

Jaydayal Poddar (Deceased) Through L.rs. and Another

Vs

Mst. Bibi Hazra and Others

Civil Appeal No. 1759 of 1967

(V. R. Krishna Iyer, R. S. Sarkaria JJ)

19.10.1973

JUDGMENT

SARKARIA, J. –

1. This appeal by certificate is directed against the appellate judgment and decree, dated October 31, 1962, of the High Court of judicature at Patna.
2. The plaintiffs-appellants instituted a suit on June 30, 1956, in the Court of Subordinate Samastipur for a declaration of title and Samastipur Municipality. It was alleged that Abdul Karim (defendant No. 1) had out of his own funds, purchased this house in the name of his wife Mst. Hakimunnissa by a registered sale-deed dated May, 10, 1941, form one Abdul Motilib. After the purchase, defendant No. 1 who was in possession of the house, executed two mortgage deeds, dated January 6, 1948 and July 28, 1948, in favour of his son-in-law, Abdul Latif (defendant No. 3), husband of Mst. Bibi Hazra (defendant No. 2) Abdul Karim (defendant No. 1) in order to clear the mortgage dues and for meeting other necessities agreed, to sell the house to plaintiff No. 1 for a consideration of Rs. 20,000. Pursuant to this agreement of sale, plaintiff No. 1. Another sum of Rs. 2,990-12-0-was left with plaintiff No. 2 for payment of the mortgage debts of defendant No. 3 Rs. 6, 800, the balance of the price was paid in cash to the vendor oat the time of the registration of the sale-deed on May 25, 1951. Thereafter plaintiff No. 2 got this house mutuated in the Municipal records in her favour. Despite the sale, defendant Nos. 1 to 3, acting in collusion, continued to be in illegal possession of the house.
3. Defendant No. 1 While admitting the execution of the sale-deed dated May 25, 1951, pleaded that it was without consideration. He, however asserted that the house had been purchased by him, and that Mst. Hakimunnissa was only his benamidar. The suit was resisted by Bibi Hazra, defendant No. 2 on the ground that the house had been purchased by her mother Mst. Hakimunnissa with her own money, she being a lady of considerable means; and on Mst. Hakimunnissa death in 1944, she (Mst. Hazra) inherited and came in possession of 12 annas share therein, while remaining 4 annas share devolved on defendant No. 1 according to Mohammedan Law by which the parties were governed in matters of succession. Mst. Hazra further pleaded that the sale-deed, dated May 24, 1951 executed by defendant No. 1 in favour of plaintiff No. 2 being a fictitious and collusive document, was ineffective qua her share in the house.
4. The trial Court held that "disputed house did really belong to Abdul Karim, and Mst. Hakimunnissa was his benamidar in the sale-deed (Ex. D/1) by which the house was acquired" and as such Mst. Hazra (defendant No. 2) had no interest in it. It further found that the sale-deed in favour of plaintiff No. 2 executed by defendant No. 1 in respect of the suit house was "valid,

genuine and for a consideration". In the result it decreed the plaintiff' suit.

5. In first Appeal No 619 of 1958 preferred by Mst. Hazra (defendant No. 2 the High Court reversing the finding of the trial Court, held that the plaintiffs had failed to show that Mst. Hakimunnissa in whose name the sale-deed (Exhibit D/1) dated May 10, 1941 stood, was only a benamidar and not the real purchase, plaintiffs' suit was dismissed with the real purchaser. In consequence, plaintiffs' suit was dismissed with regard to 12 annas share of Bibi Hazra and a decree for joint possession of 4 share of the vendor (defendant No. 1) was passed in favour of plaintiffs.

6. It is well settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real always rests on the apparent purchaser is not the real owner, always rests on the person asserting it to be so. This burden has to be strictly discharged by adducing legal evidence of a definite character which would either directly prove the fact of benami or establish circumstances unerringly and reasonably raising an inference of that fact. The essence of a benami is the intention of the party or parties concerned; and not unoften, such intention is shrouded in a thick veil which cannot be easily pierced through. But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him; nor justify the acceptance of mere conjectures or surmises, as : substitute for proof. The reason is that a deed is a solemn document prepared and executed after considerable deliberation, and the person expressly shown as the purchaser or transferee in the deed, starts with the initial presumption in his favour that the apparent state of affairs is the real state of affairs. Though the question, whether a particular sale is benami or not, is largely one of fact, and for determining this question, no absolute formulae or acid test, uniformly applicable in all situations, can be laid down; yet in weighing the probabilities and for gathering the relevant indicia, the courts are usually guided by these circumstances : (1) the source form which the purchase money came; (2) the nature and possession of the property, after the purchase; (3) motive if any for giving the transaction a benami colour; (4) the position of the parties and the relationship, if any between the claimant and the alleged benamidar; (5) the custody of the title-deeds after the sale and (6) the conduct of the parties concerned in dealing with the property after the sale.

7. The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless No. 1 viz, the source whence the purchase money came, is by the far the most important test for determining whether the sale in the name of one person, is in reality for the benefit of another.

8. The question in the case is to be considered in the light of the above in the of the above indicia. As regards circumstance (1) the High Court noted that Abdul Karim (defendant No 1) Who was the best informed person to depose to the source from which the purchases money was derived did not when examined as D.W. 7, specifically testify that the money had been when examined as D.W. 7, specifically testify that the money had been paid form his personal fund. In cross examination he admitted that the had only two kathas of ancestral land with him; he had a tailoring shop in which the entire capital invested was to the tune of Rs. 1,000 or Rs. 1,500 only; he did not keep any accounts; he had six members of his family; his rental income was 12 per month only. The High Court was thus right in holding that these facts admitted by Abdul Karim (defendant No. 1) presented a very "gloomy picture of Abdul Karim financial condition and resources "and that he was not in a position to invest Rs. 43,000 for purchase of the house in question. The High Court after a survey of the other evidence on the record further came to the conclusion that Mst. Hakimunnissa had means of her own and her first husband and her son Muktadi by the First husband were well to do persons. Muktadi had a big shop of tobacco scent, oil, Zarda, etc.

9. Mr. Desai learned Counsel for the appellants assails this finding of the High Court on the ground that it was based on the oral evidence of Abdul Rauf (D.W. 9) and Mohd. Shafiullah (D.W. 10) who according to their own showing had scant knowledge about the affairs of Abdual Karim Mst. Hakimunnissa or Bibi Hazra. It was stressed that the trial Court had rightly discarded the useless evidence of these witnesses.

10. It is true the evidence of these two witnesses suffered from infirmities but the finding of the High Court on this is not based on their evidence alone. The High Court also took into account the evidence of Bibi Hazra (D.W. 13) Who stated that she had received Rs. 1,000 or Rs. 1,500 as her share of the cash on the death of her mother. She was in a position to know about the financial condition of her father and mother. According to her Abdul Karim, had given up tailoring long ago and he was running only a petty shop of tobacco tikia hardly earning a Re. 1 or Rs. 2 per day. Then there was the documentary evidence furnished by the sale-deed (c-1/II) dated April 1, 1942, executed by Mst. Hakimunnissa where by she sold a house to Chaudhary Kishun Chand. It was recited in this deed that in order to purchase the house in dispute she (Hakimunnissa) had to incur certain debts for payment of a part of the consideration for the sale deed (C-1/II) dated April 1, 1942 executed by Mst. Hakimunnissa whereby she sold a house to Chaudhary Kishun Chand. It was recited in this deed that in order to purchase the house in dispute she (Hakimunnissa) had to incur certain debts for payment of a part of the consideration for sale-deed (Ex. D/1) The sale in question was effected about 11 months earlier on May 10, 1941. This recital being ante item motam was a valuable piece of evidence to show that the consideration of the sale was paid by Mst. Hakimunnissa, the apparent purchaser of the house, form her own resources.

11. Mr. Desai next contended that the recitals in the sale-deed (Ex-D/1) not only neutralises the effect of the recitals in the sale deed [Exc (1) - II] but also show that the money for purchasing the house must have been paid by Abdual Karim from his own pocket. Learned Counsel had invited our attention to two recitals in Ex. D/1 which are to the effect.

1. "I the executant negotiated with Abdual Karim the tenant aforesaid regarding the sale of the said house. The said tenant on receiving the said news became ready and prepared to purchase the land the house foresaid I the executant finalised the negotiation for sale house, with the said tenant and fixed the consideration money at Rs. 4, 300."

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2. Accordingly I, the executant have held out full assurance and satisfaction to the claimant and her husband in respect thereof. The husband of the claimant and the claimant get this deed of sale executed having confidence in and reliance on the assurance given by me, the executant, without enquiry about encumbrance and defect in title and without seeing the index.

12. This contention does not appear to be tenable. It is not proper to tear the above recitals out of the context and read them in isolation. They must be read with the preceding and succeeding contents of the document (Ex. D/1) and also the connected recitals in the sale-deed, [C-(1)-II dated April 1, 1942, In the latter deed Hakimunnissa inter alia stated had previously taken in mortgage plot No. 216 per registered mortgage bond dated September 13, 1940, from one Sh. Abdul Motilib and later on she had purchased that plot including the house, for Rs. 4,300 under the sale-deed, dated May 10, 1941 (Ex/D/1) from this Motlib. It is significant to note that Abdul Karim (defendant No. 1) had

signed this deed as an attesting witness. In the deed Ex. D/1 there is a clear reference to this previous mortgage executed in favour of Mst. Hakimunnissa and the vendor therein is repeatedly referring to Mst. Hakimunnissa as the "claimant" (creditor) and the payment of these past debts is mentioned as a reason for making the sale by the vendor Motlib. The learned Judges of the High Court have rightly construed these recitals as indicative of Hakimunnissa being the real purchaser of the property.

13. The evidence with regard to possession of the disputed house was to the effect that Abdul Karim and Hakimunnissa were in occupation of the house both before and after the sale. Even according to the trial Court "such joint possession was not at all material in the present case for determining the benami character or otherwise of the transaction."

14. No evidence whatever was led to show that there was any motive or reason for giving a benami character to the transaction. Abdul Karim who had special knowledge of the circumstance bearing on such motive, if any, did not say a word on this point. There was not even an oblique suggestion that Abdul Karim was heavily under debt and in order to avoid payment of such debts, he thought it fit to acquire the house in the name of his wife.

15. No Capital can be made out of the circumstance that the negotiations for the purchase of the house were carried out by Abdul Karim and a sum of Rs. 1,700 towards the part of the price was paid before the Sub-Registrar by him. It is in evidence that Hakimunnissa was a pardanishin lady and naturally therefore it was her husband who used to look after affairs. Neither the actual delivery of Rs. 1,700 before the Sub-Registrar by Abdul Karim nor the recitals made in Ex. D/1 could be accepted as evidence of Abdul Karim being the real purchaser. Obviously he was acting only as an agent of his Pardanishin wife. For the same reasons, no significance can be attached to the fact that the sale-deed remained in the custody of the husband.

16. Learned Counsel next referred to the two mortgage deeds Exs. C-1 (1)-dated January 6, 1948 and July 26, 1948, respectively executed by Abdul Karim in favour of Abdul Latif (defendant No. 3) Emphasis was laid on the fact that Abdul Latif was the son in law of Abdul Karim and the husband of Bibi Hazra (defendant No. 2) We have also adverted to the discussion of this evidence in the judgment of the subordinate Judge. In agreement with the High Court, we think, that this evidence also is not of a clinching character; firstly Abdul Latif was not only the husband of Bibi Hazra, he was also the nephew of Abdul Karim; Secondly these mortgages were brought into existence after the controversy had arisen. Bibi Hazra had alleged that these transactions had been brought about by her husband clandestinely in collusion with her father. In this connection, it is not-worthly that on the death of Hakimunnissa, her husband had also acquired 4 annas share in it. There was, therefore, ground to suspect that Abdul Karim, taking advantage of his being a sharer in the house, brought into existence these mortgages in collusion with his nephew to grab the entire property of Mst. Hakimunnissa.

17. Learned Counsel further referred to a certified copy of the order dated November 22, 1950 (EX E-1) and urged that this order where by Mst. Hakimunnissa's claim of her being the real owner of the attached house was dismissed was a weighty piece of evidence admissible under Section 13 or the Evidence Act and taken in conjunction with the judgment dated November 22, 1950, vide Ex-(1) - 1 and the recitals in the deed was sufficient to show that Mst. Hakimunnissa was only a benamidar of her husband.

18. It is common ground that the house in question at one time belonged to Abdul Motlib and he

had rented it out to Abdul Karim. The Original owner Motlib had mortgaged a part of this house to one Fakira Lal Sahu on September 28, 1947, Sahu filed a money suit against four persons (1) Abdul Karim; (2) Mst. Hakimunnissa; (3) Bibi Khatoon, and (4) Sh. Hotib inter alia for the recovery of rent with interest for the period March 21, 1941 to March 20, 1942. The suit was partly decreed against Abdul Karim alone and was dismissed as against Hakimunnissa by the Munsif on March 1, 1943, vide Ex, I-II. Abdul Karim's appeal against that decree was dismissed and the decree of the trial Court with some modification was maintained. Sahu then took of out execution of his decree against the judgment-debtor, Abdul Karim, Mst. Hakimunnissa filed an application under Section 47 (under Or. 21, Or. 57) of the Code of civil procedure claiming that the attached house in plot 216 was her exclusive property and her husband had no right or interest in it. Her application was dismissed by the Munsif on November 22, 1943 with the finding that Mst. Hakimunnissa was only a benamidar of the judgment-debtor, Abdul Karim. Mst. Hakimunnissa filed an application under Section 47 (under Or 21, r. 57) of the code of Civil procedure Claiming that the attached house in plot 216 was her exclusive property and her husband no right or interest in it. Her application was dismissed by the Munsif on November 22, 1943 with the finding that Mst. Hakimunnissa was only a benamidar of the judgment-debtor, Abdul Karim. Her appeal against that order was disallowed by the appellate Court on February 21, 1944 vide Ex. 10.

19. Mr. Desai very fairly conceded that this order, dated November 22, 1943 did not operate as res judicata because the Munsif was not competent to decide the subsequent suit from which the present appeal has arisen; but he urged that this order had become final because no suit under Order 21, Rule 103 of the Code of Civil Procedure was filed by Mst. Hakimunnissa to establish her right and as such this order even if not conclusive was a very efficacious and presumptive proof of the house in dispute.

20. The Contention is attractive but does not stand a close examination. It is to be borne in mind that Mst. Hakimunnissa died only a filing the suit under Order 21, Rule 103 had run out. Assuming this evidence was admissible under Section 13 of the Evidence Act. It was inconclusive and had been out-weighted by the other determinative circumstances and the preponderating probability that the purchase money came from Mst. Hakimunnissa and not for Abdul Karim.

21. The judgment Ex. E. (1) - 1 in the rent suit filed in 1949-50 by Abdul Karim against Sh. Mohd. Yakub with regard to a shop attached to the disputed house could not, as rightly observed by the High Court, be used against Mst. Hakimunnissa who was not a party to those proceedings

22. Defendant No. 2 had also brought on the record some rent receipts and Municipal receipts A (2)-II to A (5)-II Ex. A-II stands in the name of Mst. Hakimunnissa. It evidences payment of platform tax by the Municipality. It is true that the date on it was not decided payable; but it was obvious that document concerned the disputed those and related to a period when Mst. Hakimunnissa. It is true that the date on it was alive. This evidence further strengthened the conclusion that Mst. Hakimunnissa in her life time, after her death, her daughter Bibi Hazra, were in enjoyment of and dealing with the house in dispute as owner thereof.

23. Keeping in view that totality of the circumstances and the probabilities of the case, we have no hesitation in holding that the plaintiff appellants had filed to prove that Mst. Hakimunnissa in whose name the sale-deed (Ex. D/1) stood, was not the real purchaser but only a benamidar of her husband.

24. In the result, we affirm the decision of the High Court and dismiss this appeal with costs.

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