P. Krishna Bhatta and Others Vs Mundila Ganapathi Bhatta (died) and Others

Court: Madras High Court

Date of Decision: July 15, 1954

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 66
Contract Act, 1872 â€" Section 182

Citation: AIR 1955 Mad 648

Hon'ble Judges: Ramaswami, J; Govinda Menon, J

Bench: Division Bench

Advocate: T. Krishna Rao, for the Appellant; M.K. Nambiar and K. Vithal Rao, for the Respondent

Judgement

Ramaswami, J.
These are two connected-appeals arising from the decrees and judgment of the learned Subordinate judge of South

Kanara in O.S. Nos. 115 of 1947 and 127 of 1948.

2. The dispute in this case relates to three items of properties, viz., two parcels of land used for raising paddy and arecanut in Kedila village and a

coffee estate in Coorg, ten miles from Mercara.

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3-14. (After discussing the facts of the case His Lordship proceeded.)

The points which fall for consideration are twofold, viz., whether in regard to these items of properties Ganapathi Bhatta was benamidar and

apparent owner and whether Section 66, C.P.C. applies to the transactions relating to the two items or Kedila properties, in regard to which two

sale certificates have been issued in favour of Ganapathi Bhatta.

15. On a careful consideration of the entire circumstances of the case we have come to the same conclusion as the learned Subordinate Judge in

regard to the two items of Kedila properties and in regard to the coffee estate we have come to the conclusion that as per the even tenor of the

sale deed which has not in any way been rebutted and shown to be what it is not, defendants 8 and 9 differing from the learned Subordinate Judge,

should be held to be the real as well as apparent owners in moieties. Here are our reasons.

16. We shall take up the two items of Kedila properties first. In regard to them there are several circumstances clearly showing that Ganapathi

Bhatta was not only the apparent but also the real owner.

17. The question of the greatest difficulty that arises in dealing with the benami transactions is how to distinguish the real from the benami. For

indeed it is a matter of common experience that in these benami transactions, the proceedings which would attend a real transfer are carefully gone

through in order to throw a veil of reality, and all the subordinate parts arc notoriously fitted in to correspond with the benami agreement in its

entirety. The same motive which dictated an ostensible ownership would naturally dictate an apparent course of dealing in accordance with such

ownership -- "Rohee Lall v. Dindayal Lall", 21 SW R 257 (A). And the subsequent acts done in the name of the nominal owner would be

explained by a reference to the original transaction.

18. The essential characteristic of the benami transaction is that it is not intended to be operative. When a transaction is once made nut to be

benami, the benamidar absolutely disappears for the title. He is merely a name-lender in the transaction, In other words, his name is simply an alias

for that of the person beneficially interested. The first thing therefore that has got to be done is to find out the real intention of the parties.

19. In order to find out what is the real intention of the parties to a transaction, no hard and fast rule can be laid down, but each case, as it arises,

but be decided according to its own peculiar circumstances and probabilities. In scanning the circumstances and weighing the probabilities, the

consensus of legal decisions lay down that we must have regard to the following facts, viz., (i) the source from which the purchase money was

derived; (ii) the possession of the property, i.e., (a) the party in possession, and the nature and character of his possession; (b) whether possession

was taken after the alleged gift or purchase--If not taken, why not; (iii) the position of the parties and their relation to one another; (iv) the

circumstances, pecuniary or otherwise, of the alleged transferor; (v) his motive in making the alleged transfer; (vi) the custody and production of the

title-deed; and (vii) the previous and subsequent conduct of the parties. But it must be noted here that each of these circumstances taken by itself is

of no particular value and affords no conclusive proof of the intention to transfer the ownership from one person to the Other. One of them may be

of greater value than the other; for instance, the source of the purchase money has always been regarded as the most important criterion, though it,

in no sense, affords conclusive proof of the matter. But a combination of some or all of them and a proper weighing and appreciation of their value

would go a great way towards indicating whether the ownership has been really transferred, or where the real title lies. But these circumstances

when combined, or each one of them by itself, only raise a presumption of real ownership in favour of the party, who is able to prove all or any of

them, and thereby shift the burden of proof to establish his title to the property in question upon the opposite party, and in case he is unable to

discharge the burden by adducing evidence of some one or other of the facts indicated above to rebut the presumption, he will fail. But if he is able

produce such evidence, a presumption will again arise in his favour and thereby the burden of proof will be shifted to the other party. And thus

after raising proper presumptions and placing the burden of proof upon proper patties, we must see whether the facts proved in this case fit in

consistently with the theory of the benami or real course of dealing with the property and judge accordingly.

20. Applying these principles we find that there is no motive in this case for the joint family of Bheemayya to put the properties benami in the name

of Ganapathi Bhatta. The motives which actuate the beneficial owner have been summarised as joint family system, intention to make secret family

provision, Debutter, trand, avoidance of annoyance, mysterious desire to keep matters secret, risk in society and wakfs. In this case in regard to

item 1 the motive is stated to be nothing more than that Ganapathi Bhatta was the factotum of Bheemayya and was looking after his affairs and that

it was convenient therefore to take the sale certificate in his name and that in the case of item 2 there was an apprehension that Narayaua Bhatta"s

sons and others might cause trouble. But this motive when analysed is found to be totally incorrect. In regard to item 1 the case for P.W. 1 is that

he himself accompanied defendant 9 to the Court auction sale and was present both at the time when his father gave money to defendant 9 and

also at the lime when defendant 9 purchased the property in Court auction. If that were so, there can be no reason for taking the sale benami in the

name of Ganapathi Bhatta in order to avoid inconvenience, viz., not appearing in Court, and attending to the attendant transactions. It is also

significant in this connection that so far as Barimar properly was concerned it was purchased in the name of Bheemayya himself. Bheemaya has

also engaged Messrs. B. Ramachandra Rao and Mangesh Rao to purchase the property at Court auction on his behalf. We are unable to follow

how by purchasing the property in the name of Ganapathi Bhatta any trouble from Narayana Bhatta"s sons and others could have been avoided. It

is unnecessary to multiply these details to show that none of the motives which is usually stated to be present for the coining into existence of a

benami transaction is either apparent or made out this case.

21. The source of purchase money is always considered to be an important factor. In regard to item 1 a sum of Rs. 1915 had to be paid. In regard

to item 2, it involved only a sum of Rs. 15 concerning which there could be no dispute that it could have come from Ganapathi Bhatta. In addition

the real consideration viz., the discharge ot Rama Rao debt has been made by Ganapathi Bhatta mortgaging items 1 and 2 in favour of the Pandit

Bank as already set out. In regard to the first item the case for the joint family of Bheemayya is that first of all Ganapathi Bhatta was a pauper and

was not in a position to finance the transaction and secondly, that this sum of money was advanced by one Upendra Prabhu to Ganapathi Bhatta

on the instructions of Bheemayya. So far as this Ganapathi Bhatta being a pauper the evidence on record shows the exact contrary. It is enough to

refer to Ex. B. 27 which shows that this Ganapathi Bhatta was dealing in cardamom, Ex. B.10 is a letter written by Bheemayya to Ganapathi

Bhatta asking the latter to bring money. Ex. B.9 is a promissory note for Rs. 1000 executed by Govinda Bhatta and another in favour of Ganapathi

Bhatta. Exs. B.11 and B.12 are other letters written by Bheemayya to Gasmpathi Bhatta showing that the former was asking the latter to fetch

moneys. Ex, B.31 is registration copy of an assignment deed oÃ¯Â¿Â½ a mortgage right for Rs. 3900 executed by Ramachandra Banninthayya in

favour oi Bheema Bhatta showing that Ganapathi Bhatta had a fixed deposit in the Vitla Society for a considerable amount. This Ganapathi Bhatta

has given evidence shoeing that he was not a pauper as he is pictured to be and that he was not dependent upon Bheemayya''s family for his

maintenance. This evidence has not in any way been rebutted. Then turning to the allegation about Upendra Prabhu, it is also the case of Ganapathi

Bhatta that he took a sum of money from Upendra Prabhu on the instructions of Bheemayya who had transactions with Upendra and that

subsequently this amount was adjusted between himself and Bheemayya. On the other hand, it is the case for defendant 9 that this Bheemayya

owed him certain moneys in regard to rice, etc. and that therefore he took the money from Upendra on a Havala by Bheemayya. It is quite true

that in regard to this aspect of the case we have no clinching evidence. P.W. 1 did not choose to examine Upendra who is alive and has got

accounts, though he is found to have been summoned by him several times and no explanation is forthcoming why this Upendra has not been

examined. In other words, as rightly pointed out by the learned Subordinate Judge, the evidence regarding the funds is not clinching either way.

There is only the inconclusive evidence of P.W. 1 as against the evidence of D.W. 1 supported by some particulars. We need not point out that

when Ganapathi Bhatta has not been shown to be a pauper and that he was a person possessed of means and could have financed the transaction

and he has also put forward a plausible explanation as to how the money taken from Upendra was as a result of adjustment between himself and

Bheemayya, it cannot be said that P.W. 1 has affirmatively and satisfactorily shown that the source of the purchase money for the purchase of

these two items of property was the joint family funds of Bheemayya.

22. There is no dispute regarding the custody of documents of title. All of them are coming only from Ganapathi Bhatta. It is inconceivable that if

Ganapathi Bhatta was a benamidar Bheemayya would not have taken the precaution of keeping in his custody the original title deeds relating to

these properties. The custody of title deeds has always been considered to be an important circumstance showing who is the real owner. It is quite

true that in order to get over this P.W. 1 has been alleging that Ganapathi Bhatta was his maternal uncle and that they expected him to hand over all

the properties to them and that it was only after the death of the father Bheemayya that he started double-crossing them. It is easy to make

allegations of this nature. In 1943 itself the family of Bheemayya, according to P.W. 1, had started suspecting the reliability of Ganapathi Bhatta

and took the agreement Ex. A.51. If that were so, why did they not ask for the handing over of the title deeds following it up with the transfer of

registry or the execution of the Saswatha Mulgeai referred to in Ex. A.51? The learned Subordinate Judge therefore has rightly placed reliance

upon this circumstance as discounting the story of P.W. 1 and the custody of the title deeds with D.9 as a strong circumstance in favour of his

version.

23. Though it was asserted by P.W. 1 that they were in possession of the properties in dispute, it is found as a matter of fact that Ganapathi Bhatta

was in possession of these properties. The changing leases in respect of item 1 are in favour of Ganapathi Bhatta and have been marked as Exs.

B.14 and B.15. There has been no transfer of the registry or the leases. In regard to item 2 the Chalgeni chits in the name of Ganapathi Bhatta have

been marked as Ex. B.8 series. The patta in favour of Ganapathi Bhatta is marked as Ex. B.17.

In regard to the payment of cist, P.W. 1 has admitted in cross-examination that the assessment in respect of the properties appear in the name of

defendant 9. It is also evidenced by Ex. B-16. P.W. l, did not produce any assessment receipts. In cross-examination though he deposed that the

areca garden alone is in the possession of-defendant 9 and all the paddy fields are in his possession, he deposed that he did not know in whose

name the leases of the paddy fields had been taken and that he was not present when they were executed and that they are not with him and that

the leases executed after the death of his father fire with him and that he had not produced them, that as defendant 9 was absent the leases were

not got executed in 1946, that he (defendant 9) used to attend to all those affairs and he was attending to the household duties and that after

disputes arose he did not remember if he ""took leases from the tenants or not. He also admitted that he produced certain leases in the suits filed by

defendant 9 against his tenants but that he did not remember to which year they related though they were in his name and he Bled them to prove

that lie had taken the leases. In Other words, it is clear that the lease deeds have all been taken by defendant 9 as spoken to by him and that for a

couple of years when he was absent leases were taken by P.W. 1. This cannot be said to be due to ignorance oÃ¯Â¿Â½ P.W. 1 because P.W. 1 is the

Patel and is also seen to be well-versed in Court affairs. It is obvious that the patta, cist receipts and leases all stand in the name of defendant 9. It

is not the case for P.W. 1 that this Ganapathi Bhatta was being paid any remuneration as agent or Kariyasthan. On the other hand, the

correspondence filed shows that Bheemayya was asking Ganapathi Bhatta to bring moneys and did not treat him as a Kariyasthan at all. (24) So

possession which is generally considered an important factor for determining whether a tran saction is a benami one or not is found to be definitely

with Ganapathi Bhatta in his own right and not as the Kariyasthan or agent of Bheemayya.

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25. to 35. (After discussing the facts of the case His Lordship proceeded.) Therefore, differing from the learned Subordinate judge, we hold that

one-half of this coffee estate is joint family property of Bheemayya and therefore liable for partition in the partition suit. The decree and judgment of

the lower Court in O.S. No. 127 of 1948 will stand suitably modified in so far as one moiety of this coffee estate is concerned and in the light of

the observations made above.

36. Point 2. -- From the earliest times down to the present day benami purchases at auction sales have been forbidden by the Civil Procedure

Code; see Regulation VII of 1799 and the Sudder Dewani Adalat case of--"Ram Manick Moody v. Jynaraen", 6 I D 283 (B). Then the same

inhibition was enacted in Section 260 of Act 8 of 1859; vide the Full Bench ruling in--"Mt. Bahuns Kowar v. Buhoory Lall," 11 W .Rep 16 (C),

which became -- "Mt. Bahuns Koonwar v. Lalla Bunureelall"", 18 W R 157 (D). Section 317 of the Act of 1832 in its turn gave rise to conflicting

decisions. To do away with the divergence of judicial opinion Section 68 of the present Code was enacted. But there have always been two

limitations in regard to this prohibition u/s 86 C.P.C. Suits for recovery of possession were not barred u/s 317, C.P.C. of 1882 or stand barred u/s

60 of the Code of 1908 if the purchase is made by persons with express or implied authority or agency or by persons who stand in a fiduciary

position.

The second limitation is about the purchases made with joint family funds by the managing member of a Hindu family in the name of a third person.

Where the managing member of a Hindu family makes a purchase with joint family funds but takes the sate in the name of a third person, there is a

conflict of opinion as to whether any member of the family can sue the third person on the grounds that the purchase was benami for the managing

member and so emires for the benefit of the Family. This Court has held that he can--Vide Nataraja Mudaliar v. Kamaswami Mudaliar'', A I R

1922 Mad 481 (E). The reason is that a purchase by a managing member in the name of a third-person cannot be considered to have been made

on behalf of all the members of the family and so cannot be considered to have been made ""on behalf of the plaintiff"" within the meaning of the

section. The Allahabad High Court has held to the contrary basing its decision on the ground that a purchase by a managing member is made on

behalf of all the members of the family and so is made on behalf of the plaintiff; Baijnath Das Vs. Bishan Devi and Another, .

It purported to follow the decision of the Privy Council in Suraj Narayan v. Ratanlal, AIR 1917 P C 12 (G) which was, however, a case u/s 317

of the old Code which barred a suit on the ground that the purchase was made ""on behalf of any other person,"" The decision in Baijnath Das Vs.

Bishan Devi and Another, was dissented from in A. Nataraja Mudaliar Vs. D.P. Ramaswamy Mudaliar and Others, . The object of Section 66 is,

as has already been seen, to put a stop to benami purchases at Court sales and when a managing member makes such a purchase in the name of a

third person, he is doing something which is wholly wrong and cannot be presumed to be acting on behalf of the family. In the present case

Ganapathi Bhatta has been pressing the application of Section 66, C.P.C., on the ground that the suit in the present circumstances would not lie.

The other side anticipating this objection has throughout been alleging in the pleadings that Ganapathi Bhatta was an agent for the joint family of

Bheernayya throughout these transactions and that therefore the prohibition u/s 66, C.P.C., would not apply to this case. Ganapathi Bhatta by no

stretch of imagination can be described as the agent of Bheemayya for the purpose of buying this property in Court auction sale.

In legal phraseology, every person who acts for another is not an agent. A domestic servant renders to his master a personal service; a person may

till another''s field or tend his Hocks or work in his shop or factory or mine or may be employed upon his roads or ways; one may act for another

in aiding in the performance of his legal or contractual obligations to third persons, as when he serves a public carrier, warehouse-man or innkeeper

in performance of the latter''s duties to the public. In none of these capacities he is an ""agent"" within the above meaning as he is not acting for

another in dealings with third persons. It is only when he acts as representative of the other in business negotiations, that is to say, in the creation,

modification, or termination of contractual obligations between that other and the third persons, that he is an ""agent."" Representation of another in

business negotiations with third persons so as to bind such other by his own acts as if they were done by the former, is of the essence of the

relation of agency and the distinguishing feature between art ""agent"" and other persons who act for another.

Looked at from this point of view, an agency is a contract of employment for the purpose of bringing another-in legal relation with a third party or

in other words, the contract between the principal and agent is primarily a contract of employment to bring him into legal relation with a third party

Or to contract such business as may be going on between him and the third party. An agent is thus a person either actually or by law held to be

authorised and employed by any person to bring hint into contractual or other legal relations with a third party. He is a representative vested with

authority, real or ostensible, to create voluntary primary obligations for his principal by making promises or representations to third persons

calculated induce them to change their legal relations. Representative character and derivative authority may briefly be said to be the distinguishing

features of an agent.

It is not stated in the pleadings in the present case as to when precisely Ganapathi Bhatta was constituted an agent, or on what terms he was so

constituted or when the agency was got terminated or other details to spell out an agency. On the other hand, it is seen that Ganapathi Bhatta was

a man of moderate affluence and was in a position to purchase these properties and there was no motive for him to be the ''agent of Bheemayya

and Bheemayya had no motive to constitute him as an agent. In fact P.W. 1 accompanied him to the Court for these purchases and that when

Bheemayya wanted to constitute an agent he Constituted two lawyers for that porpose. The correspondence in this case clearly snows that

Bheemayya''s family and Ganapathi Bhatta were not in the relationship of principal and agent. On the other hand, in regard to the first two items

Ganapathi Bhatta was in possession and enjoyment of those properties in his own right and as regards the coffee estate he and the joint family of

Bheemayya were working as equal partners. Therefore, the plea of agency invented to get over Section 66, C.P.C., fails. In regard to the plea of

Ganapathi Bhatta the decision in A. Nataraja Mudaliar Vs. D.P. Ramaswamy Mudaliar and Others, referred to above is an authority directly

against the position taken by him. The same position has also been taken in a decision of the Calcutta High Court in -- Durga Das De Vs.

Bagalananda De and Others, . The position is clearly put thus at p. 568 ;

The purchase was not made on his behalf within the meaning of the section, but on behalf of defendant 1, it on behalf of any one. These words in

the section refer to private agreements or understandings between the ''benamidar'' and the person who employs him;--''Bodh Singh Doodhooria

v. Ganesh Chunder Sen,'' 12 Beng L R 317 (1). Plaintiff does not claim the property on the ground that it was brought on his behalf, or even on

behalf of the joint family. His case is that the joint family, in fact, bought it because it was bought with funds belonging to the joint family by

defendant 1, who as ''karta'' was, in the words of Mayne in his work on Hindu law acting as its mouth-piece. The ''karta'' is not the agent, or

trustee of the joint family, but his position has been described as like that of a chairman of a committee.

The purchase being made out of joint family funds, ''ipso facto'' it become immediately the property of the joint family by operation of law.--''Bodh

Singh Doodhooria v. Ganesh Chunder Sen,'' (supra) (I). Nor does the plaintiff claim through defendant 1, in the sense indicated in the section. His

title is not derivative, like that of an heir, legatee, assignee or purchaser, and, if it could be argued that the plaintiff however unfortunately, did fall

within the words of Sub-section (1), if read literally and strictly, he is protected under the provisions of Sub-section (2).

The learned Advocate Mr. Krishna Rao sought to get over this position by pleading that the term ""person"" in Section 66, C.P.C., cannot be made

to cover joint family and for this contention we see no authority or reason to uphold. On the other hand, the term '' person"" is wide enough to cover

the joint family of Bheemayya and in the plaint it has been made clear beyond all doubt that the property was purchased by the joint family of

Bheemayya benami in the name of Ganapathi Bhatta out of their joint family funds and that the beneficial interest was held by the joint family and

that the property should revert to the joint family and become partible property. In other words, this was not a case of Bheemayya purchasing the

property in derogation to the joint family but the joint family itself purchased it and is not the case of the Chairman of the Committee referred to in

the Calcutta decision buying property but the Committee itself buying the property. It is this entity or person which is hit by Section 66, C.P.C.

Therefore, though it has become theoretical in view of our previous findings, we hold that Section 66, C.P.C., on the pleadings of the joint family of

Bheemayya, will constitute a bar for the recovery of the two items of properties covered by the sale certificates.

37. In the result A.S. No. 499 of 1950 is dismissed with costs, and in A.S. No. 500 of 1950, the decree of the lower Court is modified in the

manner stated above. Each party will bear his costs in the appeal, and in the lower Court.