SUPREME COURT OF INDIA

Vidyadhar Krishnarao Mungi

Vs.

Usman Gani Saheb Konkani

C.A.No.2213 of 1969

(P. Jaganmohan Reddy, S. N. Dwivedi and P. K. Goswami, JJ.)

26.02.1974

JUDGEMENT

DWIVEDI, J.:-

1. There was one Laxman Govind Mungi. He had a mistress, Bhagirathibai. From her he had two sons, Sridhar and Sadashiv. The name of his wife was Jankibai. From Jankibai he had two sons, Krisnaji and Dattatraya. Vimlabai is the wife of Krishnaji. Kumudini is the wife of Dattatraya. Vidyadhar is the son of Krishnaji. Udaykumar and Shri Praksh are the sons of Dattatraya. Laxman Govind Mungi, Jankibai, Bhagirathibai, Sridhar and Sadashiv died before the commencement of the suit out of which this appeal has arisen. Laxman Govind Mungi died on March 26, 1940 and Jankibai on June 15, 1953.

2. The suit property is a plot of land situate in Nasik. It bears No. 954. In 1909 it belonged to one Satyabhamabai. She sold it on December 6, 1909 for Rs. 1,250/-. The sale is evidenced by a registered sale deed executed by her in favour of Jankibai. After the sale the name of Jankibai was mutated in the Record of Rights. One her death, the names of Krishnaji and Dattatraya were

mutated in her place. The plot was allenated by them to Usman Gani Ahmed Saheb Konkani some time in 1963. Their sons and their wives have instituted the suit out of which this appeal has arisen. They asked for setting aside the alienation and for partition of their shares in the plot. It was alleged that the plot belonged to Laxman Goving Mungi and constituted ancestral property in the hands of Krishnaji and Dattatraya. The alienation was made without any legal necessity and without any benefit to the estate. It was ineffective against their interest. Usman Gani Ahmed Saheb Konkani was the first defendant in the suit. Krishnaji and Dattatraya were defendants 2 and 3.

3. Usman Gani Ahmed Sahib Konkani contested their claim. He filed a written statement. His allegations were that the suit property belonged to Jankibai and was not ancestral property in the hands of Krishnaji and Dattatraya. They had full right to alienate the property and the plaintiffs had no right in the property. He also pleaded that the alienation was binding on the plaintiffs as they have "received full benefit of the amount of consideration of the said transaction." He also raised several other pleas in his written statement.

4. Krishnaji and Dattatraya filed a joint written statement. As usually happens in such cases, they admitted the claim of the plaintiffs. They admitted that the suit plot belonged to Laxman Govind Mungi and was ancestral property in their hands. They also admitted that the plaintiffs had an interest in the land. They also admitted that the sale was without legal necessity and without benefit to the estate.

5. The trial Court framed as many as 17 issues. Issue 1-A and 2 are relevant for this appeal. They are:

"1-A. Whether plaintiffs prove that their grand-father one Laxman Govind Mungi purchased suit land benami in the name of Jankibai on 6-12-1909 as alleged?

2. Do plaintiffs prove that the suit property ..... is the ancestral property of the joint family consisting of plaintiffs and defendants 2 and 3?"

6. The contesting parties produced their oral and documentary evidence. After examining the evidence, the trial court held that Laxman Goving Mungi had purchased the suit land benami in the name of his wife Jankibai and it was ancestral property of the joint family consisting of the plaintiffs 1 to 3 and defendants 2 and 3. The findings on the issue about legal necessity and benefit of the estate and other issues were against the first defendant. In the result, the trial court decreed the suit of the plaintiffs for 17/24 shares in the suit land. Feeling aggrieved with the judgment and decree of the trial court, the first defendant filed an appeal in the Bombay High Court. The High Court has reversed the judgment and decree of the trial court and has dismissed the suit of the plaintiffs. The

High Court has held that Laxman Govind Mungi did not purchase the suit land and that Jankibai was the real owner of it. The High Court did not accept the plaintiff's plea of the sale being benami. The High Court also held that the sale was legal necessity and for the benefit of the estate. Hence this appeal by the plaintiffs.

7. The vital issue in this appeal is as to whether Jankibai was the real purchaser of the suit land or a mere benamidar of her husband Laxman Govind Mungi (hereinafter called Laxman). For this purpose it is necessary to ascertain whether Laxman had paid the sale consideration mentioned in the sale deed of 1909 to Smt. Satyabhamabai with the intention of becoming the owner of the suit land. Plaintiffs could not give any direct evidence about this matter. Laxman, Jankibai, Annaji and Satyabhamai were the persons connected with the sale deed. They had died before the plaintiffs commenced their suit. Dattatraya was examined by them as a witness. He has stated that the land was purchased by money provided for by his father Laxman. He has also said that his mother had no funds to purchase the land and that she came from a poor family. He has tried to show that his father was in affluent circumstances and could purchase the land from his own funds. But the courts below have not relied on his evidence and we thing rightly. He is a partisan witness. He is highly interested in the success of the suit. More, he speaks with two voices. In his statement in the tenancy case No. 37 of 1956 (in which the first defendant was also a party) he had stated:

".... the land bearing S. No. 954 is my land ... the said land was purchased by my mother and after her death myself and my brother are the owners."

Contrary to this statement, he has now deposed that the land was purchased by his father. The plaintiffs also examined Ram Chandra, son of Annaji. But he has only stated that his father used to do forest business. So, his evidence is not at all helpful.

8. We shall now examine the circumstantial evidence led by the plaintiffs to prove that the purchase money was given by Laxman.

9. It appears from the sale deed (Ex. 91) that the sale consideration of Rs. 1,250/- was paid in three instalments. Rs. 100/- were paid as earnest money on November 6, 1909, Rs. 950/- - were paid at the time of registration before the Sub-Registrar by Annaji; and the remaining Rs. 200/- were paid on February 7, 1913, in the presence of the Sub-Registrar. The receipt for this payment (Ex. 206) is also registered in the Sub-Registrar's Office. According to the plaintiffs, the agreement of sale was between Laxman and Satyabhamabai and the earnest money of Rs. 100/- was paid by him. The agreement and payment are evidenced by Isar Pawati (Ex. 154), dated November 6, 1909. No doubt this document states that Rs. 100/- were paid by Laxman and Satyabhamabai. It also states that there was an agreement of sale between Laxman and Satyabhamabai. Relying on this document, the trial court has held that the agreement of sale was between Laxman and Satyabhamabai and the earnest money of Rs. 100/- was paid by the former to the latter, and not by Jankibai. The High Court has

held that the document is not genuine. As we agree with the High Court's view, it is not necessary for us to consider whether the document is genuine or not. In the beginning of this century a Hindu husband often used to negotiate and obtain receipts for his wife in his own name. The probability of this inference is enhanced by the circumstance that there is no reference to this receipt in the sale deed. On the other hand, the sale deed recites that the amount of Rs. 100/- was paid by Jankibai. It is said that Isar Pawati was not mentioned in the sale deed in order to conceal the real nature of the transaction with the object of defeating any potential claim of Sadashiv for maintenance from Laxman. We shall deal with the argument later in our judgment. It is sufficient to state here that agreeing with the High Court we are not inclined to give any credence to the suggested motive for Laxman's entering into a benami transaction.

10. Rs. 950/- were paid by Annaji, the maternal uncle of Laxman. So the trial Court has drawn an inference that this amount was paid by Laxman and not by Jankibai. Here again, the High Court has disagreed with the trial Court. The possibility of Jankibai keeping this amount with Annaji cannot be ruled out. After all, he was her maternal uncle-in-law. He was doing forest business. So she might have kept this amount with him. As the money was with him, the sale deed contained a recital that it would be paid by him to the seller at the time of registration before the Sub-Registrar.

11. As regards the payment of Rupees 200/- the trial Court has held that this amount was also paid by Laxman. The trial Court has drawn this inference merely from a recital in the registered receipt: "Receipt taken in writing by Jankibai w/o Laxman Govind Mungi, represented by Laxman Govind Mungi. According to the trial Court, this recital shows that the amount was actually paid by Laxman to Satyabhamabai. That is true. But that does not necessarily prove that the amount came from the pocket of Laxman. As in the case of earnest money, it is quite probable that Jankibai had entrusted this amount to him for payment to Satyabhamabai at the time of registration of the receipt. The receipt contains a recital to the effect that the amount was being paid by Jankibai.

12. There is no other evidence regarding payment of the purchase money by Laxman. So we agree with the High Court that the plaintiffs have failed to prove that purchase money was paid by Laxman.

12-A. The benami character of the transaction is sough to be proved by two other documents. Ex. 218 and Ex. 224. It may be recalled that Sadashiv was an illegitimate son of Laxman. On January 26, 1925, Sadashiv instituted a suit for maintenance against Laxman. In paragraph 3 of the plaintiff he had mentioned the properties belonging to Laxman. Two houses bearing C.S. No. 97 and 98 and the lands bearing C.S. No.422 and 954 were mentioned there. Besides them, five other items were also mentioned. Four of them were mortgages. One of the mortgagees was in favour of Laxman, while the others were in favour of Jankibai. The one in favour of Laxman was of 1922, and the others in favour of Jankibai were of 1923. The last items of property was a promissory note in favour of Jankibai. The mortgage in favour of Laxman was for Rs. 300/-. The mortgages in favour of Jankibai were for Rs. 1,000/-, Rs. 500/- and Rs.500/- respectively. He had also mentioned some

moveable property worth about Rs. 5,000/-. In paragraph 4 of the plaint he had stated that Laxman had purchased some of the aforesaid properties in the name of his wife and his minor son. He had also stated that Laxman was doing money lending business in the name of his wife. Then he claimed : "The defendant alone is the real owner." We agree with High Court that the allegations in the plaint could not prove the benami nature of the sale. After all, they are mere assertions of an interested person. Sadasiv was interested in inflating the properties of Laxman in order to receive a large amount of maintenance. It may also be observed that even though Sadashiv had prayed for the creation of a charge on the aforesaid properties for realising maintenance money, he did not implead Jankibai as a party to suit. So Jankibai could not get an opportunity to refute his assertions. It is also important to notice that even Laxman did not file a written statement in the suit because Sadashiv had entered into a registered agreement with him in regard to his maintenance claim before the date of the filing of the written statement. Thus there is not even an admission by Laxman to the effect that the suit land belonged to him and not to Jankibai.

13. The agreement executed by Laxman far from helping the plaintiffs, helps the first defendant. The agreement contains this important recital:

"I have grown old and it has become impossible for me to do business .... As stated above you are my illegitimate son. You have passed today separately a deed of release (relinquishment) in my favour to the effect that you have given up all the rights in our movable and immovable properties etc. and your right for maintenance etc. It is, therefore, my duty to provide for you something from out of my self-acquired small property for your maintenance etc. It is, therefore, my duty to provide for you something from out of my self-acquired small property for your maintenance etc. For this reason I am giving to you the property described herein below which is standing in my own name and which is in my possession." (emphasis added.)

It is evident from this recital that Sadashiv had executed simultaneously a release deed in favour of Laxman in lieu of receiving maintenance in the shape of land from him. The relinquishment deed has not been filed by the plaintiffs. However, the aforesaid recital gives the gist of that document. By that document Sadashiv gave up all his rights "in our movable and immovable properties" in lieu of his receiving "something from out of my self-acquired small property." It is evident from this gist of the relinquishment deed that Laxman was very particular in pointing out the distinction between "our property" and "my property". The properties described in the plaint of Sadashiv were described by him as "our movable and immovable properties", while the property given by him to Sadashiv was described by him as "my self-acquired property". This distinction was made because some of the plaint properties belonged to Jankibai and his son and not to him. Thus understood, this agreement contains an implied admission of Laxman that certain properties described in paragraph 3 of the plain belonged to Jankibai and his minor son and not to him. The document thus helps the first defendant, and not the plaintiffs.

14. We shall now examine the conduct of Laxman and Jankibai in relation to the land in dispute. It is said that several payments have been made by Laxman in respect of the land revenue of the suit land. He had issued the receipt Ex. 24 to one Sadhu, said to be the tenant of the land in dispute. The

land revenue was paid from 1912 to 1918, from 1924 to 1929 and in 1934. All the receipts are exhibited as Ex. 92. These receipts show that various sums on account of land revenue were paid in the account of Jankibai "by the hand of Laxman Goving Mungi." The receipt Ex. 234 is not the original but a copy thereof said to have been preserved by Laxman. It is said that it bears his signature. The receipt shows that he had received Rs. 110/- as rend from Sadhu. The receipt is dated March 12, 1922. It contains a recital to the effect that Sadhu had taken land from him for cultivation. From the two documents the trial Court drew an inference that Laxman was dealing with the suit land as his own. The High Court has held that these documents do not prove that Laxman was the owner of the suit land. As regards the receipt, the High Court has also held that it is not genuine. We thing that the High Court is right in its view that mere management by Laxman would not prove his ownership. It is common knowledge that in those days a husband used to manage the property of his wife because she was not well educated and used to keep herself in parda. (See Kanakarathanammal v. V. S. Loganatha Mudaliar, (1964) 6 SCR 1 at p. 7 = AIR 1965 SC 271)).

15. There is no other evidence regarding the conduct of Laxman in relation to the land in dispute. There is some evidence regarding the conduct of Jankibai in regard to the property. On March 30, 1942 she accepted rent from Shivram Kashiram Vazre, the tenant of the land in suit. The amount accepted was Rs. 50/-. The receipt shows that the rent of the land was Rupees 70/-. She has signed the receipt. It is dated March 30, 1942. On March 24, 1948 she issued a notice to Vazre to vacate the land. The notice contains a recital to the effect that "S. No. 954 .... belonging to me is with you for cultivation on rental basis. You should vacate the land by the end of March 1949 and deliver in my possession." It appears that Vazre did not vacate. There was some litigation and he was directed by the appropriate authority to vacate the land. In pursuance of the said direction possession over the land was delivered to Jankibai on November 30, 1949. Kabza Pawati (receipt for possession) is Ex. 180. It is dated November 30, 1949. It is addressed to the Mamlatdar, Nasik. The receipt is signed by Jankibai in token of her having received possession over the land from Vazre. The receipt contains this important recital:

"I by remaining personally present today on the said survey number took possession of the property together with the crops standing thereon through the 'Kamgar' Patil Talathi of Nasik."

This recital shows that she was present on the field in order to take possession. These three documents should show that after the death of her husband in 1940 she herself was looking after the suit land and exercising rights of management over it.

16. Admittedly one more property stood in her name. It was C. S. 98. It was purchased on June 2, 1913. There was another property C. S. 97. It stood in the name of Krishnaji. It was purchased on October 6, 1924. On April 11, 1946, Krishnaji applied to the City Survey Officer, Nasik for getting the name of his brother Dattatraya also mutated in the records in respect of C.S. No. 97. On April 3, 1946 Jankibai also applied to the City Survey Officer, Nasik for mutation of the names of her two

sons over the property No. 98. In the application it is stated that as her "sons are major at present and possession of the property is with them only", it should be entered in their names. In this connection her statement was recorded on June 21, 1946. In her statement she said:

"As I have become old at present the name of my two sons may be entered against the said property in place of my name. Both the said sons are major."

Counsel for the appellant has submitted that these two documents would show that the properties Nos. 97 and 98 were purchased by Laxman in the name of Krishnaji and Jankibai. We may assume for the sake of argument that that is so. But that assumption would strengthen the inference that the suit land did not belong to Laxman at all. The reasons given by Jankibai in her application and in her statement should have equally persuaded her to get the names of her sons mutated over the suit land if it had really belonged to Laxman. In all probability she did not agree to have her sons' names entered over this property during her lifetime, as she was the real owner of the property.

17. To sum up while the conduct of Laxman is dubious, the conduct of Jankibai shows that the property in suit belonged to her and not to Laxman.

18. According to the appellants, Laxman purchased the suit land in the name of Jankibai with the object of protecting the property from going to Sadashiv, his illegitimate son, as maintenance. The trial Court accepted this motive as sufficient to explain the alleged benami character of the sale in favour of Jankibai. The High Court differed from the trial court, and we think rightly.

19. The appellants instituted the suit on October 18, 1966. The plaint did not include any allegation to the effect that the sale in favour of Jankibai was benami for Laxman. Naturally there was not a whisper in the plaint about the motive for Laxman's purchasing the property in the name of his wife. The first defendant filed his written statement on February 6, 1967 alleging that Jankibai was the purchaser and real owner of the suit land. Krishnaji and Dattatraya, defendants 2 and 3, filed a joint written statement on the same date. In paragraph 2 of their written statement they pleaded that Jankibai was a benamidar for their father, Laxman. It is however significant to note that even they did not mention any motive for disguising the sale. The plaint was then amended on March 7, 1968. The amendment introduced for the first time the plea of benami and the motive that Laxman wanted to protect the property from going to Sadashiv. The plea was taken after a delay of over a year from the date of the suit. The delay would suggest that the alleged motive is an after-thought.

20. It is also important to observe that Dattatraya, who appeared as a witness for the plaintiffs, did not speak about this motive. On the contrary, he admitted in his cross-examination that he had made "no inquiry about the purchase of suit land from mother." He further admitted that he "never

questioned father why he purchased the suit land benami in the name of mother." So his evidence does not bear out the alleged motive. None of the plaintiffs have entered the witness box. Under the Hindu Law Sadashiv could claim maintenance from Laxman only from ancestral property in his hand. Sadashiv could not claim maintenance from any self-acquired property of Laxman. This legal position is not disputed by counsel for the appellants. But he says that Laxman could have hardly known the law. It is difficult to believe that Laxman was ignorant of the law. He was a petition writer. His occupation brought him in constant touch with lawyers and litigants. Accordingly, it is not improbable that he had acquired information that this self-acquired property was in no danger. So there was no reason why Laxman should have concealed the purchase of the suit land from Sadashiv.

21. There is yet another important circumstances which discounts the suggested motive. It may be recalled that Sadashiv settled his claim for maintenance on March 26, 1925. Laxman had agreed to give him a part of land which stood in his own name in lieu of maintenance, while Sadashiv relinquished his claim to the other properties specified in his plaint. Laxman died in 1940. Although after the settlement there was no danger whatsoever from Sadashiv in regard to it, the suit land continued to be shown in the revenue records in the name of Jankibai. Laxman did not get his name mutated in her place. It seems to us that if the property had really belonged to Laxman, he would have got his name mutated after March 1925 as there was no further need of wearing a mask.

22. In support of his finding in favour of the plaintiffs, the trial court has heavily relied on Ex. 100. It is a receipt executed on March 31, 1959 by Dattatraya in favour of first defendant. It acknowledges payment of Rs. 10,000/- by the first defendant to Dattatraya and his brother Krishnaji towards payment of sale consideration of Rs. 30,000/- for sale of the suit land in favour of first defendant. The recital in the receipt relied on by the trial court is this:

"the land bearing S. No. 954 ... ... is our ancestral ownership .. we have received in all Rs. 7,000/- ... made up of the sum of Rs. 5,000/- .. and the sum of Rs. 2,000/-. Further your have this day given Rs. 1,000/- in cash and a cheque .. dated 15-4-1959 for rupees two thousand. Thus in all Rs. 10,000/- are received towards the transaction (agreement) in respect of the suit land. The receipt is given in writing." It is signed by Dattatraya for self and for Krishnaji.

23. In this cross-examination the first defendant said in regard to this document.

"I ... demanded the receipt for Rupees 10,000/- when payment of Rs. 3,000/- was made. We demanded the receipt relating to the agreement of sale of the suit land. The writer of Ex. 100 was known to him. He was some account writer of Razak. Ex. 100 mentions that the land was ancestral land of defendants 2 and 3. On the basis of this writing the land was purchased at the time of compromise decree."

24. The trial court took the view that the words "our ancestral ownership" in Ex. 100 connoted that the suit land came to the hands of Krishnaji and Dattatraya from the side of their father. According to the trial court, the aforesaid passage from the cross-examination of the first defendant indicated that he was aware of this fact at the time of purchasing the property. The trial Court thought that this admission of the first defendant shifted the onus from the plaintiffs to him. As the first defendant did not explain as to how the words "our ancestral ownership" were understood by him, the trial court held that he knew that Laxman was the owner of the suit land. Here again, the High Court did not agree with the trial court. For the reasons to be stated hereafter we would agree with the High Court's evaluation of the probative weight of Ex. 100.

25. Firstly, it should be noticed that Ex. 100 is an unregistered document. It was in the custody of the first defendant. It was filed by him court in this case. He is a Muslim. To a Muslim the words "our ancestral ownership" would connote not only paternal ancestral property but also maternal ancestral property. We are satisfied that the first defendant understood those words in the sense of maternal ancestral property. If he had known that these words would only apply to paternal ancestral property, he would have never filed the document in court in support of his case. And he could have easily withheld it, for it was an unregistered document.

26. No adverse inference can be drawn against him from his admission in his cross-examination that he and his brothers have inherited some ancestral property from their father, Ahmed Latif Saheb Konkani. As already stated, a Muslim would consider the property inherited from his father as well as from his mother as ancestral property. For the same reason we are unable to draw an adverse inference against him from his admission that Ex. 100 mentioned that the land was ancestral land of the defendants 2 and 3. In this connection it is necessary to remember that in the tenancy case No. 37 of 1956 (in which the first defendant was a party) Dattatraya has appeared as a witness. In his statement in that case he had said: "The suit land was purchased by my mother. After her death myself and my brother are the owners." It may be presumed that the first defendant also knew that the suit land was entered in the revenue records in the names of Krishnaji and Dattatraya after the death of their mother. Jankibai as her heirs. So in the context of the statement of Dattatraya in the tenancy case and the entry of his and his brother's name in the revenue record on the death of their mother as her heirs the first defendant could easily have understood the words "our inherited ownership" in the sense of property inherited from a maternal ancestor, that is to say, from mother and not from father.

27. Secondly, Dattatraya has not deposed that he had told the first defendant that the suit property was inherited by him and his brother from their father. He has not explained as to how the words "our ancestral ownership" were understood by him and the first defendant at the time Ex. 100 was executed by him.

28. Thirdly, no question was put in cross-examination to the first defendant as to how he understood the words "our ancestral ownership" in Ex. 100. In the absence of such cross-examination, we think

it will be unfair to the first defendant to draw any adverse inference against him.

29. For the aforesaid reasons, we agree with the High Court that the first defendant cannot be fastened with the knowledge that the suit land came to the hands of Krishnaji and Dattatraya from Laxman.

30. Counsel for the appellants has submitted that the High Court could not have differed on the findings of fact recorded by the trial court because the latter's finding cannot be said to be clearly wrong. But it appears to us that the trial court's appraisal of evidence is vitiated because it has incorrectly applied to the evidence the observations of Mahajan, J., in Gangadara Ayyar v. Subramania Sastrigal. In that case Mahajan J., observed:

"It is also well established that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit of another, the real test is the source whence the consideration came and that when it is not possible to obtain evidence which conclusively establishes or rebuts the allegation, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts." The trial court considered that as the vendor and the vendee and the alleged owner Laxman were dead, it was "not possible to obtain evidence to conclusively establish or rebut the allegation about the benami nature of Ex. 91 and therefore the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts."

But the trial court fell in error in relying on documents of dubious evidentiary value. The documents were, as already discussed, also consistent with the real ownership of Jankibai. So the trial court was wrong in thinking that it was reasonably probable that Laxman was the real owner of the suit land. In our view, the High Court has correctly appraised the entire evidence and has come to the right conclusion that the real owner of the suit land was Jankibai, and not Laxman.

31. In the result, the appeal is dismissed with costs.

Appeal dismissed.