

**Saira Khatun Vs. Qutubuddin and ors.**

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**Court :** Allahabad

**Decided On :** Sep-24-1934

**Reported in :** AIR1935All143; 157Ind.Cas.615

**Appellant :** Saira Khatun

**Respondent :** Qutubuddin and ors.

**Judgement :**

**Niamatullah, J.**

1. This is an appeal by defendant 1, and arises from a suit brought by the plaintiff-respondent for recovery of a share in four properties mentioned at the foot of the plaint. The trial Court dismissed the plaintiffs suit, but the lower appellate Court has decreed it. The position of the parties will appear from the following pedigree.

Asgar Ali

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Mt. Martini Ausaf Ali Mt. Kaniz

{daughter} Roshan Ali Fatma (daugh-

Mt. Fatma Mt. Saira ter)Imtiaz

Begam (daughter) Defdt. 1. Ali

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Nizam Mt. Muhammodi Hafizul Kutubud

Uddin Begum Rab din

Defdt 2. Defdt. 3. Dofdt. 4. Plaintiff.

2. The plaintiff's case as set out in the plaint is that the properties detailed at the foot of the plaint belonged to Roshan Ali though properties Nos. 2 and 3 were purchased benami in the name of defendant 1 and property No. 4 was purchased at auction by one Abdul Rahman for Roshan Ali and he (Abdur Rahman) transferred it to defendant 1 with whom he was in collusion. As regards property No. 1 which stood in the name of Roshan, Ali himself there is no dispute in appeal, the plaintiff being one of the heirs of Roshan Ali is entitled to a frantional share therein. The suit was contested by defendant 1, the appellant, who pleaded that the money with which properties Nos. 2 and 3 were taken belonged to her, but in her evidence she admitted that the money had been given to her by her husband. As regards property No. 4, her case was that it had been purchased at an auction by Abdul Rahman as her agent. It is common ground that Abdul Rahman purchased it at an auction and a certificate was granted to him and that after the death of Roshan Ali Abdul Rahman executed a deed of sale in respect of that property in favour of defendant 1. Abdul Rahman was examined as a witness and stated that he had in fact received no consideration from defendant 1 in respect of the sale-deed. He also stated that Roshan Ali had supplied him with funds for the purchase at auction sale and directed him to transfer it to his wife defendant 1. In accordance with Roshan Ali's direction which Abdul Rahman characterises as will he executed a sale-deed in favour of defendant 1 for an ostensible consideration

of Rs. 400. The sale-deed was admittedly executed after the death of Roshan Ali.

3. One other defence was taken by defendant 1. She alleged that Roshan Ali was not the son of Ausaf Ali and that he was a foundling and was brought up by Imtiaz Ali, the husband of the sister of Ausaf Ali. It has however been found by the lower appellate Court that Roshan Ali was the son of Ausaf Ali. The finding is one of fact and cannot be questioned in second appeal. If it had been found otherwise the plaintiff would not have been entitled to inherit any part of Roishan Ali's property. The plaintiff's right to a share in the properties in dispute cannot therefore be disputed, if they belonged to Roshan Ali. The only question is whether the same belonged to Roshan Ali. As already stated, there is no controversy as regards property No. 1. The arguments before me related to the other three properties. The trial Court was of opinion that in the absence of evidence to the contrary it should be presumed that Roshan Ali purchased the properties in question for the benefit of his wife and that the plaintiff not having rebutted that presumption his suit is liable to be dismissed. Accordingly that Court dismissed the plaintiff's suit. The lower appellate Court referred to certain cases and held that where property is purchased by a husband in the name of his wife there is no presumption of advancement in India and that any one alleging that the husband made the purchase for the wife should establish it by evidence other than that afforded by the fact that the title-deed stood in the name of the wife. In my opinion the lower appellate Court has taken a correct view of the law on the subject.

4. The evidence in the case leaves no doubt that properties Nos. 2 and 3 were purchased by Roshan Ali through Abdul Rahman who directed to obtain title-deeds in the name of the appellant. There is in these circumstances no presumption that Roshan Ali had the title-deeds obtained in the name of his wife as he desired her to become the owner of the property. It is true that one of the modes by which a man desires to make his wife the owner of property which he purchases from a third person is to take a deed in her favour, in which case the transaction properly analysed amounts to a gift by the husband to the wife of the fund with which the property is purchased and whatever part he takes in the transaction itself is on her behalf as her agent. It is however a matter of evidence as to whether he intended that the wife should become the owner of the property

which is purchased at his instance or that he made a gift of the money with which it was purchased.

5. Though the learned Subordinate Judge enunciated the law correctly he observed in the course of his judgment that:

there appears however no evidence or circumstances in this case which can favour the defendant's contention exclusively or be incompatible with her ostensible ownership.

6. At another place he said that:

Abdul Rahman who was admittedly the right hand man of Roshan Ali and through whom Roshan Ali had purchased all this property swears that Roshan Ali was their owner and that the name of defendant 1 in the sale-deeds was merely benami.

7. I have referred to the evidence of Abdul Rahman and have not been able to find any statement to the effect mentioned by the learned Subordinate Judge. All that he says is that properties Nos. 2 and 3 were taken by him with funds belonging to Roshan Ali and that as desired by Roshan Ali the title-deeds were taken in the name of defendant 1. In answer to questions put by the Court he stated that he could not, say whether Roshan Ali had taken the properties in the name of his wife because he desired to make her the owner thereof, or because he was in service and did not like to make it appear that he had purchased properties. Roshan Lal was in service in Gwalior State. Defendant 1 was living with him there. The properties were purchased in the district of Bulandshahr where Abdul Rahman was employed as Ahalmad. It may be that the learned Subordinate Judge inferred from Abdul Rahman's evidence that Roshan Ali was the owner and defendant 1 was benamidar. But the learned Subordinate Judge was not right if his observation implies that there is no evidence or circumstances in this case which may be indicative of the fact that Roshan Ali desired to make his wife the owner of the properties purchased by him through Abdul Rahman. To my mind the fact that Roshan Ali had no children and that the plaintiff and his sisters who were his prospective heirs besides defendant 1 were not near relatives are circumstances which have evidential value on this question. If this were a first

appeal I would have considered the question whether in all the circumstances of the case an inference of Roshan Ali's intention to make defendant 1 the owner of the property should be drawn from them. I might have arrived at my own finding even in second appeal on this question of fact if I were satisfied that the learned Subordinate Judge overlooked these circumstances. But other parts of his judgment show that these facts were present in his mind. In saying that there is No. evidence or circumstance to, rebut the prima facie ownership of Roshan Ali the learned Judge probably meant that the facts mentioned above are not of any weight. In this view I accept the finding of fact though with a certain amount of reluctance.

8. The case as regards property No. 4 stands on a somewhat different footing, As already stated the property was purchased at an auction sale by Abdul Rahman with funds belonging to Roshan Ali. The former transferred it to defendant 1 after Roshan Ali's death under a sale-deed which is couched in the usual terms and declares that he had purchased the property to which it relates at an auction and was transferring it to; defendant 1 in consideration of Rs. 400. It is of importance to notice that Abdul Rahman asserts in the sale-deed to be the owner by virtue of the auction sale and professes to transfer his rights whatever they were to defendant 1. In the Courts below no distinction was made between property No. 4 and properties Nos. 2 and 3 all of which were dealt with on the footing of benami transactions. The memorandum of appeal in this case also did not raise any other question. In the course of arguments my attention was arrested by para. 8 of the plaint, which runs as follows:

Munshi Abdul Rahman, Kaikun of Roshan Ali, purchased at an auction-sale a house, mentioned against No. 4 at the foot of the plaint, for Roshan Ali with the latter's money, and it is adjacent to the residential house, mentioned against No. 1 at the foot of the plaint. After Roshan Ali's death defendant 1, in collusion with Munshi Abdul Rahman, the Karkun, contrary to the rights of the heirs, obtained a sale-deed in her favour alone.

9. It appears to me that the plaintiff stands non-suited by his own allegation having regard to the provisions of section 66, Civil P.C. He clearly claims property No. 4

on. the allegation that Abdul Rahman the auction-purchaser, was a benamidar for Roshan Ali and that in collusion with defendant 1 Abdul Rahman transferred his rights to her instead of two other heirs including the plaintiff. In my opinion Section 66, Civil P.C., is in terms applicable. It provides that:

no suit shall be maintained against any person claiming title under a purchase certified by the defendant in such a manner as may be prescribed on the ground that the purchases was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

10. The plaintiff claims through Roshan Ali. His case is that Abdul Rahman had purchased on behalf of Roshan Ali. The suit which has given rise to this appeal was instituted against defendant 1 who holds a deed of transfer from Abdul Rahman and is to that extent his representative in interest. Section 66 in my opinion applies not only to cases in which the property is claimed against an auction purchaser himself, but also where it is claimed against his representative in interest.

11. The learned advocate for the respondents has argued that defendant 1 claimed the property on the same allegation as the plaintiff, treating Abdul Rahman as a benamidar for her. This is not correct. Her case is that Abdul Rahman purchased the property for her as her agent. Though the sale-deed is not specifically referred to in her written statement she produced it in support of her case. In my opinion taking the written statement with the sale-deed produced by defendant 1 it is clear that she is claiming title under a purchase certified by the Court within the meaning of Section 66, Civil P.C. The learned advocate for the respondents relies on *Ramaswami Aiyar v. Venkappaier* 1917 Mad. 365. In that case there was no transfer or assignment by the auction-purchaser in favour of the defendant. The auction-purchaser was no party and the case of both parties was that he was a benamidar. The auction-purchaser had executed, a deed of release in favour of the defendants. The learned Judges took care to point out (p. 1001 of 33 I C), that the deed executed by the auction-purchaser was only a deed of release pure and simple whereby the executant renounced a claim, but conveyed no title. They proceeded to observe that 'defendant 1 cannot therefore pose as an

assignee of the rights of the auction-purchaser. In the case before me the position is different as I have already indicated. Defendant 1 is a transferee in the real sense of the term. The fact that Abdul Rahman received no consideration from her can make no difference. Abdul Rahman intended to transfer the property to her and did transfer it. A third person such as the plaintiff cannot assail the validity of the deed on the ground that as between the parties to it there was no consideration.

12. Another case relied on is Jambu Dass v. Jai Prakash 1925 All. 47, which followed Saradindu v. Gosta Boliari 1923 Cal. 302. In none of these cases the defendant was either the auction-purchaser or a transferee of the auction purchaser. He could not be considered to be claiming title under the sale certificate. Same was the case in Abinas Chandra v. Pratul Chandra 1928 Cal. 448. These cases may be authorities for the proposition that where the auction-purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the, property purchased by him he being admittedly a mere stakeholder Section 66: does not apply. They do not apply to a case where the defendant is a transferee under a valid title-deed from the auction-purchaser.

13. The learned advocate for the respondents protested against this part, of the case being disposed of with preference to Section 66, Civil P.C., which was not relied on in any of the Courts below. It is certainly open to me to ignore a point even of law if it is raised for the first time in this Court. At the same time the power of a Court of Second appeal to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted there is no legal bar to the point being taken cognizance of by the Court itself. In taking this point I was influenced by the consideration that defendant 1 is the widow of Roshan Ali; he had expressly asked Abdul Rahman to convey this property to her whom, he would naturally prefer to the plaintiff and the other heirs who are otherwise not very near relations. It is more equitable to give effect to his wishes if it is possible to do so as I think it is by invoking the aid of Section 66, Civil P.C. The result is that I allow this appeal in part and modify the decree of the lower appellate Court by dismissing the plaintiff's suit as regards property No. 4. In other respects its decree shall stand. The

plaintiff-respondent shall have 3/4ths of his costs from defendant 1 who shall have 1/4th of her costs from the plaintiff.

14. N.B. - Leave to appeal under the Letters Patent is granted to the plaintiff, but not to the defendant.

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