

Tilak Raj Vs. Vidhya Devi and ors.

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SooperKanoon Citation : sooperkanoon.com/900592

Court : Jammu and Kashmir

Decided On : Jun-07-2005

Reported in : AIR2006J& K29

Judge : S.K. Gupta, J.

Appeal No. : C.I.A. 46 of 1995

Appellant : Tilak Raj

Respondent : Vidhya Devi and ors.

Advocate for Def. : M.L. Gupta, Adv.

Advocate for Pet/Ap. : R.S. Thakur, Adv.

Disposition : Appeal dismissed

Judgement :

S.K. Gupta, J.

1. This Civil 1st Appeal arises out of the judgment and decree dated 1-3-1995 passed by the learned District Judge, Jammu, whereby the suit filed by the appellant-plaintiff for declaration and partition of the suit shop has been dismissed.

2. The facts giving rise to the litigation between the parties, in brief, may be noticed :-

The appellant-plaintiff is the son of deceased defendant, Krishan Lal, the predecessor-in-interest of present respondents. He filed a suit in claiming therein that he along with his two brothers namely Sudershan Kumar and Mohan Lal, besides the deceased defendant were the partners of firm M/s. Amarnath Krishan Lal. According to the appellant plaintiff, the suit shop was purchased by firm M/s. Amarnath Krishan Lal, vide Sale Deed dated 7-10-1967 in the name of deceased defendant Krishan Lal. It was a benami transaction and the entire sale consideration of Rs. 51,000/- was paid out of the funds of firm M/s. Amarnath Krishan Lal and, thus, the deceased defendant was only a benamdar. In fact, the real owner of the said shop was firm M/s. Amarnath Krishan Lal. The other two partners of the aforesaid firm namely Sudershan Kumar and Mohan Lal were retired from the partnership in the year 1970-72 and 1972-73 respectively. The appellant plaintiff further submitted that he along with the deceased defendant constituted the partnership firm and the retiring members Sudershan Kumar and Mohan Lal surrendered their rights in favour of the appellant-plaintiff. The suit shop being the property of the firm, the appellant plaintiff claims half of the share in the said shop which devolved upon them after the retirement of two brothers namely Sudershan Kumar and Mohan Lal from the partnership firm, M/s. Amarnath Krishan Lal. The appellant plaintiff further asserted that though partnership between him and the deceased defendant stands dissolved but the suit property remained undivided and, thus, through the currency of suit claims possession of half of the share by partition in the said shop.

3. The deceased defendant, however, resisted the claim of the appellant-plaintiff on variety of grounds and pleaded to be the sole owner of the property viz., the suit shop having been purchased by him with his own funds. The deceased-defendant also stated that the appellant plaintiff had admitted this fact at the time of his retirement from the, firm M/s. Amarnath Krishan Lal, while executing retirement deed on 30-1-1984 and compromise deed of the same day executed between him and the appellant-plaintiff, besides other partners.

4. Upon consideration of the pleadings, the following issues were struck for adjudication by the trial Court in terms of its order dated 1-3-1995 :-

1. Whether the suit in the present form is not maintainable. If so, how OPD
2. Whether value for purposes of Court-fee and jurisdiction has not been properly fixed. If so what is the correct valuation ?

OPD.

3. Whether the property in dispute was purchased by the firm M/s. Arnar Nath Krishan Lal and the consideration amount was paid out of the funds of the said firm in which the plaintiff was one of the partners? OPP
4. Whether the shop in dispute was purchased by the firm in the name of defendant only because he was the head of the family and the transaction was a banami transaction OPP.
5. Whether after the retirement of Sudershan Kumar and Mohan Lal from the partnership concern in the year 1970-72 the plaintiff became the owner of the shop to the extent of one half share? OPP
6. Finally to what relief is the plaintiff entitled? OPP.

5. Parties, apart from examining themselves as witnesses in support of their respective cases, have assembled, each for itself, testimony of various witnesses. After an analytical evaluation of the primary and perceptive facts/evidence deposed to by the witnesses examined at the trial by the parties and testimonial boost these provided by either way, also on consideration of the facts in the books of account maintained by M/s. Amarnath Krishan Lal, rent deed dated 30-1-1984 and compromise deed between the parties, relied upon and placed on record by the appellant-plaintiff, on the strength of which deceased-defendant had been receiving the entire rent as its sole owner, the trial Court dismissed the suit of the plaintiff mainly on three grounds; firstly that the appellant-plaintiff has received his share at the time of his retirement in view of explicit admission made in para 2 of the retirement deed {Ex PW 1/9}, secondly, the deceased defendant had been getting rent and enjoying the usufruct of the property ever since its purchase openly, which was in the knowledge of appellant-plaintiff, without any demurrer from the latter, until the institution of the plaint and, thus, cannot raise this plea on

the principle of estoppel by conduct and thirdly, that the appellant-plaintiff has not succeeded in proving his interest in the property as, where the property is purchased by any member in his name in case of joint family, the presumption is that he has acquired the same from his own income, unless it is proved otherwise, the correctness of which has been assailed by the unsuccessful appellant-plaintiff in this appeal.

6. I have heard the arguments advanced by the learned Counsel appearing for the respective parties at length and also considered their rival contentions in context with the evidence both documentary and oral deposed by the parties and the witnesses examined by them before the trial Court in support and in rebuttal thereof meticulously.

7. The main plank of the appellant-plaintiffs contention is that he owns half of the share of suit shop based on the plea that the suit shop though purchased in the name of the deceased-defendant but the entire sale price was paid out of the funds of the firm M/s. Amarnath Krishan Lal. At the time of purchase of the shop, there were four partners of the aforesaid firm and they had equal share in the suit property as is explicitly delineated in the plaint. According to the appellant-plaintiff. M/s. Amarnath Krishan Lal partnership firm was comprised of four partners at the relevant time. As the deceased-defendant was the head of the family, the suit shop was purchased in his name out of the funds of the firm M/s. Amarnath Krishan Lal. It was in fact, a benami transaction in the name of deceased-defendant but the property belongs to the firm M/s. Amarnath Krishan Lal of which the appellant-plaintiff being one of the partners also has ownership interest in the said shop. Further plea of the appellant-plaintiff, taken in the plaint, was that the parties were living jointly in the same building having the joint, interest from the year 1963 to 1984 with common mess.

8. The sole controversy raised in the suit which is required to be determined by the Court is as to whether the suit property was purchased out of the funds of the firm M/s. Amarnath Krishan Lal in which the appellant-plaintiff was one of the partners and is squarely covered in the issues framed by the trial Court in the suit.

9. The case of the appellant-plaintiff as projected in the suit is that the suit shop belonged to and was owned by four partners of the aforesaid firm M/s. Amarnath Krishan Lal. The appellant-plaintiff further admitted that two of its partners namely Sudershan Kumar and Mohan Lal retired from the partnership by abandoning their claims in favour of the continuing partners and in this manner, the appellant-plaintiff became the owner of the suit shop to the extent of one half share. The appellant-plaintiff, however, retired from the firm on 30-1-1984 and in para-2 of the retirement deed, the contents and its execution stands admitted by the appellant-plaintiff, Tilak Raj on 2-1-1988 which clearly recites that the party of 1st Part hereby, acknowledges to have received whatever was agreed to be due towards him in the assets of the aforesaid firm and nothing is due towards the parties of the 2nd part or towards the firm. When Sudershan Kumar and Mohan Lal had lost their shares in the suit property on their retirement from the firm, the same could also be taken as true in case of appellant-plaintiff on his retirement on 30-1-1984 from the firm. In such an event, the appellant-plaintiff cannot legally press his claim to be the owner of the suit property to the extent of half of the share on retirement of his two brothers namely Sudershan Kumar and Mohan Lal.

10. That apart, when the property was purchased in the name of the deceased-defendant and subsequently also when his two brothers retired from the partnership of the firm, the appellant-plaintiff did not claim the ownership in the property of the firm rather he admitted in unequivocal terms in the retirement deed to have received whatever was agreed to be due towards him in the assets of the aforesaid firm.

11. It may further be pointed out that the appellant plaintiffs share in the firm was 20% as against the deceased-defendant who held 40% share in the firm. So the appellant-plaintiff on this count also cannot assert his claim of ownership in the suit property to the extent of half of the share with the respondents.

12. In order to prove that the property belongs to the firm for having been purchased out of the funds of M/s. Amarnath Krishan Lal, the appellant-plaintiff has referred to certain entries made in the balance sheet, the books of account

and other relevant material of the partnership firm. Entries referred to by Mr. R.S. Thakur, learned Counsel appearing for the appellant-plaintiff indicate that not only the amount had been taken by the deceased defendant to purchase the property in his name but, however, PW Krishan Dev who happened to be the accountant of the firm M/s. Amarnath Krishan Lal who, examined by the appellant-plaintiff in his evidence, stated that the balance sheet of the firm for the year 1967-68 at page 21 of the case file is under his handwriting and bears his signatures which is marked as EXPW KD. He submitted that after serial No. 5 of this balance sheet a separate account known as property khata, of Krishan Lal partner (defendant) was maintained. It is also in his statement that when he prepared the balance sheet EXPW KD, he had brought forward the entries of the year 1966-67 in the said balance sheet. This fact is further proved by account sheet marked as EXPWKD1. It was in the knowledge of the partners of the firm M/s. Amarnath Krishan Lal that the respondent defendant had purchased the property in his own name and none of the partners including the appellant plaintiff objected to it. The Stand of the appellant-plaintiff, therefore stands negated by the aforesaid entry in the balance sheet of the firm and proved by the Accountant, PW Krishan Dev in his sole testimony. Nothing was suggested by the appellant-plaintiff to the witnesses in his cross-examination with regard to this entry as to its genuineness. It was for the appellant-plaintiff to prove that the amount withdrawn from the firm by the deceased-defendant was for the purchase of the property as nothing had been adjusted towards his share or that it was in his share and the amount withdrawn was not the share of the deceased-defendant with which the latter purchased.

13. It is admitted case of the parties that the suit property was purchased for sale consideration of Rs. 51,000/- out of which Rs. 44,000/- was paid through different cheques from 1-1-1967 to 30-5-1967 and balance amount, of Rs. 7,000/- was paid by the deceased-defendant in cash on 7-10-1967 at the time of registration of the sale deed.

14. In view of a specific plea raised by the appellant-plaintiff, that the suit property has been purchased with the funds of the firm, in that case, it would become the asset of the firm M/s. Amarnath Krishan Lal. It is stated that the firm was consisted of four (04) partners at the time of purchase of the property. Two of the persons

namely Sudershan Kumar and Mohan Lal retired from the partnership and none of them claimed share in the property in asserting that it is a property of the partnership firm. The appellant-plaintiff also in the like manner, while executing the retirement deed dated 30-1-1984, admitted without any reservation that he had received whatever was due to him from, the assets of the firm. The appellant-plaintiff, thus, had to prove by evidence both orally and documentary that the amount with which the suit property was purchased, belonged to the partnership firm. It could not be assumed that the said property forms, the part of one of the assets of the firm or it was purchased by the firm.

15. In reiterating his submission, Mr. R.S. Thakur, learned Counsel appearing for the appellant-plaintiff further reinforced his contention in submitting that the deceased-defendant, Krishan Lal Gupta had no separate funds to purchase the suit property and the amount of sale consideration was with-drawn from the account of the Arm deposited in its account in the Bank and then paid through various cheques to the person from whom the suit property was purchased. This plea also stands negatived by a gift deed dated 24-8-1963, the contents and execution of which has been admitted by the appellant-plaintiff vide which a sum of Rs. 15,000/- each were given to Tilak Raj, appellant-plaintiff and Sudershan Kumar to join business with the deceased-defendant which further shows that the deceased-defendant had sufficient funds to purchase the property in his own name. This is so, when the appellant-plaintiff could not prove by evidence that the amount of sale consideration with which the suit property was purchased belonged, to the partnership firm. Had the appellant-plaintiff any interest in the suit shop, he would have indicated it in the retirement and compromise deeds. In the retirement deed, the appellant-plaintiff admitted that whatever was due in the assets of the firm has been received by him. In view of this admission of the appellant-plaintiff in the retirement deed and non-mention of having any interest in the suit shop in the compromise deed, the appellant-plaintiff is estopped from acting contrary to his admission, even assuming though not admitting the property was a part of the assets of the firm until such an admission is withdrawn by him or proved erroneous.

16. It is a well settled proposition of law that admission is the best evidence and is decisive of the matter with which the opposite party can rely upon. The appellant plaintiff even continued to accept the deceased defendant as the sole owner of the property who had been getting the rent of part of the property leased out by him and did not claim any right in respect of the said property from the date it was purchased till his retirement from the firm in the year 1984. This amounts to estoppel by conduct and the appellant-plaintiff is estopped from claiming any share in the property.

17. In view of the aforesaid revealing documentary evidence viz, sale deed, retirement deed, balance sheet (referred supra), compromise deed and at top of it appellant plaintiffs own admission that he has received his due in the assets of the partnership firm M/s. Amarnath Krishan Lal. As estoppel relates to the act prior to litigation, the conduct of a party in the course of the litigation is wholly irrelevant. No actual verbal representation is necessary, but it is quite enough that the conduct of the party leads another to act in the belief that he asserts no claim to the property.

18. The doctrine of estoppel precludes a party from taking up a position which is inconsistent with an admission which he has previously made. The admission made by the appellant plaintiff in paragraph 2 of the retirement deed dated 30-1-1984 (EXPW 1/9) to have received whatever was agreed to be due towards him in the assets of the firm M/s. Amarnath Krishan Lal is of an unequivocal character and creates a clear unambiguous estoppel against him. In its plain language, it must be certain to every intent. Admissions are declarations against one's interest; they are good though not conclusive, is decisive of the matter unless successfully withdrawn or proved untrue. On the other hand it creates an absolute bar, and an admission operates as estoppel and can appropriately be used against its maker.

19. Appellant plaintiffs counsel Mr. R.S. Thakur further asserted that the property in possession of the deceased-defendant was in joint ownership of the partners, including the appellant plaintiff and the former was liable to account for usufruct enjoyed from the income and benefits derived as rent in respect of the said property and it is well within the right of the appellant-plaintiff to seek the

settlement of the accounts and receive his share to the extent of half of the share, after taking into account of whatever is found due towards him from the assets of the firm M/s. Amarnath Krishan Lal, it was undoubtedly to the knowledge of appellant plaintiff that the deceased defendant was receiving the rent of the suit property alleged to have been purchased out of the funds of partnership firm M/s. Amarnath Krishan Lal but allowed him to enjoy usufruct without any murmur, objection or protest till the commencement of the suit and he did not claim any share. The conduct of the appellant-plaintiff, therefore, clearly amounted to acquiescence and the appellant plaintiff is estopped by conduct either to exclusive ownership of the suit property or seeking settlement of the account in respect of the rent and other benefits derived by the defendant from the said property since its purchase. The contention raised by Mr. R.S. Thakur, appellant-plaintiffs Advocate, therefore, is of no avail to him and the same does not merit acceptance.

20. In *Carncross v. Lorimer* (1861) 3 L.T. 130, Lord Campbell enunciated the principle of acquiescence in these words :.Generally speaking, if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous licence.

21. It is one of the essential elements of estoppel by conduct that the party against whom it is pleaded should have acted in a manner or made some representation intended to induce a course of conduct by the party to whom it was made.

22. In this case, the appellant plaintiff has abstained from asserting any right to the said property with knowledge, its enjoyment and receipt of the rent by the deceased-defendant during all this period he remained as partner of the firm M/s. Amarnath Krishan Lal, is clear recognition of the ownership of the deceased-defendant over the suit property and, therefore, appellant-plaintiff cannot be allowed to behave differently as the rule of estoppel must prevail. Estoppel, as is well known, is a rule of evidence which prevents one party from denying the

existence of fact which he represented as existing and upon which representation another person has been induced to act to his detriment. The appellant plaintiff, therefore, in such an event cannot be said to have any claim or entitlement or interest in the suit property which is proved to have been purchased by the deceased-defendant from his own source of income and the deceased-defendant was alone its owner and enjoyed its usufruct and now the respondents have become its owners. Having done so, it is not now open to the appellant plaintiff to turn around and question the ownership of the deceased defendant, the predecessor in interest of respondents in respect of the suit property and ask for the settlement of the account and claim share to the extent of half of the share both in the property and the income derived from there.

23. Mr. R.S. Thakur, learned Counsel appearing for the appellant-plaintiff further pleaded that it was a joint Hindu Family when the property was purchased in the name of respondent defendant being head of the family. In order to prove this plea, it was incumbent on the appellant plaintiff to establish by positive and cogent evidence that the property purchased was the property of joint family in which he is asserting his claim to the extent of half of the share by division.

24. It is pertinent to point out that where a member of the joint family purchases a property in his own name, the presumption is that it is purchased by him from his own funds, unless it is otherwise proved. The initial burden always lies upon a party asserting that any item of property was joint family property. It is so because the existence of a joint family does not carry the presumption that the property purchased by any member of the family is a joint property of the family. Burden shifts upon a party Claiming to have acquired the property from his own income without any financial aid of joint family when it is established that the property is joint having been purchased out of the common funds of the joint family.

25. The appellant plaintiff could not succeed to prove the issues, the onus of which was on him to discharge that the property in suit was joint. I see no reason to differ from the aforesaid finding of the trial Court and this finding in question is in accord with the guidelines laid down in this behalf by Privy Council in Appalaswami v. Suryanarayanarnurti AIR 1947 PC 189 referred to and relied upon by the trial

Court in its judgment.

26. On the dichotomy of the record, it is clearly emanated that the sale deed does not recite that the payment of sale consideration was made out of the partnership account or the property was purchased in the firm's name. There is no document placed on record and relied upon by the parties showing that the amount was drawn from the Bank in the account of firm and the same was paid to the vendors by Krishan Lal at the time of purchase of suit property. An amount of Rs. 44,000/- was paid from his personal account by the deceased defendant towards the agreement to sell for the suit property as it is clearly gatherable from the balance sheet of the Bank account.

27. As regards the financial position of the deceased defendant to pay the money in respect of the suit property, it is borne out from the gift deed dated 24-8-1963 (EXPW1/ 12) duly registered by virtue of which Rs. 30,000/- (Rs. 15,000/- each) were gifted to Tilak Raj and Sudershan Kumar to join partnership. It is also not in dispute that the deceased-respondent was a partner in other partnership business and he had sufficient earnings from the said business. The deceased-defendant was also receiving rent in respect of the suit shop Amar Textiles shop by executing rent deed in this behalf. This clearly shows that the deceased-defendant had sound financial position and had also sufficient funds to purchase the suit property.

28. That apart, there is no document placed on record by the appellant-plaintiff showing that the assets of the firm also included the suit property. The plea put across by Mr. R.S. Thakur, learned Counsel for the appellant plaintiff on this count also cannot be accepted. Therefore, the findings returned by the trial Court in respect of the issues 1 to 05 after careful and elaborate assessment of the evidence on record are sound and unimpeachable and, therefore, the same are hereby affirmed.

29. For the foregoing reasons, the appeal possesses no merit and the same is, accordingly, dismissed. Costs throughout shall be met by the unsuccessful appellant-plaintiff.

