

Dal Chand Vs. Babu Ram and ors.

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Court : Allahabad

Decided On : Jul-11-1980

Reported in : AIR1981All335

Judge : M.N. Shukla, J.

Acts : Hindu Law

Appeal No. : First Appeal No. 173 of 1963

Appellant : Dal Chand

Respondent : Babu Ram and ors.

Advocate for Pet/Ap. : J. Swarup, Adv.

Disposition : Appeal dismissed

Judgement :

M.N. Shukla, J.

1. This is a defendant's appeal arising out of Suit No. 2 of 1959 which was a sequel to Suit No. 220 of 1958 against which a second appeal is still pending in this Court. The earlier suit was brought by the present appellant Dal Chand against Hukum Singh (tenant and impleaded as defendant No. 5 in the present suit) in respect of arrears of rent which were alleged to have been paid to the

present plaintiff viz.. Babu Ram. He had actually applied to be impleaded as a Manager of the joint family in the earlier suit but Dal Chand plaintiff of the earlier suit raised an objection and the application for impleadment was dismissed. It was in these circumstances that Babu Ram filed Suit No. 2 of 1959 giving rise to the present appeal.

2. The relief claimed in this suit was a declaration that the Kothi in question was a joint family property of the plaintiffs and defendants Nos. 1 to 4. Hukum Singh and Gur Dayal, being tenants of the Kothi, were impleaded as defendants Nos. 5 and 6 respectively. The plaint allegations were that the plaintiffs viz. Sobha Ram (plaintiff No. 2) and Prakash Chand (plaintiff No. 3) and defendants Nos. 1 to 4, namely, Dal Chand, Kashi Ram, Madan Lal and Bhaewan Dass were sons of plaintiff No. 1, namely, Babu Ram. that the plaintiffs and the aforesaid defendants Nos. 1 to 4 constituted a joint Hindu family which had been doing cloth business till 1954, they were importers and wholesale dealers of cloth in the district of Badaun and they had been paying Income-tax and Sales Tax. It was alleged by the plaintiffs that plaintiff No. 1 Babu Ram purchased a Kothi out of the joint family funds in his capacity as the Manager of the said joint family, though the sale-deed was executed in favour of defendant No. 1 Dal Chand. The plaintiffs Nos. 2 and 3 Sobha Ram and Prakash Chand and the defendants Nos. 2 to 4, namely, Kashi Ram, Madan Lal and Bhagwan Dass were minors at the time of the purchase and defendant No. 1 Dal Chand alone was major and used to sit in the shop along with plaintiff No. 1 and assist him in his business. It was further alleged that the said Kothi had been in possession of the entire joint family and plaintiff No. 1 had been letting it out and realising the rent of the said Kothi as the Karta of the joint family. The rent deeds were sometimes executed in the name of defendant No. 1 Dal Chand but plaintiff No. 1 Babu Ram used to realise the rent either himself or through his sons. The income of the said Kothi was deposited in the joint family fund and the Income-tax was assessed on the income of the joint family property and the plaintiffs and defendants Nos. 1 to 4 treated the said Kothi as the joint family property. The defendants Nos. 5 and 6 Hukum Singh and Gur Dayal had taken the said Kothi in two different portions from plaintiff No. 1 as Karta of the joint family. The plaintiff No. 1 Babu Ram got a rent deed executed from defendant No. 5 in the name of defendant No. 1 on 11-5-1949. Similarly another rent deed

was executed in favour of defendant No. 1 on 15-1-1956 and one more rent deed was executed by defendant No. 6 in favour of plaintiff No. 1 Babu Ram on 16-1-1956. It was alleged that defendant No. 5 Hukum Singh had been actually paying rent to the joint family fund but since defendant No. 1 Dal Chand filed suit No. 220 of 1958 for arrears of rent against Hukum Singh the plaintiffs were obliged to file the present suit.

3. Dal Chand, defendant No. 1 alone filed a written statement denying the possession of the plaintiffs and defendants Nos. 2 to 4 over the Kothi in question and alleged that he was himself in exclusive possession thereof and that the suit was, therefore, barred by Section 42 of the Specific Relief Act. His defence further was that the Kothi was his self-acquired property, he had purchased it with his own funds on 28-5-1937 and got it constructed and had spent his own money in the electric installation in the said building. He claimed to be in exclusive possession of the Kothi since the time of its purchase and pleaded that he resided in the same, that he let out portions of it by himself and had been exclusively realising rent. He denied that any rent deed was got executed by plaintiff No. 1 in his favour. He also averred that rent was never realised by plaintiff No. 1 or defendants Nos. 2 to 4 and that the rent was never deposited in the joint family fund nor was it ever shown in the Income-tax account or any other account of the joint family fund. It was stated by him that there was a shop of the joint family in the Kothi in question prior to its purchase which was run in the name of the firm Harsahai Mal Ishwari Prasad and he had permitted plaintiff No. 1 Babu Ram to continue that shop in the said Kothi. Thus the user of the portion of the shop was permissive and later on that shop was closed. It was further alleged by him that he used to keep his personal account in the firm Harsahai Mal Ishwari Prasad, that he also kept his personal money in deposit there and used to take out money on his personal responsibility and entry regarding the same was made in the Bahi Khata of the firm. He added that plaintiff No. 1 Babu Ram used to keep the Bahi Khata of the firm and maintain them, that his account was separately maintained and the plaintiffs Nos. 2 and 3 had admitted the disputed Kothi to belong to him since after they became majors and the suit was thus barred by estoppel and acquiescence. He also stated that plaintiff No. 1 Babu Ram did not divide the joint family property and paid him his pay as his pocket expenses which was Rs. 300/- per annum

during 1937 to 1941 and later on during 1941-1942 it was Rs. 400/- and it was Rs. 500/- from 1942 to 1953 and the entry about the pay was made in the account books of the firm. He said that he used to do mortgage business out of that money.

4. The plaintiffs' suit for declaration, was decreed by the trial court and defendant No. 1 Dal Chand has challenged the said decree in the present appeal. The sole question which arises for decision in this appeal is as to whether the Kothi in question was the property of the joint Hindu family or it was a self-acquired property of defendant No. 1 Dal Chand. It will be manifest from the pleadings of the contesting defendant, which I have already mentioned, that the existence of joint family and Babu Ram being its Manager was admitted. It was also admitted by Dal Chand that there was a shop of the joint family in a portion of the Kothi in question prior to its purchase which was given in the name of the firm Har-sahai Mal Iswari Prasad and that he had permitted the plaintiff No. 1 Babu Ram to continue that shop in the said Kothi and further the said firm remained there till it was dissolved. The sale deed (Exhibit 1) dated 28-5-1937 of the Kothi in question was executed by Ram Lal Bhaffat in the name of Dal Chand. In his written statement Dal Chand had admitted paragraph 1 of the plaint. Thus, the existence of the joint family and its cloth business of wholesale and import was admitted by defendant No. 1. There is no presumption under Hindu Law that a joint family possesses joint property but once it is admitted or proved that a family is joint and also possesses property, the presumption of law is that all the property which it possesses is joint, of course, the joint property possessed by the family must be such that from its nature and relative value it could have formed a nucleus from which the property in question could be acquired. In such circumstances if any member claims any portion of the property as his separate property, the burden of proof shifts on him to show that it was acquired by him in a manner which would constitute it his separate property. See Mulla 'Hindu Law,' Fourteenth Edition, paragraph 233, The mere fact that it was purchased in his name and that there are receipts in his name with regard to its income does not render the property a separate property because this is perfectly consistent with the notion of its being joint. There is no presumption under Hindu Law that the property acquired by a father in the name of his son is necessarily intended for his advancement. In the case of a joint family where there was a nucleus of joint property the initial

presumption is that the property acquired in the name of any member belongs to the joint family. The presumption is, however, rebuttable. In the instant case Dal Chand has not denied the version of the plaintiff Babu Ram (P. W. 3) that the joint family had one shop, one house and two groves before the purchase of the Kothi in question and that the shop was run since the time of his ancestors. On the evidence adduced by the defendant Dal Chand I am constrained to hold that he has failed to prove that the Kothi was his self-acquired property. For one thing he had no funds for paying the sale consideration of the Kothi. He stated that he had received only Rs. 286/- before the purchase of the Kothi which he had deposited on 21-5-1937 and this was the saving from his pay and pawning of ornaments. He was unable to mention the names of those persons who had mortgaged ornaments to him. I have carefully scrutinised the evidence regarding the pawning of ornaments, and in my opinion, it was rightly disbelieved by the court below. Secondly, Dal Chand stated that he received some money in his marriage which was utilised by him for purchasing the Kothi. It was, however, admitted that the expenses of his marriage were defrayed from the joint family funds. Babu Ram (P. W. 3) stated that Dal Chand was only twelve years old when he was married and in all Rs. 51 twice were given to Dal Chand in marriage along with some utensils. This was too meagre an amount to suffice for the sale consideration of the Kothi. I am also unable to believe the appellant's evidence regarding the alleged payment of his salary. The deduction claimed by him was refused by the income-tax authorities. Thus, Dal Chand's inherent incapacity to pay the sale consideration of the Kothi has been fully established. Since he had no other source of income the presumption is that the Kothi was the property of the joint family. See AIR 1959 SC 906 Mallappa Girimallappa Betceri v. R. Yellappagouda Patil. Even if it be accepted that some petty amounts were spent by Dal Chand in the repairs of the Kothi it would not affect the nature of the acquisition.

5. The appellant has relied on Khatas (Exhibits 189, 192, 198 and 199 etc.) in the name of Dal Chand and said that they were his individual Khatas. Similarly reference was made to the ledgers in the names of Sobha Ram, Kashi Ram and Dal Chand. A careful probe into the circumstances of the case demonstrates that these Khatas were not personal of the members in whose names they stood. There was no reliable evidence on record to show that the Khatas did not belong

to the family. Babu Ram plaintiff stated that the Khatas belonged to the family and his statement appears to be correct. There are, for instance, Khatas of Mst. Hira and Mst Prema, daughters of the plaintiff Babu Ram to whom the family had paid interest because the ladies had deposited money in the firm. On the other hand, the ledger does not show payment of interest to any member of the family. This is a strong circumstance to show that the Khatas were not personal. The only way in which Dal Chand could prove that the Khatas in his name were his personal Khatas was to prove that the items of cash credited in the ledger and the amount in the Khatas in the names of Kashi Ram, Dal Chand to meet the expenses of the construction on the Kothi represented the money out of the self-earning of Dal Chand. Dal Chand did not lead any evidence about any item at deposits which could show that it came from his self earning. However, when an opportunity was given in cross-examination he took shelter under the plea that he borrowed the money from the joint Hindu family through his father Babu Ram but that plea was not raised in the written statement. The question, therefore, which is pertinent is from where did Dal Chand receive money to pay off the debt. He completely failed to give details of the money realised by him from his alleged borrowers by pawning of ornaments. In fact he broke down altogether and stated that one may call it a debt or help. This admission of Dal Chand destroyed the entire fabric of his case. He had mentioned Sri Ram, Sudarshan Lal and Govind Ram as witnesses of his pawning business but they were not produced. Babu Ram denied that Dal Chand had any money or that he was carrying on his own business and Babu Ram's said version was not challenged by directing any cross-examination on that point.

6. Sri Jagdish Swarup, learned counsel for the appellant, raised two legal grounds which merit consideration. His first contention was in substance that the plaintiff's case was that Dal Chand was the Benamidar of the Kothi and hence the burden was on the plaintiffs to prove the Benami nature of the transaction and since they had failed to discharge that burden the plaintiff's case was liable to be dismissed. This argument is untenable. In the case of a joint Hindu family the analogy of Benami transaction standing in the name of a stranger does not apply at all because the joint family itself includes the alleged Benamidar which is entirely different from a case where a stranger Benamidar is involved in the transaction. It was observed by Mulla in his 'Hindu Law', Fourteenth Edition, Paragraph 604 that

'where a person buys property with his own money, but in the name of another person or buys property in his own name, but subsequently transfers it into the name of another person, without any intention in either case to benefit such other person, the transaction is called 'benami' and the person in whose name the transaction is effected is called 'benamidar,' It cannot be doubted that the burden of proving that a particular sale is Benami and the apparent purchaser is not the real owner always rests on the person asserting it to be so. This burden is strictly discharged by adducing legal evidence at a definite character which would either directly or by circumstances lead to such inference. See *Sm. Surasaibellini Debi v. Phanindra Mohan Majumdar* : [1965]1SCR861 and *Jayadaya Poddar v. Mst. Bibi Hazra* : [1974]2SCR90 . But as I have already observed, the analogy of a Benami transaction is wholly misconceived in the context of a Hindu coparcenary. In the present case there was no allegation in the plaint that the sale deed was a Benami transaction. The suit was founded on the averment that the purchase was in the name of a member of a coparcenary. It followed that the purchase in the name of any member of the coparcenary was really a purchase by the joint family and so no question of Benami transaction arose. The essence of a coparcenary under the Mitak-shara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners: every coparcener is a joint owner of the whole property. No individual member of that family whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a definite share. It is only on partition that he becomes entitled to a definite share. The rights of each coparcener until a partition takes place consist in common possession and common enjoyment of the coparcenary property. See paragraph 218 of Mulla 'Hindu Law,' Fourteenth Edition and : [1969]3SCR681 . *State Bank of India v. Ghamandi Ram*. Hence, where the property is proved to be joint family property, it is wholly immaterial that it is acquired in the name of an individual member of the joint family. As held by the Supreme Court in *K. V. Narayanaswami Iyer v. K. V. Ramakrishna Iyer* : [1964]7SCR490 :--

'The legal position is well settled that if in fact at the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any member of the joint family should be presumed to be acquired from out of family funds and so to form part of the joint family property,

unless the contrary is shown.'

7. The fact of the property being in the name of one person only or the payment of taxes etc. by any one member of the coparcenary or the rent notes being in his name or his maintaining separate Khatas and account books is not inconsistent with the property being joint family property. All these acts will be deemed to be acts of the joint family. The only thing which could displace this presumption would be evidence to the effect that the individual had enough funds or source of income which he utilised for purchasing the property or incurring the aforesaid items of expenditure. On the material of the present case the finding recorded by the trial court cannot be impeached as incorrect.

8. Learned counsel for the appellant has not been able to show anything which may impel me to disturb the other important finding recorded by the trial court viz., that the plaintiff Babu Ram had been in possession of the Kothi since its purchase. He denied that there was any shop in the Kothi prior to its purchase and stated that the shop came in the Kothi one year after its purchase. The contrary assertion of the defendant Dal Chand was discarded and the evidence of the plaintiff witnesses on the point was in my opinion rightly believed. Hence, even on the Question of possession the appellant fails because the allegation of his exclusive possession has not been proved by cogent evidence.

9. The second limb of the argument of the appellant is based on the principle : 'In pari delicto potior est conditio defendenti'. The doctrine was succinctly stated by Mansfield C. J. in *Holman v. Johnson* (1775 to 1802) All ER (Reprint) 98) in these words :

'No court will lend its aid to a man who founds his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*; or the transgression of a positive law of this country, there the court says that he has no right to be assisted.'

It was argued that in the instant case both parties were guilty of making fictitious entries in the account books and the device of opening Khatas ostensibly in the names of the individual members of the family had been adopted to camouflage

the hidden income flowing into the firm Behi and evading tax on that income. These Khatas were really Khatas of the joint family and not personal Khatas of the individual members and hence the court should desist from giving its assistance to the plaintiffs who sought a declaration in their favour. It was also ureed that the rental income being the income of the joint family property, it should have been shown in the Income-tax returns and the omission to do was a deliberate device to dodge the Income-tax authorities by treating such income as the income of a particular member of the family. It was pointed out that under the Income-tax Act income from a property includes rent and suppression of that income is clearly illegal. In my opinion on these facts the doctrine of 'Pari delicto' is not applicable. The law postulates certain conditions which are precedent to the application of this doctrine. For one thing it will be attracted only where the cause of action itself is founded on some illegal or fraudulent transaction to which according to the averments in the plaint both the plaintiffs and defendants were parties. In other words, it must be shown that the plaintiffs could not sustain their action except upon the plea of illegality committed by them: that they would have been unable to establish their claim without relying upon the illegal agreement or conspiracy entered into between them and the defendants. The true test as observed by Mellor. J. in *Bere v. Saddler and Moore*, (1937) 2 KB 158 was whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he himself was a party. The above dictum was endorsed by the Supreme Court in *Kedar Nath Motani v. Prahlad Rai* : [1960]1SCR861 where Hidavatullah. J. speaking for the Court observed (at D. 219) :--

'The correct position in law. in our opinion, is that what one has to see is whether the illegality goes so much to the root of the matter that the plaintiff cannot bring his action without relying upon the illegal transaction into which he had entered. If the illegality be trivial, or venial, as stated by Williston and the plaintiff is not required to rest his case upon that illegality, then public policy demands that the defendant should not be allowed to take advantage of the position. A strict view, of course, must be taken of the plaintiff's conduct, and he should not be allowed to circumvent the illegality by resorting to some subterfuge or by mis-stating the facts. If, however, the matter is clear and the illegality is not required to be pleaded

or proved as part of the cause of action and the plaintiff recanted before the illegal purpose was achieved, then, unless it be of such a gross nature as to outrage the conscience of the Court, the plea of the defendant should not prevail.'

In the present case the plaintiff's suit rested on an entirely different cause of action. It was based on the plaintiffs' title and the assistance of the court was not sought to effectuate an illegal or fraudulent purpose but rather to enforce the plaintiffs' title which was based on the ground that the sale-deed was really in favour of the joint family. In order to apply the maxim of 'pari delicto' the illegal or immoral transaction must be an integral part of the pleadings. Then alone the plaintiff would be non-suited otherwise not. In the instant case, on the other hand, the cases of the plaintiffs and the contesting defendant were diametrically opposed to each other, the former claiming joint family ownership and the latter asserting individual ownership. The position was analogous to the one which arose before the Supreme Court in Kedar Nath Motani's case (supra) (at p. 216):--

'Where both parties do not show that there was any conspiracy to defraud a third person or to commit any other illegal act, the maxim, in pari delicto etc. can hardly be made applicable.

Thus, where the cases of the appellants and the respondents were poles apart in that while the appellants claimed that R. the Karta of their joint family, had acquired certain lands benami in the names of the respondents to avoid the operation of a clause in the lease which required R. the lessee, not to retain possession, after the expiry of the lease of the lands acquired during the term of the lease and that R did not even consider it necessary to obtain the consent of the respondents and even did not obtain their signatures, the respondents claimed that R had nothing whatever to do with the acquisition of the lands and had merely recommended them to the lessor in his capacity as the lessee.

Held that the appellants and the respondents were not in pari delicto.'

For like reason the facts of the present case exclude the applicability of the principle of 'pari delicto' to it,

10. Secondly, the bar of 'pari delicto' is attracted only where the fraud contemplated has been carried out and succeeded and not where it has failed. In the latter eventuality obviously the assistance of the court would not be invoked for the purpose of effectuating the fraud. To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be actually carried into effect. Then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with. See *Raunaq Ali v. Syed Nazir Hussain*. AIR 1924 Oudh 321; *T. P. Petherpermal Chetty v. R. Muni-andi Servai* (1908) 35 Ind App 98; *Jadu Nath Poddar v. Rup Lal Poddar*. (1906) ILR 33 Cal 967; *Girdhari Lal Pravag-datt v. Manikamma and Girdharlal Prayagdatt v. Yashodabai*. (1914) ILR 38 Bom 10: (AIR 1914 Bom 283); *K. Tirupathi Mudali v. T. Lakshmana Mudali* : AIR 1953 Mad 545 ; *Kammula Venkataramayya v. Vilapani Pullayya*. AIR 1936 Mad 717 (FB); and *Immani Appa Rao v. Gollapalli Ramalingamurthi* : [1962]3SCR739 . I have already mentioned the fact that in the instant case the parties were foiled in their attempt to persuade the Income-tax authorities to accept the allegation that the Khatas were individual Khatas and that the rental income from the Kothi in dispute was not the income of the joint family property. I must also emphasise the fact that the cause of action set up in the plaint is the converse of what was sought to be impressed upon the Income-tax authorities. While their endeavour was to represent that the said income was an individual member's income the vital concern of the plaintiffs in the plaint was to show that the Kothi in suit was a joint family property. The court's assistance was sought to obtain a declaration precisely to this effect and this was far from asking for the aid of the court in perpetrating a fraud. In fact, it amounted to unmasking the fraud which did not succeed even in its nascent stage in the proceedings before the Income-tax authorities. In this connection I am inclined to refer to an illuminating passage from Mayne's Hindu Law (7th Ed. p. 595, para 446) :

'Where a transaction is once made out to be a mere benami it is evident that the benamidar absolutely disappears from the title. His name is simply an alias for that of the person beneficially interested. The fact that A has assumed the name of B. in order to cheat X. can be no reason whatever why a court should assist or permit B. to cheat A. But if A, requires the help of the Court to get the estate back into his

own possession, or to get the title into his own name, it may be very material to consider whether A. has actually cheated X. or not. If he has done so by means of his alias, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B., whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away..... where they had intended to defraud creditors, who, in fact, were never injured..... But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, 'in pari delicto potior est conditio possidentis.' The Court will help neither party 'Let the estate lie where it falls'.

In the present case since the Income-tax authorities rejected the case of the parties and treated the rental income of the Kothi as the income of the joint family property, the alleged fraud certainly did not succeed and the matter ended there. The plaintiffs did not plead that case before the court below and in order to obtain relief from the civil court they did not attempt to take advantage of any fraud ever perpetrated by them. So, for this reason also the doctrine of 'In pari delicto' does not apply to the present case.

11. I, therefore, find no force in this appeal and dismiss it with costs.

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