

Promode Kumar Roy and ors. Vs. Kali Mohan Saha Pramanick and ors.

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Court : Kolkata

Decided On : Aug-22-1922

Reported in : AIR1923Cal228,70Ind.Cas.555

Judge : Asutosh Mookerjee and; Chotzner, JJ.

Appellant : Promode Kumar Roy and ors.

Respondent : Kali Mohan Saha Pramanick and ors.

Judgement :

1. This is an appeal by the plaintiffs in a suit for partition of land upon establishment of title. The subject-matter of the litigation is described in the plaint as 6 gds 2k. 2kr. share in sikimi taluk Mohammad Amiruddin including, amongst others, released Mouzas Champaknagar and Kalai Gobindapur known as Budhiamara re-formed after diluvion of Alinagar. The case for, the plaintiffs is that the disputed property belonged at one time to a wealthy Muhammadan lady of Dacca, by name Akikannessa Bibi, and that by successive devolution, the share mentoned has vested in them. The case for the first four defendants, who alone contested the claim, is that the interest has devolved on them, and that this litigation. has been engineered by the fifth defendant, Lolitmohan Ray, a Pleader at Dacca, because he was unsuccessful in his effort to secure the property for his own benefit. The lands in controversy have a long and complicated history; but upon an examination of the evidence and a review, of the relevant facts, the Subordinate Judge has come to the conclusion that the plaintiff had no vestige of a

title and that they had failed to establish their possession within 12 years antecedent to the suit. In this view, the Subordinate Judge has dismissed the suit with costs. On the present appeal, the arguments have been directed towards two fundamental questions, namely, first, whether, successive purchases of the interest of Akikannessa by Abdul Majid and Abdul Azith were genuine or fictitious transactions; and, secondly, whether one Asmatannessa had a share in Champaknagar and Kalai Gobindpur, known as Budhiamara Khalasimahal, and, if so, how much. A subordinate point has also been argued with regard to the title to an indigo factory and lands appertaining thereto.

2. As regards the first point, it is not disputed that one Kalachand Mukerji obtained a decree for money against Akikannessa in 1891, and in execution brought the disputed properties to sale on the 9th March 1892 when Abdul Majid became the purchaser of three lots, two for Rs. 45 and a third for Rs. 42 making an aggregate of Rs. 87. The sale was confirmed on the 13th May 1892. The plaintiffs contend that the purchase was made by Akikannessa herself in the name of Abdul Majid. In support of this conclusion, reliance is placed upon the surrounding circumstances, and it is urged that as Akikannessa was heavily indebted at the time, she had a motive to place her properties in the name of an ostensible owner. Our attention is drawn to the fact that on the 3rd February 1882, she borrowed Rs. 30,000 on mortgage from Ruplal Das and Raghunath Das, two well known bankers of Dacca, and that the mortgagees sued on the 9th April 1891 to enforce their security, which resulted on the 30th June 1892 in a decree for over Rs. 88,000. Besides this, in 1890, Nawab Asanullah of Dacca obtained a decree against her for more than Rs. 4,000 and when he attempted to realise his dues in execution, claims were preferred by her relations who had taken from her three deeds of gift or release on the 5th March 1891. These claim cases were unsuccessful, and the suits which were thereafter instituted by the disappointed claimants on the 22nd January, 1892, were all ultimately dismissed on the 19th January 1913. There can, we think, be little doubt that Akikannessa was pressed by her creditors in 1891 and was in considerable embarrassment at or about the time when Kalachand Mookerjee obtained his decree against her. There is also little doubt that she had recourse at the time to fictitious transfers as is sufficiently indicated by the result of the claim cases mentioned. The defendants urge,

however, that it does not necessarily follow that the purchase by Abdul Majid was fictitious, merely because the judgment-debtor was involved in litigation and made ineffectual efforts to place her estate beyond the reach of her creditors. But we are pressed to take into consideration also other events which happened immediately afterwards. In 1895 one Ayesha Akhtar Khatun, a co-sharer Zemindar, obtained a rent decree against Akikannessa and others. The decree was executed and the disputed properties were purchased on the 15th December 1896 by one Chandrakumar Ray, on behalf of the fifth defendant, Lalitmohan Ray, for a sum of Rs. 500. This sale was confirmed on the 24th February 1897. At the same time, a similar decree was obtained by the same plaintiff against Golamulla and others, with the result that, at the sale which followed, Chandrakumar Ray became the purchaser as before for Rs. 805 and the sale was confirmed, on the 24th February 1897. Before confirmation of the sales, Chandra kumar Ray and Lalitmohan Ray, however, jointly executed a conveyance, in favour of, Abdul Azim on the 13th January 1897 for a sum of Rs. 1,605, that is, upon a profit of Rs. 300 on the purchase-money actually paid at the execution sales. Meanwhile, Jabinda Khatun and others, another set of co-sharer Zemindars had obtained two rent-decrees in 1895 against Golamulla and others. The decree-holders took out execution, whereupon Abdul Azim preferred two claims. On the 4th January 1898, the claims were allowed, except in respect of the share of Akikannessa in taluk Muhammad Amiruddin. On the 24th February, 1898 Abdul Aziz, whose claim had thus proved abortive in part, took a conveyance from Abdul Majid for a sum of, Rs. 199. The substance of the transaction was that Abdul Aziz, who had failed in his claim, in respect of the share of Akikannessa, acquired the outstanding title from Abdul Majid, so that he might be able to rely thereupon in the event of future dispute. The decree-holders, Jabinda Akhtar Khatun and others, proceeded with execution of their decree in so far as the claim order allowed, and on the 14th March 1898, Tarinicharan Saha became purchaser for Rs. 625 of the share of Akikannessa in taluk Muhammad Amiruddin. On the 24th April 1902 Abdul Azim executed a conveyance in favour of Nurennessa, the daughter-in-law of Akikannessa, in respect of the taluks together with arrears of rent, for a sum of Rs. 6,000. On the 2nd June 1902 Nurennessa granted a mirash tenure of the properties to Abdul Azim and his brother Abdul Halim on receipt of Rs. 2,500 as bonus and on a net

annual rental of Rs. 600, the lessees undertaking to pay in addition the head rent direct to the Zemindars. On the 17th March 1904 Nurennessa conveyed her right to receive rent under the lease of 2nd June 1902, to the fifth defendant Lalitmohan Roy for a consideration of Rs. 6,000. Thereafter, on the 3rd December 1909, Tarinicharan Saha and his brother, Chandranath Saha, conveyed their interest to the present plaintiffs and others for a sum of Rs. 500. On the 27th September 1913 the plaintiffs instituted this suit on the strength of their purchase. The history outlined above makes it plain that the title of the plaintiffs is dependent upon the true effect of the purchase by Tarinicharan Saha on the 14th March 1898. That title is ineffectual against the contesting defendants, if a real interest had already vested in Abdul Azim by virtue of his purchase dated 24th February 1898, from Abdul Majid, who had acquired the interest of Akikannessa under the sale which was held on the 9th March 1892 in execution of the decree obtained by Kalachand Mukherjee, and was confirmed on the 13th May 1892. The plaintiffs are, consequently, driven to assert that the purchase by Abdul Majid on the 9th March 1892, as also the purchases by Abdul Azim on the 13th January 1897 from Lalitmohan Ray and on the 24th February 1908, from Abdul Majid were fictitious transactions, which left the title of Akikanessa wholly unaffected and free to vest in the defendants through the purchase of Tarinicharan Saha. The Subordinate Judge has held that the purchases by Abdul Majid and Abdul Aziz were all genuine transfer. In our opinion, no good grounds have been established to justify our dissent from this conclusion.

3. It is important to bear in mind in this class of cases that, as pointed out by lord Phillimore in *Maniklal Mansukbhai v. Bijoy Singh* 62 Ind. Cas. 356 : 25 C.W.N. 409 : (1921) M.W.N. 80 (P.C.) the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This recalls the earlier pronouncements to the same effect by Lord Westbury in *Sreemanchnder Dey v. Gopaulchunder Chuckerbutty* 11 M.I.A. 28 at p. 43 7 W.R. 10 (P.C.) : 2 Sar. P.C.J. 215 : Suth P.C.J. 651 : 20 E.R. 11 (P.C.) and by Sir Lawrence Jenkins in *Mina Kumari Bibi v. Bijoy Singh* 40 Ind. Cas. 242 : 44 I.A. 72 : I.P.L.W. 425 : 5 L.W. 711 : 32 M.L.J. 425 : 21 C.W.N. 585 : 21 M.L.T. 344 : 15 A.L.J. 382 : 25 C.L.J. 508 : 19 Bom. L.R. 424 : (1917) M.W.N. 473 : 44 C. 662 (P.C.). But we are not unmindful that, in the words of lord Hobhouse in *Uman Parshad v. Gandharp Singh* 14 I.A.

127 : 15 C. 20 : 5 Sar. P.C.J. 71 : Rafique and Jackson's P.C. No. 98 : 11 Ind. Jur. 474 : 7 Ind. Dec. (N.S.) 599. (P.C.) and of lord Shaw in Muhammad Mahbub Ali Khan v. Bharat Indu 53 Ind. Cas. 54 : 23 C.W.N. 321 : (1919) M.W.N. 507 (P.C.) as benami transactions are very familiar in Indian practice even a slight quantity of evidence to show that it was sham transaction may suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buck-master observed, in Irshad Ali v. Kariman 26 Ind. Cas. 217 : 22 C.W.N. 530 : (1918) M.W.N. 394 : 21 O.C. 86 : 5 O.L.J. 197 : 28 C.L.J. 173 : 20 Bom. L.R. 790 : 24 M.L.T. 86 (P.C.). He must show something definite to establish that it is a sham transaction on the principle that the burden of proof, lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things; Nawab Azimut Ali Khan v. Hurdwaree Mull 13 M.I.A. 395 : 14 W.R.P.C. 14 : 5 B.L.R.P.C. 578 : 2 Suth P.C.J. 343 : 2 Sar. P.C.J. 571 : 20 E.R. 599; Faez Buksh Chowdhury v. Fukeeroodeen Mahomed 14 M.I.A. 234 : 9 B.L.R. 456 : 2 Suth P.C.J. 490 : 2 Sar. P.C.J. 733 : 20 E.R. 755; Suleiman Kadr Bahadur v. Mehndi Begam 25 C. 473 : 25 I.A. 15 : 2 C.W.N. 186 : 7 Sar P.C.J. 254 : 13 Ind. Dec. (N.S.) 313 (P.C.); Nirmal Chunder Banerjee v. Mahomed Siddik 25 A.I. 225 : 26 C. 11 : 7 Sar. P.C.J. 383 : 13 Ind. Dec. (N.S.) 611 (P.C.); Moti Lal v. Kundan Lal 39 Ind. Cas. 964 : 21 C.W.N. 920 : 32 M.L.J. 468 : 15 A.L.J. 329 : 1 P.L.W. 490 : 25 C.L.J. 581 : 19 Bom. L.R. 471 : 22 M.L.T. 10 : (1917) M.W.N. 464 : 6 L.W. 2 (P.C.) The most important test to be applied in these is, as observed by Mr. Amir Ali in Nityamoni Dassi v. Lakhan Chunder Sen 33 Ind. Cas. 452 : 43 C. 660 : 24 C.L.J. 1 : 20 C.W.N. 522 : 30 M.L.J. 529 : (1916) 1 M.W.N. 332 : 3 L.W. 471 : 18 Bom. L.R. 418 : 20 M.L.T. 10 (P.C.) the source whence the consideration came, Sir George Farwell formulated the same test in different language, when, he observed in Bilas Kunwar v. Desraj Ranjit Singh 30 Ind. Cas. 299 : 42 I.A. 202 : 37 A. 557 : 22 C.L.J. 516 : 19 C.W.N. 1207 : 29 M.L.J. 335 : 2 L.W. 830 : 18 M.L.T. 248 : 13 A.L.J. 991 : 17 Bom. L.R. 1006 : (1915) M.W.N. 757 (P.C.) that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase-money. To the same effect is the, decision of the Judicial Committee in Parbati Dasi v. Baikuntha Nath Das 22 Ind. Cas. 51 : 18 C.W.N. 428 : 15 M.L.T. 66 : (1914) M.W.N. 42 : 12 A.L.J.

79 : 19 C.L.J. 129 : 16 Bom. L.R. 101 : 26 M.L.J. 248 (P.C.) which re-calls the earlier pronouncements by Lord Campbell in *Dhurm Das Pandey v. Musammat Shama Soondari Dibiah* 3 M.I.A. 229 : 6 W.R.P.C. 43 : 1 Suth. P.C.J. 147 : 1 Sar P.C.J. 271 : 18 E.R. 484 and by Knight Bruce, L.J., in *Gopeekrist Gosain v. Gungapersaud Gosain* 6 M.I.A. 53 : 4 W.R.P.C. 26 : 1 Sar P.C.J. 493 : 2 Suth. P.C.J. 13 : 19 E.R. 20 where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when, he observed in *Dalip Singh v. Chaudhrain Nawal Kunwar* 35 I.A. 104 : 30 A. 258 : 10 Bom. L.R. 600 : 12 C.W.N. 609 : 14 Bur. L.R. 151 : 4 M.L.T. 141 (P.C.) that if the evidence on neither side, is wholly convincing as to the fundamental criterion, namely, the source of the purchase-money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property; see *Upendra Nath Nag v. Bhupendra Nath Nag* 32 Ind. Cas. 267 : 21 C.W.N. 280. We must further look to the substance of the transaction as evidenced in the deeds of the parties, not, permitting the real question to be obscured by what Knight Bruce, L.J., calls, in *Hunoomanpersaud Pandey v. Musammat Babooee Munraj Kunweree* 6 M.I.A. 393 : 18 W.R. 81 n. : Sevestre 253 n. : 2 Suth P.C.J. 29 : 1 Sar P.C.J. 552 : 19 E.R. 147 the form of expression, the literal sense nor by what Lord Macnaghten describes, in *Lal Achal Ram v. Raja Kazim Hussain Khan* 32 I.A. 113 : 9 C.W.N. 477 : 8 O.C. 155 : 47 A. 271 : 15 M.L.J. 197 : 8 Sar. P.C.J. 772 (P.C.) as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument.

4. Keeping these well-established principles in view in the consideration of the evidence the Subordinate Judge has interpreted the surrounding circumstances as unfavourable to the theory that Abdul Majid and Abdul Azim were shadows of Akikannessa and never really acquired, her interest in the disputed property. It is not questioned that Akikannessa was heavily involved at the time, but that is

consistant with the theory that there was a real sale at the instance of Kalachand Mukherji, who found it otherwise impossible to recover his dues. Stress has also been laid on the circumstances that Abdul Majid made the purchase for a small sum, but the fact cannot be ignored that the properties sold were heavily encumbered, while no evidence is forthcoming to establish accurately the relation the purchase-money paid bore to the real value of the right, title, and interest brought to sale. There is also the circumstance that the purchaser and the judgment-debtor were distantly related; but it must be remembered that strangers, unless speculative purchasers, would hardly be anxious to step in when the entire estate of Akikannessa and her co-sharers was involved in what the Subordinate Judge calls a general overwhelming ruin. As regards the source of the purchase-money, there is no room for suspicion that the purchaser was not able to provide the sum. Nor can much weight be attached to the fact that Akikannessa did attempt to effect colourable transfers in favour of some of her relations; that does not show that all the transfers, voluntary or compulsory, were of the same character. As was observed by Lord Westbury in *Sreeemanchunder Dey v. Gopaulchunder Chuckerbutty* 11 M.I.A. 28 at p. 43 7 W.R. 10 (P.C.) : 2 Sar. P.C.J. 215 : Suth P.C.J. 651 : 20 E.R. 11 (P.C.) if we were to take away men's estates upon inferences derived from such circumstances, as these, it would' be impossible that any property would be safe. The Subordinate Judge has observed that the considerations applicable to the purchase by Abdul Majid at the execution sale, apply also more or less, to the purchases by Abdul Aziz from Abdul Majid and from the fifth defendant, Lalitmohan Ray. We may add that upon the fundamental test of possession, the plaintiffs are in inextricable difficulty; for the evidence does not establish that Akikannessa continued in occupation notwithstanding all the transfers mentioned, nor that the plaintiffs have custody of the title deeds. On a review of the whole evidence, we are not prepared to dissent from the view, taken by the Subordinate Judge that although there may be ground for suspicion and although some of the surrounding circumstances may engender doubt, no inference can be drawn from legal testimony that Abdul Majid and Abdul Azim were the benamidars of Akikannessa.

5. In this view, it is not necessary to consider whether Section 317 of the Civil Procedure Code of 1882 which was in operation when Abdul Majid became

purchaser at the execution sale on the 9th March 1892 governs the case, or whether the plaintiffs are debarred from raising the question of benami under Section 66 of the Code of 1908, which is now in force. The decision of this Court in *Promotha Nath v. Sourav Dasi* 58 Ind. Cas. 327 : 47 C. 1108 : 3 C.L.J. 463 : 24 C.W.N. 1011 shows that the stringent rule in favour of the certified purchaser, enunciated in the Code of 1908, has not retrospective operation and cannot be utilised by an execution, purchaser whose title was perfected when Section 317 of the Code of 1882 was in force. This, however, is immaterial, because we have held that the execution purchaser Abdul Majid was the real purchaser, and the subsequent purchases by Abdul Azim also were real transfers. This renders it superfluous for the plaintiffs to invoke the aid of the principle formulated by the Judicial Committee in *Ramcoomar Koondoo v. McQueen* 11 B.L.R. 46 : 18 W.R. 166 : I.A. Sup. Vol 40 : 3 Sar. P.C.J. 160 : (P.C.) and *Mahomed Mozuffer Hossein v. Kishore Mohan Roy* 22 C. 909 : 22 I.A. 129 : 5 M.L.J. 101 : 6 Sar. P.C.J. 583 : 11 Ind. Dec. (N.S.) 602 (P.C.) which would protect them as bona fide purchasers for value without notice from ostensible holders, even if Akikannessa were shown to have utilised Abdul Majid and Abdul Azim to carry out a scheme of 'benami'.

6. As regards the second point, the Subordinate Judge has pointed out that the question of the nature and extent of the rights of the parties in Mouzas Champaknagar and Kalai-Gobindapur known as Budhamara Char, is involved in considerable obscurity. This is chiefly due to the fact that as the village had been diluviated many years ago and reformed only in part, the parties themselves had no clear knowledge of their rights and dealt with them in a reckless manner. The three documents, which throw light on this matter are the partition-deed and the ekramama of the 3rd March 1843, and the robkar of Mr. H.N. Metcalfe, Collector of Tipperah dated the 2nd April 1845. In the partition-deed, the villages Kalaigobindapur, Champaknagar, Budhiamara and Alinagar are treated as distinct villages, and the first three are taken to appertain to more than one distinct mahal. This confusion is reproduced in the robkari. But the thak papers as also the Settlement papers show that there is no separate mouza of the name of Budhiamara; it appears to be only another name for Kalaigobindapur and Champaknagar, which are in reality the names of two different parts of Alinagar. The partition-deed and the ekrarnama leave no room for doubt that such of the

lands as, at the time, were either not in possession of the parties or were the subject-matter of litigation, were left unpartitioned. The lands of Alinagar were given to Khatunjan, and, consequently, the title to the released lands would vest in her. Her title could not be affected by reason of assertions in derogation of her undoubted right, made by Tier co-sharers and others in documents of a later date. The inference follows that the shikimi taluks are now vested in the fifth defendant, and the first four defendants are the mirashdars. Consequently, neither the plaintiffs nor the defendants, other than those mentioned, have a share in Budhiamara, and the claim in this respect has been rightly dismissed.

7. Next, as regards the indigo factory, there is no doubt that the partition-deed of the 3rd March 1843 implies an under-tenure in respect thereof under Khatunjan, and this is supported by the ekrarnama. But there is no evidence to show that this under-tenure was ever really in existence or rent was at any time paid on account of it. We are unable to hold, in these circumstances, that an under-tenure ever came into existence or was in operation at the date of the institution of this suit.

8. Finally, we have to consider the question of limitation. The Subordinate Judge has pointed out that complete sets of collection papers have not been produced on either side, and that what has been placed before the Court does not indicate that either side was in peaceful occupation. He has held, however, that, on the whole, the balance of evidence as to possession is in favour of the defendants who are proved to be the rightful owners. In such circumstance the rule enunciated by the Judicial Committee in *Runjeet Ram Panday v. Goburdhun Ram Panday* 2 W.R. 25 (P.C.) may be applied namely, that where there is strong evidence of possession on the part of the respondents, opposed by evidence apparently strong, also on the part of the appellant, in estimating the weight due to the evidence on both sides, the presumption may well be regarded that possession went with the title, and that with the aid of it, there is a stronger probability that the respondents case is true than that of the appellant; see also *Secretary of State v. Chelikani Rama Rao* 35 Ind. Cas. 902 : 43 I.A. 192 : 39 M. 617 : 31 M.L.J. 324 : 20 C.W.N. 1311 : (1916) 2 M.W.N. 224 : 14 A.L.J. 1114 : 20 M.L.T. 435 : 4 L.W. 486 : 18 Bom. L.R. 1007 : 25 C.L.J. 69 (P.C.); *Kuthali Moothavar v. Peringati Kunharakutty* 66 Ind. Cas. 451 : 26 C.W.N. 666 : 44 M. 883 : 14 L.W. 721 : (1921)

M.W.N. 847 : 41 M.L.J. 650 : 30 M.L.T. 42 : 48 I.A. 395 : 24 Bom. L.R. 669 : (1922) A.I.R. (P.C.) 181 (P.C.); Shiva Prasad Singh v. Hira Singh 62 Ind. Cas. 1 : 6 P.L.J. 478 : (1921) Pat 305 : 2 P.L.T. 487 : 3 U.P.L.R. (Pat.) 81 (F.B.); Jai Chand v. Girwar Singh 52 Ind. Cas. 366 : 41 A. 669 : 17 A.L.J. 814 ; Innasimuttu Udayan v. Upakarath Udayan 23 M. 10 (P.C.) 26 I.A. 210 : 7 Sar. P.C.J. 620 : 8 Ind. Dec. (N.S.) 401 and Lata Singh v. Latif Hossein 28 Ind. Cas. 477 : 21 C.L.J. 480 which points out that in the judgment in Mirza Shamsheer Bahadur v. Munshi Kunj Behari Lal 12 C.W.N. 273 : 7 C.L.J. 4141 : 3 M.L.T. 212 the word 'satisfactory' is misprinted as 'unsatisfactory' in the passage summarising the rule in Runjeet Ram Panday v. Goburdhun Ram Panday 2 W.R. 25 (P.C.).

9. The result is, that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs.

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