CALCUTTA HIGH COURT

Prokash Chandra Ghose

Vs

Mahima Ranjan Chakravartty

(Chakravartti ,J.)

19.12.1946

JUDGMENT

Chakravartti, J.

1. This appeal arises out of a suit under Order 21, Rule 103, Civil P.C., brought by the decree-holders auction purchasers. The plaintiffs purchased the properties in suit in execution of a mortgage decree, but were resisted by the defendants in their attempt to obtain possession. A proceeding under Order 21, Rule 97 of the Code resulted in favour of the defendants. Thereupon, the plaintiffs brought the present suit which has been decreed by both the Courts below. The defendants have appealed.

2. The facts are no longer in dispute and may be stated as the common case of the parties in the present appeal. On 4-2-1932, one Phanibhusan Banerjee, to whom the properties originally belonged mortgaged them to the father of the plaintiffs for a sum of Rs. 1499. This Phani was an officer of defendants 2 to 6 and shortly before the mortgage, had made a written acknowledgment to his masters of a liability for Rs. 8400. Defendants 2 to 6 sued Phani for this amount and, on some date in 1933, obtained a decree for Rs. 1599. When the decree was put into execution, Phani applied successfully for adjudication as an insolvent and a Receiver was in due course appointed for his estate. On 15-2 1935, the Receiver sold the properties in suit to one Sudhakar Banerjee, subject to the mortgage. Sudhakar was the Revenue Agent of defendants 2 to 6 and his purchasewas on their behalf as their benamdars.

3. Sudhakar died on 22-4-1935. On the 25th May following, the plaintiffs, whose father had meanwhile died, commenced a suit upon the mortgage against the mortgagor Phani, the Receiver-in-insolvency and the sons of Sudhakar. Only one of the latter had attained majority. On 3-7-1935, he filed a written statement in which he stated that he had no interest in the property as his father had been a mere benamdar for defendants 2 to 6 and that the real owner was Prakash Chandra Ghose, defendant 1 of the present suit, who should be made a party. Defendant 1, we were told is the karta of the family to which defendants 2 to 6 belong and their interests are the same. On 14-9-1935, defendants 1 to 6 them-selves made an application to be made parties and along with their application, filed a deed of release dated 8-15-1935 and executed by the major son of Sudhakar on behalf of himself and as the guardian of his minor brothers in favour of defendant 1. The Court rejected this application on 23-9-1935 by an order

to which fuller reference will be made later. Thereafter, on 14th November, the minor sons of Sudhakar, who were represented by a Pleader guardian, filed a written statement which contained no disclaimer of interest or plea of benami, but, on the other hand, a challenge to the mortgage as a collusive and colourable transaction. It was exactly a written statement of the kind which a mortgagor, interested in the mortgaged properties, might file. The suit was strenuously contested by the minors whose Pleader was paid by defendant 1. The latter himself and an officer of defendants 2 to 6 went to the witness box. The defence succeeded in the trial Court which held the Mortgage to have been a collusive transaction and dismissed the suit, but on appeal the decision was reversed and the suit decreed. The rest of the story has already been told.

4. By the order of 23-9-1935, on which a great deal of argument was addressed to us the application of defendants 1 to 6 to be joined as parties to the mortgage suit was rejected mainly on the ground of delay. But the Court added two other reasons and also made an observation. It appears to have been somewhat sceptical about the bona fides of the deed of release and observed that it "smacks of the nature as though defendants 3-7 executed it after getting scent of the present suit". Then it observed that the question whether the ostensible mortgagor was a benamdar for somebody else did not properly come within the purview of a mortgage suit, but such a question would inevitably arise if the applicants were made parties. But the main reason for which the application was rejected was the "unconscionable delay" in making it, for which no explanation had been given. The Court, however, added the following remark: By the petitioners not being made parties, they will not be prejudiced in any way in this suit beyond the fact that if their ease be true, they will be driven to another litigation to fight out their own ease.

5. In the present suit, the plaintiffs based their claim of title on the purchase at the mortgage sale. The defendants pleaded that the beneficial owner of the properties were they and not Sudhakar who was only their benamdar and that in the special circumstances of the case, the decree against Sudhakar's sons and the sale of the properties in their hands were not binding upon them. They relied on the disclosure of their interest in the mortgage suit, the rejection of their application to be made parties, and the order passed on 23-9-1935. The position they took up, therefore, was that in relation to them-selves, the plaintiffs were still mere mortgagees who had not obtained a decree and had acquired no title to the properties.

6. Both the Courts below have found that Sudhakar was a benamdar for defendants 2 to 6 and the deed of release was a bona fide and valid document : But they have decreed the plaintiffs' suit chiefly on the general ground that a decree against a benamdar fully binds the real owners, whether they be joined in the suit or not. They have held further that after their failure to be added as parties in their own names, defendants 2 to 6 had in fact contested the suit in the benami of the minor sons of Sudhakar and thus ultimately accepted them as their benamdars for the purposes of the suit. The order of 23-9-1935, it has been held, contained merely an expression of the Court's opinion and could not prevent the mortgage decree from operating as res judicata against the defendants. In the result the Courts below have held that the defendants not having redeemed the mortgage at the opportunity given to their benamdar s by the decree, had lost their right of redemption and were now precluded from questioning the title of the plaintiffs.

7. Pour grounds were urged before us in support of the appeal. The general proposition that a decree against a benamdar binds the real owner was not disputed, as it could not be. But it was contended that if in a suit against the benamdar, the real owner came forward to be joined as a

party but was refused admission, the decree eventually passed against the benamdar could not be binding on him. It was contended in the second place that although a benamdar could represent the real owner, his sons could not. It was next contended that assuming a benamdar's sons also could represent the real owner, they could not do so after they had disclaimed their trusteeship. It was contended lastly that, in any event, the order of 23-9-1935, not only prevented the decree in the mortgage suit from operating as res judicata against the defendants, but itself operated as res judicata against the plaintiffs.

8. In our opinion, interesting as these questions are, the first and the third of them are disposed of, on the facts of the present case, by a short consideration. The whole argument of the appellants was based on the ground that the representation had ceased, either by reason of the death of the benamdur, or by reason of the disclaimer of interest by the benamdar's sons or by reason of the assertion by the defendants of their own title. The chain of representation had been broken by one or other or all of these facts. But it is to be noticed that the disclaimer was not by all the sons of the benamdar, but by only one of them; and even so, the disclaimer was not of the trusteeship, as the appellants contended, but only of his own interest, so that there was in fact not repudiation, but rather an assertion of trusteeship. The remaining sons of the benamdar did not even disclaim interest in the property, but strongly resisted the suit as if things really were what they seemed and the right to represent the mortgagor as also the mortgaged property really belonged to them. The appellants undoubtedly made an attempt to assert their hidden title, but the Court came to no decision on the question and viewed the deed of release with suspicion. In the end it preferred to let the suit proceed as against the persons in whom the equity of redemption had ostensibly vested, leaving the question of benami as between them and the defendants to be settled outside the mortgage, suit. The effect of that decision, to our mind, was to let representation by the benamdars continue, if there was a benami. The appellants on their part, took no steps against this decision and made no further attempt to enter the suit in their own names, but on the other hand, placed their case before the Court in the names of the minor sons of Sudhakar and actively prosecuted their defence through them. The effect of such conduct, to our mind, was that the defendants, after making an attempt to terminate the representation, in which they failed submitted to the representation continuing and indeed made active use of the representation for asserting and prosecuting their own defence. In these circumstances, the representation, in our opinion, never ceased. The position was that the suit started properly against the recorded owners of the property who, if they were benamdars for third parties, would in law fully represent them. The representation was only disturbed for a time, without being broken, but soon the disturbance ceased and the real owners who created it accepted the representation for the further stages of the suit and utilised it for the i carriage of their defence. The appellants pointed out that the deed of release, which had been executed before the appellants' application to be made parties, had been placed before the Court and it had been found in the present suit to be a bona fide and valid document. The representation, they contended, could not continue after the deed of release had been brought to the Court's notice. But, in our opinion, what is material is not the finding about the deed of release in the present suit, but how the Court, trying the mortgage suit, viewed it. That Court did not accept the deed as conclusive of the title of the appellants nor did it definitely reject it, although it expressed some suspicion, and in the end left the question undecided, so that the nominal purchasers, if they were benamdars, holding for the defendants, remained so for the purposes of the suit. In our opinion, on the facts, of the present case, there was no break or cesser of representation and the general questions raised by the first and the third contentions of the appellants do not arise.

9. The appellants relied on the decision in Mohunt Das v. Nilkomul Dewan (1900) 4 C.W.N. 283 but the grounds on which that decision must be distinguished are to be found in the decision itself. There, a son, against whom a suit ought to have been instituted had conducted on behalf of his mother a suit wrongly brought against her, knowing all the time that he and not his mother should have been sued. In a subsequent suit against the son, the question being whether the decree in the previous suit was binding on him, it was held that it was not and the reason given was that there was nothing to show that it was by reason of any representation or conduct of the son that the plaintiff had been led to think that the mother was the right person to be sued. In the course of their judgment Banerjee and Stevens JJ., observed as follows: Now the rule of law applicable to judgments and decrees inter partes is that they bind only parties and privies. The only extension, given to this rule by our Courts, is that a decree against a benamdar binds also the beneficial owner.... But the rule which makes a decree against a benamdar binding on the beneficial owner is based on the ground that the benamdar acts in concert with the beneficial owner or rather the beneficial owner acts through the benamdar and on the further ground that it is by the act and conduct of the beneficial owner that the benamdar is held out to the world as the rightful owner; so that the beneficial owner cannot complain if a decree in a suit which the plaintiff was led to institute against the benamdar by reason of the acts and representations of the beneficial owner is sought to be used as binding against him. But can the same thing be said of a person in the position of the defendant in this suit...?
The learned Judges proceeded to refer to the findings of fact by which the possible grounds for holding the decree to be binding upon the defendant on the principle of benami were all excluded. In the present case, on the other hand, they are all present. There is the original setting up of Sudhakar as the true owner; and then there are the acceptance of representation by the benamdar's sons after an unsuccessful attempt to assert the beneficial interest, the acting "through" the sons and the acting "in concert with" them. In our opinion, the case cited is clearly distinguishable and rather suggests that in circumstances like those of the present case the decree would be binding.

10. But it may be said that if a benamdar's heirs cannot represent the true owner on any intelligible principle, there was no setting up of Sudhakar's sons by the defendants and their position as persons who had helped Sudhakar's sons in the conduct of the suit was exactly the same as that of the defendant in the case cited who had similarly helped his mother. It was contended before us that a benamdar's sons could not represent the real owner, because trusteeship was a matter of personal confidence and was not a heritable right. The respondents relied on an observation of the Judicial Committee in Jagannath Prasad Singh v. Syed Abdullah 5 A.I.R. 1918 P.C. 35 and contended that the trusteeship created by a benami transaction was heritable. In the second place, they referred to certain passages in the works of Lewin and Underhill on Trusts and contended that after, the death of a sole trustee and before the appointment of a new trustee, the personal representatives of the former would occupy the position of trustees, not perhaps trustees to administer the express trust but at least bare trustees. Their last contention was that, in any event, the defendants in the present case had expressly agreed that not only Sudhakar, but also his sons after him, would hold the property in their names, for the deed of transfer which they had taken in the name of Sudhakar recited that the latter would own and hold the property himself and from generation to generation through sons and grandsons.

11. If, as a matter of law, a benamdar's heirs cannot represent the true owner, we agree that the position of the defendants in the mortgage suit would be that of third parties, assisting Sudhakar's sons and the decree could not be binding on them by reason of such assistance. The element of an initial representation that Sudhakar's sons were the true owners would be lacking. We think also that the recital in the deed of transfer is not by itself sufficient to make the sons benamdars, for it appears to UP to be nothing more than one of the usual formalities of a draft of an absolute conveyance. We would even concede that it is possible to argue that the observation in *Jagannath Prasad Singh v. Syed Abdullah*[1] does not represent a decision that the status of a benamdar is heritable. The judgment proceeds on the ground of estoppel against the true owner and persons claiming under him with respect to a transfer by a son of the benamdar. This transfer was made at the express instance of the true owner, Raja Bhikham; and the sentence. "Kashinath was a trustee for Raja Bhikham and Lajjadhari could only succeed to his father's trusteeship," may simply mean that the only right in which Lajjadhari could have been made to deal with the property, if he had any right at all, being the right of an heir to his father's trusteeship for the Raja and no other right, his act was an act of the Raja by which the latteic was bound. The observation may contain only an interpretation of the act of Lajjadhari rathei than a statement of his legal status. But we must add that it has been understood to imply that the status of a benamdar is heritable : see Mohmmad Shariff v. Syed Kasim , *Chidambaram Chettiar v. Swaminathan*[2] and *Deo Dal Jha v. Bindeswari Narayan Singh*[3] There are certain observations to the contrary effect in *Bala Krishnan Naidu v. Durvada Patrudu*[4] but the real question there was whether on the death of a benamdar decree-holder, his heirs had a right to be brought on the record for the purposes of execution in preference to the heirs of the true owner.

12. Apart from authority, in our opinion, it is a complete mistake to judge the status of a benamdar by reference to the strict conception of an express trustee. When the Judicial Committee, in *Gur Narayan v. Sheo Lal Singh*[5] observed that a benamdar "represents, in fact, the real owner and so far as their relative legal position is concerned, he is a mere trustee for him", they did not, we apprehend, intend to lay down that the benamdar was a person charged with the administration of a trust and that he held an office, for the incidents of which the law of trusts was to be looked to. They had in mind only resulting trusts, as an earlier passage in the judgment makes clear; and what they desired to emphasise was that a benamdar having no separate or any interest in the property but the owner's and being a person who had been trusted by the owner to lend to the property the appearance of his ownership for that of himself, there was no reason why he could not represent the property in legal proceedings in his own name or why the representation by him should not bind the owner's interest. It is only in the limited sense of holding the property, standing in his name, for the benefit of the real owner and of appearing to the world in the latter's place and stead that a benamdar seems to have been called a trustee. There is no question of performing any other function. It seems to us to be impossible in the very nature of things that a trust of this character should, as a matter of law, be limited to the lifetime of the trustee. The essence of benami is secrecy. What is done is that property belonging to one person is placed in the name of another, with every appearance of the latter being the true and full owner, which involves that, to external appearance, the property will descend as a matter of course along the line of the ostensible owner until and unless the real owner or his heirs choose to disclose their interest and terminate the appearance. So long as that is not done and the real owner goes on maintaining the appearance of the benamdar's ownership, there must be an ostensible succession in the line of the ostensible owner and an heir of the benamdar will represent the property and personate the true owner just as his predecessor-in-interest did. A

benamdar may be a trustee in relation to the true owner, but to the world at large he is the real owner and that appearance must necessarily go on devolving till the true owner comes out into the open. In our opinion, it is not correct to say that a benamdar's son cannot represent the true owner. The second contention of the appellants must therefore fail.

13. In the view we have taken of the facts of the ease, it is not necessary to consider what the Judicial Committee really meant when they said in Gur Narayan v. Sheo Lal Singh 5 A.I.R. 1918 P.C. 140 that it was open to the true owner to apply to be joined in the action, "but whether he is made a party or not, a proceeding by or against his representative in its ultimate result is fully binding on him." Assuming this observation does not cover a case where the real owner comes forward to be joined but is refused permission, the subsequent conduct of the appellants in contesting the suit through the minor sons of Sudhakar restored the representation or rather served to maintain its continuity. The case in *Mata Prasad v. Ramcharan Sahu*[6] cited by the appellants, is easily distinguishable. The decision was given four years before Gur Narayan v. Sheo Lal Singh 5 A.I.R. 1918 P.C. 140 and, besides, there was a clear finding in the earlier suit that the mother was not a benamdar for her sons, whereas in the present case the Court had proceeded on the footing that Sudhakar might be a benamdar and that even if he was, his presence was sufficient for the mortgage suit.

14. It remains to deal with the order of 23-9-1935. In our opinion, that order cannot prevent the mortgage decree from operating as res judicata, nor is there anything in it which can itself operate as res judicata between the parties. The Court was, in our view, not right in holding that the joinder of tie appellants would introduce a question of paramount title which would be outside the proper scope of a mortgage suit. No one was claiming adversely to the original mortgagor Phani and the only question that might arise, if the appellants were impleaded, was to whom Phani's interest had passed and who could present it, whether the sons of Sudhakar or the appellants. That would not be a question of paramount title. However that may be, what the learned Judge thought would remain open was the question between the appellants and the sons of Sudhakar as to the true ownership of the property and not any question against the mortgagees. In any event, he did not say that the appellants were persons interested in the mortgage security and that he was leaving the mortgagee's right against them to be determined in another suit. He rejected the application of the appellants chiefly on the ground of delay and proceeded with the suit as against the benamdars. In the circumstances, even if his observation had any reference to the effect of the mortgage suit, it was merely an expression of opinion which could not prevent his decree from operating as res judicata.

15. In our opinion, the appellants having once fought the mortgagees in the names of their benamdars and lost are now trying to have the whole matter re opened at a time when, in all probability, a second suit on the mortgage is barred by limitation Happily, technical as the law is, it is not so unjustly and inequitably technical as to permit them to have their pleasure. For the reasons we have already given, their appeal fails and it is dismissed with costs.

Blank, J.

I agree.

Cases Referred.

15 A.I.R. 1918 P.C. 35
2('37) 24 A.I.R. 1937 Mad. 101
3('29) 16 A.I.R. 1929 Pat. 440
414 A.I.R. 1927 Mad. 903
55 A.I.R. 1918 P.C. 140
61 A.I.R. 1914 All. 173