smt. Dhanta Devi to save the property from being proceeded against by the creditors of the defendant who were doing speculative business in stock and shares at a very large scale and were not intended to be treated as true and genuine transactions conveying any title to Smt. Dhanta Devi. The consideration for the usufructuary mortgage amounting to a sum of Rs. 25,000/- consisting of two promissory notes was stated to be fictitious as no money had ever been paid on account of those promissory notes by Smt. Dhanta Devi to the respondent herein. It was also stated that the respondent had even transferred his car, some shares and deposits and other money loans, properties etc., in the name of Smt. Dhanta

Devi nominally to save them from being attached by his creditors. A number of issues were framed by we are now concerned only with the following issues :

"1. Were the mortgage deed, dated May 20, 1921, and the sale deed, dated November 23, 1925, and the deed of release, dated July 14, 1928, without consideration and were they executed in circumstances mentioned in Paras 5 and 15 of the written statement ?

7. Was the plot mentioned in sale-deed, dated November 23, 1955 and in deed of release, dated July 14, 1928, non-existent and was it fictitiously inserted in these documents as alleged in Para 16 of the amended written statement ? If so, were both the transactions void ?"

For the purpose of deciding whether the usufructuary mortgage deed was a sham transaction the trial court went quite rightly into the question of consideration. It was found that the respondent needed money during the period 1919 to 1921, and he must have executed two promissory notes mentioned in the usufructuary mortgage deed Ext. 7. The trial court next proceeded to examine the evidence relating to the capacity of Smt. Dhanta Devi to make advance to the tune of Rs. 25,000/- and came to the conclusion that she had the necessary funds for making the said advances. As regards the possession of 'Krishna Bhavan' the trial court was of the view that Smt. Dhanta Devi had allowed the respondent to occupy certain portion of 'Krishna Bhavan' for his residence and to let out certain portions in order to obtain money for his maintenance as he had fallen on bad days. The trial court finally held that the mortgage deed, May 20, 1921, was for consideration and was not a fictitious and a sham document. As regards the other documents, namely, the sale deed, dated November 23, 1925, and the release deed, dated July 14, 1928, Ext. 9, it was held that these documents were void because of the non-existence at Delhi a plot of 20 yards of land mentioned in the document. It was, however, found that Smt. Dhanta Devi had no concern with the transfer Ext. 8. As regards Smt. Dhanta Devi having been put in possession of 'Krishna Bhavan' after the execution of the mortgage deed, Ext. 7, the trial court found that she had in fact been put in possession and that she had only permitted the respondent to occupy a portion of it for the reasons already stated. The suit was accordingly decreed.

6. The appeal filed by the respondent came up in the first instance before I. N. Modi and B. P. Beri, JJ. The two learned judges differed in their conclusion. Beri, J., affirmed the decision of the trial court whereas Modi, J., disagreed with that decision and came to the conclusion that the usufructuary mortgage was a fictitious and a sham transaction and no title could pass to Smt. Dhanta Devi by virtue thereof. Owing to this difference of opinion the appeal was referred to Jagat Narain, J. (as he then was) for decision. That learned judge agreed with Modi, J. The appeal was consequently allowed and the suit filed by the appellant was ordered to be dismissed.

7. Mr. Gupte, who appears for the appellant, has not rightly and quite properly Challenged the findings of the courts below with regard to the sale deed Ext. 8, dated November 23, 1925, executed by the respondent in favour of Har Chand and the release deed executed by the latter (Ext. 9), dated July 14, 1928, in favour of Smt. Dhanta Devi were void transactions. He has however strenuously urged that the majority of the judges in the High Court were in error in holding that the usufructuary mortgages deed Ext. 7, dated May 20, 1921, was without consideration and was a sham transaction being only a part of the scheme to defeat the creditors of the respondent. Our attention has been invited to the findings of the trial court and Beri. J., and a great deal of emphasis has been laid on the fact that there was no basis or proof with regard to the plea in the written statement that it was

Dhanta Devi who had, out of love and affection for the respondent, asked him to adopt the device of executing the usufructuary mortgage to keep the property 'Krishna Bhavan' safe and free from being proceeded against by the creditors. Moreover there was hardly any justification for the view taken by the majority judges of the High Court that on consideration had passed from Smt. Dhanda Devi to the respondent for the usufructuary mortgage. Mr. Gupte has relied on the finding of the trial court that Smt. Dhanta Devi had enough funds for making the advances amounting to Rs. 25,000/- for which promissory notes were executed by the respondent and which formed the consideration for the usufructuary mortgage.

8. We have given in detail the various transactions entered into by the respondent as also the transfers made by him most of which were in favour of Smt. Dhanta Devi before the after the usufructuary mortgage deed was executed in May 1921. There can be no manner of doubt that the respondent was carrying on speculative transactions at the Bombay Stock Exchange. It appears that either at the initiative of Smt. Dhanta Devi which is not very likely or on his own the respondent took the precaution of transferring a number of his assets including the car to Smt. Dhanta Devi apparently to escape the payment of debts to the creditors. The suit of Madan was already pending and the respondent was fully aware that he would ultimately have to pay the monies of the Tata Power Co. Ltd. an account of the liability of the shares which he had purchased. He might also be anticipating other indebtedness which would be incurred in the course of speculative business which he was carrying on. We are wholly unable to understand why the respondent transferred even the car on April 4, 1921, in favour of Smt. Dhanta Devi. It has not been suggested on his behalf that this was done to pay off any debts due to her. This was done immediately before the usufructuary mortgage was executed apart from the transfer of another debt of Rs. 3,000/- on May 16, 1921. The events which followed the transfer of the usufructuary mortgage and in particular the fact that two wholly fictitious documents Exts. 8 and 9 were executed, even though it was some years later, certainly reflect very adversely on the conduct of the respondent. Smt. Dhanta Devi was also a party to those documents and it is difficult to believe that all these transfers including the transfer preceding the execution of the usufructuary mortgage were made without her knowledge and consent. The conclusion, therefore, is irresistible that prior and subsequent to the execution of the usufructuary mortgage deed there was some scheme or understanding between the respondent and Dhanta Devi by which all these transfers were made with a view to avoiding payment of debts by the respondent.

9. As regards the consideration for the usufructuary mortgage the promissory notes were never produced. It is true that there was some evidence that Smt. Dhanta Devi had received certain insurance monies on the death of her husband but the aggregate of those amounts did not exceed Rs. 13,000/- Even if she was possessed of some jewellery and other funds it is difficult to believe that she would have advanced such a substantial amount of Rs. 25,000/- to the respondent by means of two promissory notes on December 10, 1919, and on March 17, 1920. It would further appear and some stress has been laid on this aspect by Jagat Narain, J., in his judgment that the financial position of the respondent at the time the usufructuary mortgage deed was executed was fairly good considering the various articles like diamonds and the car which he had purchased apart from the shares. The house at Ajmer and the Ville Parle land and been mortgage with possession for Rs. 25,000/- for a period of 60 years. It was difficult to believe that the respondent would have entered into such a transaction in view of his financial position in the year 1921. It was equally not likely that a person dealing in shares who would require ready money would lock up his assets like the property in dispute in a transaction which was such that the mortgage could not be redeemed before the expiry of the period of sixty years. The mortgage, therefore, was executed only with an ulterior purpose it being wholly fictitious.

10. The other question with fell to be examined was the question of possession over 'Krishna Bhavan'. There was a good deal of evidence which was discussed by Jagat Narain, J., showing that the respondent was in possession of 'Krishna Bhavan' as owner even after the execution of the usufructuary mortgage and Smt. Dhanta Devi occupied merely a portion of it for her residence. The case put forward by the appellant in the plaint as well as in his statement in court that Smt. Dhanta Devi was realizing rent from all the tenants had been proved to be false. We have been taken through some of the documentary evidence on the point of possession and it appears to us that the view of Modi, J., and Jagat Narain, J. that even after the execution of the mortgage deed the respondent continued to remain in effective possession of a very large portion of 'Krishna Bhavan' and received its rents and profits for a long period during the lifetime of Smt. Dhanta Devi was correct. If that be so it becomes apparent that Dhanta Devi never took possession of the property in dispute pursuant to the usufructuary mortgage deed executed by respondent in her favour. It appears that even as the widow of her husband Mool Chand Kapoor she had a right of residence in the house and it was largely in that capacity that she continued to keep a portion of it or received rent from some of the tenants.

11. Ordinarily this Court is most reluctant to interfere with the finding of the fact of the High Court or appreciation of evidence by it; but we have gone into most of the material circumstances and considered the important pieces of evidence because of the difference of opinion among the learned judges of the High Court. However, for the reasons that have been indicated above we are satisfied that conclusion of Modi and Jagat Narain, JJ., were correct and must be upheld. In the result the appeal fails but we make no order as costs in this Court.

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