(1936) 08 BOM CK 0017

Bombay High Court

Case No: None

Dattatraya Sitaram Kulkarni and Others		APPELLANT
	Vs	
Shankar Mahadji Kulkarni		RESPONDENT

Date of Decision: Aug. 18, 1936

Acts Referred:

- Trusts Act, 1882 - Section 90

Citation: AIR 1938 Bom 250

Hon'ble Judges: Rangnekar, J

Bench: Division Bench

Judgement

Rangnekar, J.

These are two cross appeals. The question in Second Appeal No. 841 is, whether certain Sheri lands which were included, in the suit by the plaintiffs as being part of the joint family property, were joint family property in which the plaintiffs had a share. The trial Court accepted the plaintiffs'' claim, but the Appellate Court rejected it. Unfortunately the judgment of the Appellate Court is somewhat meagre and does not clearly deal with the contentions raised by the parties.

2. The family pedigree is set out at p. 15 of the record. Laxman was the common ancestor. He had four sons. The plaintiffs claimed through the second son, Sitaram; and the contesting defendants claimed through the third son, Mahadji. Now, it is common ground that, among others, Laxman was in possession of certain Sheri lands as a lessee from Government. There is nothing to show when this lease terminated, though the presumption seems to be that in 1883 the period of the lease had come to an end. It is well known that the Sheri lands are Crown lands, and until 1912 or 1913 they used to be leased out by Government to various persons as lessees, in order that the lands could be cultivated and developed. For this purpose the leases formerly used to be given for a fixed period, until some time towards the end of the nineteenth century the duration was increased, and it is borne out by

decisions of this Court that these leases came to be made for a fixed period of 30 years. It is also clear that these being Crown lands were resumable by Government on the termination of the period of the lease. In 1883, Ex. 90 shows that a patta in respect of the suit Sheri lands was given by vernment to Mahadji; and in my opinion the rights of the parties in this case can only be determined upon the construction to be placed on the grant as contained in the patta. It is well-established that there is nothing to prevent a member of a joint family from obtaining a grant from Government for his own benefit: Katama Natchiar v. Rajah of Shivaganga (1861) 9 M.I.A 539 Whether such a grant enures for the benefit of the family of which he is a member must, as their Lordships of the Privy Council have held, depend upon the terms of the grant: Sri Mohant Govind Rao v. Sita Ram Kesho (1898) 21 All 53. It is also open to such a person to treat, what initially was his separate property, as joint family property; and it is equally possible for the family or the members of the family to prove that the consideration paid to Government for the grant originally proceeded from the family funds. In either of these cases though, initially the grant was the separate property of the grantee, the property would acquire the character of joint family property in which according to Hindu law, the other coparceners would be equally interested. About this time there was a disruption of the family in the sense that the moveable property of the family was divided. There is a clear admission of the plaintiff to that effect in his evidence; and I think the learned Judge in appeal was right in holding that in 1883 the sons of Laxman became tenants-in-common of the joint family property.

3. The plaintiffs'' case, as made out in the pleadings and during the hearing of the suit, was that these Sheri lands originally belonged to the joint family of which Laxman was the head. On Laxman''s death the property came to Mahadji, and he obtained a lease from Government as an heir of Laxman. Therefore the property in the hands of Mahadji would be ancestral property. Subsequently, in 1912, Government passed a resolution, which is set out in Dharma v. Keshav AIR (1934) Bom 219. The effect of that resolution was to authorize the district officers to transfer the Sheri lands to the persons mentioned in the resolution, or persons answering the description set out in the resolution on full occupancy tenure, in consideration of such persons paying to Government the occupancy price, which was about twenty times the assessment. In 1914, by which time Mahadji was dead, Mahadji''s son Shankar and the son of his predeceased brother by name Mahadji Bhikaji were given these Sheri lands on occupancy tenure on payment of proper price by Government. Therefore it was submitted on behalf of the plaintiffs that the property being ancestral in the hands of Mahadji, when his son and nephew obtained the full occupancy tenure, they must be considered to be trustees of such lands for the benefit of the family under the terms of Section 90, Trusts Act (2 of 1882) read with III. (b) to that section.

4. It was never the case of the plaintiffs that the consideration for the grant came from the common chest; nor was it their ease that the lands were thrown into

hotchpot and treated as part of the joint family property. It follows from this that, if the plaintiffs fail to bring their case within the terms of Section 90, Trusts Act, they must fail. A somewhat similar question arose in the case to which I have referred. There it was held by Shingne J. that Section 90 would apply to tenants-in-common, who were members originally of a joint and undivided Hindu family. The plaintiffs therefore rely on that case as an authority in support of their contention. The learned Appellate Judge has observed in his judgment that the Sheri lands were leased for a period of thirty years in 1883 to Mahadji as the heir of Laxmam In my opinion, that finding has no evidence in support of it. Ex. 90, the patta which was granted to Mahadji, clearly shows on the face of it that the lease was granted to Mahadji for himself and not as heir of anyone else, nor for the benefit of the family, subject to this, that Government reserved to themselves the right to resume the lands. It is not disputed that at the end of the lease the Sheri lands were liable to be surrendered by the lessee to Government. If this is correct, then it follows that Mahadji became the direct lessee of Government and took the property for his own benefit; and if after that his heirs enlarged the nature of the tenure by reason of the resolution of 1912, it is difficult to see how they can be treated to be holding that property in a fiduciary capacity and for the benefit of the family.

5. The principle underlying Section 90 is, that no person who is in a fiduciary position can make any profit out of that position to the detriment of persons who are equally interested with himself in the property held by them all. In other words, a person, who is a limited owner by reason of his position, must not utilize that position to obtain an advantage to the detriment of his co-owners. It is not necessary in such cases that the other persons should make out that he obtained an advantage fraudulently or by misrepresentation, or by suppression of the true facts. All that Section 90 says is, that if there is a person in a fiduciary relation to another, he cannot take advantage of that position so as to gain something exclusively for himself which he otherwise would not have obtained, or but for the position which he held. It is difficult to see how, in a case like this, where a lease is made by Government to a person eo nomine and for himself, the principle of the section would apply. As I have stated, it is common ground that the lands belonged to Government. It was the sole prerogative of Government on the expiry of the lease to resume the lands and to give them on lease to somebody else. Government were not bound to lease them either to the original lessee or to his heirs. The resolution, which is relied upon, is nothing more than a recommendation made by Government to the district officers indicating that, as far as possible, the lands should be continued to the original lessees or rather to the persons who were in actual cultivation of them. But the distinction, which I am making, is emphasized by the very Illustration on which reliance is placed. The Illustration is in these terms:

(b) A village belongs to a Hindu family. A, one of its members, pays nazrana to Government and thereby procures his name to be entered as the Inamdar of the village. A holds the village for the benefit of himself and the other members.

6. Therefore it is necessary for the plaintiffs to establish, before the case can be brought u/s 90, that this property belonged to the family when Shankar and Mahadji Bhikaji obtained the grant of it. In my opinion they have failed to do so--and that is clear from the patta. It is said on behalf of the appellants that certain botkhat extracts, which were put in, support the case that the lease was renewed to Mahadji as an heir of Laxman; but if the lease was originally given to Mahadji eo nomine and for himself, a mere description made by a subordinate revenue officer in the botkhat or other revenue records, would not affect the nature of the grant in the title deed, namely the patta, Ex. 90.

7. In the case before Shingne J., the facts, again, were different from the facts in the present case. There it appears that the father of two persons had acquired a lease. On the death of the father the lease came to his two sons. The eldest son then executed a kabulyat in respect of his share in favour of the younger son. Then came the resolution of 1912, as a result of which the younger son making a false representation and by means of fraud succeeded in obtaining a grant for himself alone from the authorities. At that time there were disputes as regards the rights of the parties pending, which were the subject-matter of a suit, and so when the order transferring the occupancy tenure exclusively to the younger son was made, it was provided that the order was without prejudice to the rights of the other son as well as his assignee. Nor was there any reservation in favour of Government in that order. These facts clearly distinguish that case from the present one, apart from the fact, as I have indicated, that it is difficult to hold that on the facts of this case Section 90 comes into operation. Under these circumstances, it seems to me that the view taken by the Appellate Court with regard to the Sheri lands is correct. This appeal fails and must be dismissed with costs.

8. This brings me to the Cross Appeal No. 11 of 1932 made on behalf of defendant 1. This is limited to two contentions. The first contention was that the lower Courts were wrong in holding that there was no complete partition between the parties, and that assuming that the partition was partial, they were wrong in throwing the burden of proof that there was a partition in the family upon the defendants. Now, it is true, that once you have a partial partition either admitted or proved, the presumption of law would be that it was a complete partition, and the burden would be on the party who says that the partition was partial. The question therefore is whether there has been any miscarriage of justice by reason of a wrong view being taken by the Courts below with regard to onus. It does appear from the issues raised in the trial Court that the burden was placed upon the defendants; but it is clear from the issues raised in the Appellate Court that the burden was thrown on the plaintiffs, and the finding of the learned Judge in appeal was that the partition was partial, but that thereafter the parties continued to live as tenants-in-common. I do not think therefore there is any sub-stance in this contention.

9. The second point taken in this appeal is with regard to limitation. The appellant urged that on the evidence the Courts ought to have held that since 1911 the plaintiffs were excluded from the alleged joint family property. Apart from anything else, it seems to me that whether there has been or not an exclusion from the joint property, must be primarily a question of fact. The Courts below have considered the evidence. The trial Court has exhaustively gone into the question, referred to the conduct of the parties and to the fact that some part at any rate of the common property was in possession of the plaintiffs, and that the plaintiffs used to go to the home of the family and live with other members, and came to the conclusion that there was no exclusion. This finding was accepted by the learned Judge in appeal; and, in my opinion, no case is made out why I should take a different view from that taken by both the lower Courts. But it seems to me that the mainstay of the appellant as regards this contention is an admission made by the plaintiff in his cross-examination. No doubt, as an admission, it would certainly bind him, but it is clear on the authorities that a mere demand for partition followed by a mere refusal, if nothing more, would not amount to exclusion. In order to prove exclusion, it must be shown that there was a deliberate conduct on the part of the party alleging exclusion, to keep his co-sharer out of the enjoyment of the common property and a complete denial of his rights. In my opinion, there is no such evidence to support the contention; and, finally, it may be stated that the learned advocate on behalf of the appellant does not very seriously press this contention. In this view, this appeal also must be dismissed with costs.