

(2011) 12 CAL CK 0044

Calcutta High Court

Case No: S.A. No's. 336 to 338 of 1998

Smt. Santa Hazra

APPELLANT

Vs

Smt. Basanti Ghosh and Others

RESPONDENT

Date of Decision: Dec. 23, 2011

Citation: (2012) 2 CHN 228

Hon'ble Judges: Tarun Kumar Gupta, J

Bench: Single Bench

Advocate: Buddhadeb Ghoshal, Mr. Biplab Guha and Mr. K. J. Tewari, for the Appellant;
Animesh Kanti Ghosal, Swapan Debnath and Mr. Sutirtha Das, for the Respondent

Final Decision: Dismissed

Judgement

Tarun Kumar Gupta, J.

This appeal is directed against judgment and decree dated 9th of October, 1996 passed by learned Additional District Judge, 9th Court, Alipore in Title Appeal Nos. 199, 201, and 202 all of 1992 affirming judgment and decree dated 30th of January, 1992 passed by learned Assistant District Judge, First Court at Alipore in Title Suit Nos. 92 of 1987, 93 of 1987 and 94 of 1987. Learned Trial Court disposed of those three suits analogously by single judgment resulting filing of said three appeals in the learned Lower Appellate Court who also disposed of those three appeals analogously by the judgment impugned.

2. One Basanti Ghosh alias Lila Ghosh filed Title Suit No.180 of 1966 which was later renumbered as Title Suit No.93 of 1987 in the Court of learned Munsif, second Court at Alipore against Jatindra Mohan Ghosh alleging inter alia that she was the owner in possession of premises No.2/3, Hindustan Park, Ballyganj, Calcutta-29 by virtue of a registered deed of gift dated 14th of December, 1963 executed by her husband Jatindra Mohan Ghosh. Defendant Jagadindra Nath Ghosh was a son of Jatindra Mohan Ghosh by his first wife and was staying in a portion of said suit house which was described in the schedule of the plaint, as a licensee under Jatindra Mohan Ghosh and later on under plaintiff. The plaintiff revoked the licence of defendant

Jagadindra Nath Ghosh on 14th of February, 1964 and asked him to vacate the suit premises. On his refusal the suit was filed for declaration that defendant Jagadindra Nath Ghosh was a licensee under the plaintiff and that the licence was revoked, with a prayer for recovery of "khas" possession of the suit premises after evicting defendant therefrom and mesne profit etc.

3. On 13th May, 1964 said Basanti Ghosh filed another suit for recovery of khas possession on termination of licence against defendant Abanindra Nath Ghosh, another son of Jatindra Mohan Ghosh by his first wife, being Title Suit No.208 of 1964 finally renumbered as Title Suit No.94 of 1987 in the Court of learned Munsif, Second Court at Alipore on same grounds of Title Suit No.93 of 1987.

4. On 27th January, 1965 said Abanindra Nath Ghosh and Jagadindra Nath Ghosh filed Title Suit No.5 of 1965 finally renumbered as Title Suit No.92 of 1987 in the Second Court of Sub-ordinate Judge at Alipore for declaration and injunction against their father Jatindra Mohan Ghosh, step mother Basanti Ghosh, Mira Biswas and Sima Sarkar (married daughters of Jatindra Mohan Ghosh through his first wife).

5. The case of the plaintiffs" in Title Suit No.92 of 1987 may be summarized as follows:-

Their father Jatindra Mohan Ghosh married their mother Subala Ghosh who was second daughter of Atul Chandra Guha, Zamindar of Bajra Jagini of Dhaka (now in Bangladesh) in 1916. Atul Chandra Guha gave sufficient dowry in said marriage. He also made a provision for Rs.5,000/- for each of his children including Subala Ghosh. At the time of said marriage Jatindra Mohan Ghosh was an employee of the Port Commissioner, Calcutta having meagre income. Subala with her "Stridhan" purchased the suit land at a price of Rs.3,000/- from one Indu Bhusan Sarkar through a kobala dated 9th of August, 1935 and constructed the suit building upto ground floor with her own money. While Subala was ill and not fit either physically and mentally a deed of release dated 20th of September, 1938 in favour of her husband Jatindra Mohan Ghosh was obtained by exercising undue influence. Said fact was not known to the plaintiffs as they were minor at that time. The deed of release was vitiated by fraud and undue influence and was not binding on them and by said deed no title of Subala in the suit property passed to Jatindra Mohan Ghosh. Subala due to her prolonged illness died in September, 1939 and Jatindra Mohan Ghosh married Basanti Ghosh in 1940 and Reba Sarkar is the only daughter of Jatindra Monhan Ghosh through his second wife Basanti alias Lila. Jatindra Mohan retired from service in 1948. Plaintiff Abanindra Nath Ghosh at the request of his father constructed the first floor of the suit building in 1955 with savings of his income. At that time he was employed at Calcutta Port Commissioner. Since 1962 Jatindra Mohan Ghosh developed eye problem and became blind. During said period Jatindra Mohan Ghosh made various false allegations against the plaintiffs at the instigation of his second wife Basanti. On receipt of a lawyer's notice in 1964 the plaintiffs came to know for the first time that their father Jatindra Mohan Ghosh

transferred the suit property in favour of his second wife Basanti by a registered deed of gift dated 14th of December, 1963. Accordingly, plaintiffs alleged that as Jatindra Mohan Ghosh had no title in the property, on the basis of said fraudulent deed of release, no title passed to Basanti Ghosh. Accordingly, plaintiffs prayed for declaration of their title in the suit property, for cancellation of deed of release dated 20th September, 1938 executed by their mother in favour of their father Jatindra Mohan Ghosh as well as the cancellation of deed of gift dated 14th of December, 1963 executed by Jatindra Mohan in favour of Basanti alias Lila Ghosh with a prayer for permanent injunction.

6. These plaintiffs filed the respective written statements in the suits filed by their step mother Basanti Ghosh against them more or less on the same line denying title of Jatindra Mohan and or Basanti in the suit house and claiming their possession in the suit property as a matter of right being legal heirs of their mother Subala, the original owner of the property.

7. Defendant Nos. 1 and 2 namely Jatindra Mohan and Basanti filed written statement in Title Suit Nos.92 of 1987 denying material allegations of the plaint and contending inter alia that Jatindra Mohan purchased the suit land in the name of his first wife Subala with his own money in 1935 and that in 1938 Subala executed the deed of release voluntarily and knowing its contents. Jatindra Mohan being owner of the land constructed the suit building, let out some portions of building to some tenants and collected rents from them as of right. The plaintiffs being sons of Jatindra Mohan maltreated him on several occasions and that Jatindra Mohan voluntarily gifted the suit property to his second wife Basanti through a deed of gift. Basanti mutated her name in municipality and paid rent and taxes. The plaintiffs being heirs of late Subala have no right, title and interest in the suit property. The suit was also barred by limitation.

8. There was analogous hearing of all three suits in the Court of learned Trial Judge. After contested hearing learned Trial Court dismissed Title Suit No.92 of 1987 and decreed other two suits of eviction namely Title Suit Nos. 93 of 1987 and 94 of 1987. Abanindra Nath Ghosh and Jagadindra Nath Ghosh being plaintiffs of Title Suit No.92 of 1987 and being respective defendants of Title Suit Nos. 93 of 1987 and 94 of 1987 preferred three appeals being Title Appeal Nos. 199, 201 and 202 all of 1992 in the District Court. After contested hearing their appeals were dismissed. Hence were these second appeals being 336 of 1998, 337 of 1998 and 338 of 1998.

9. At the time of admission of second appeals the following substantial questions of law were formulated.

(1) Whether the learned Courts below erred in construing the deed of release as a deed of conveyance although no consideration was paid therefore.

(2) Whether the learned Courts below correctly applied the law of limitation in relation to the suit in question.

10. During hearing another substantial question of law was formulated namely whether learned Courts below substantially erred in law in interpreting the documents namely purchased deed of Subala Ghosh and the release deed executed by Subala in favour of her husband.

11. Mr. Buddhadeb Ghoshal, learned counsel for the appellant has submitted that the suit property was purchased in the name of original plaintiffs' mother Subala in 1935 mentioning therein that said purchase was made from the "Stridan" money of Subala. According to Mr. Ghoshal defendants of Title Suit No.92 of 1987 tried to make out a case that Subala was nothing but Benamdar of her husband Jatindra Mohan Ghosh with whose money the property was purchased but they miserably failed to establish the same in view of overwhelming evidence adduced by relevant witnesses from the side of the plaintiffs. Mr. Ghoshal has further submitted that the onus was upon those defendants to establish that said kobala of 1935 standing in the name of Subala was a Benami deed. According to Mr. Ghoshal in order to ascertain whether a kobala is a Benam transaction or not, regards had to be given to the source of money, intention of Benam, custody of the document and possession. According to him, learned Lower Courts failed to examine those ingredients before opining that the kobala of 1935 standing in the name of Subala was Benam property of her husband Jatindra Mohan Ghosh.

12. In this connection Mr. Ghoshal has referred several case laws namely [Valliammal \(D\) by Lrs. Vs. Subramaniam and Others](#), [V. Shankaranarayana Rao \(D\) by Lrs. and Others Vs. Leelavathy \(Dead\) by Lrs. and Others](#), [Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another](#), [Bhubanmohini Dasi and Ors. vs. Kumudbala Dasi and Ors. \(28 CWN 131\)](#), [Protimarani Debi and Another Vs. Patitpaban Mukherjee and Others](#), and [Sm. Khabirannessa Bibi Vs. Sudhamoy Bose, Official Liquidator to the Berhampore Bank Ltd. and Another](#),

13. Mr. Ghoshal has next submitted that even if it was assumed for argument's sake that said kobala of 1935 was a Benam property of Subala's husband but by a deed of release title cannot pass.

14. In support of his contention he has referred case laws of Dharam Chand Baid vs. Mauji Sahu (16 C.L.J. 436) and [Sm. Pankajmi Debi and Others Vs. Sudhir Dutta and Others](#), According to Mr. Ghoshal, learned Lower Courts erroneously treated said deed of release as a document of passing of title from Subala to her husband Jatindra Mohan Ghosh. According to him, if no title passed to Jatindra Mohan Ghosh by said deed of release executed by Subala then subsequent deed of gift of Jatindra Mohan in favour of his second wife Basanti did not confer any title on Basanti and hence eviction suits filed by Basanti treating the original plaintiffs as licensees were bound to fail and accordingly the original plaintiffs were entitled to get a decree as claimed. The last contention of Mr. Ghoshal was that question of limitation in this case did not arise as the deed of release vitiated by fraud and undue influence and was void ab initio. His further contention is that there is no limitation when a

document is void ab initio. His further contention is that original plaintiffs had knowledge of said fraudulent deed only on receipt of revocation of licence in the ejectment suits filed by the step mother Basanti in 1964 and thereafter they filed the title suit in 1965 i.e., well within the period of limitation. According to Mr. Ghoshal the observation of learned Lower Courts that the title suit was also barred by limitation had no leg to stand upon. Accordingly, he has prayed for setting aside the impugned judgments and decrees.

15. Mr. Animesh Kanti Ghosal, learned counsel for the respondents, on the other hand, has submitted that the case laws as referred by Mr. Ghoshal, learned counsel for the appellant, had no application in this case as Subala herself admitted her purchase kobala of 1935 as a Benam deed in her deed of release executed in 1938. According to him, when the person in whose name the sale deed of 1935 was standing executed a document in 1938 admitting that said property was purchased from the money of her husband and that she had no "Stridan" money for purchase of the same, then there is no question of applying the test of Benam for ascertaining whether said sale deed of 1935 was Benami or not. In this connection he has further submitted that learned Courts below still examined the question of Benam from the materials lying in the record and came to concurrent findings of fact that purchase deed of 1935 standing in the name of Subala was Benam property of her husband Jatindra Mohan Ghosh. He further submits that learned Courts below on the basis of evidence on record also came to concurrent findings of fact that deed of release in 1938 executed by Subala in favour of her husband was not vitiated by fraud or undue influence or misrepresentation. According to him, the question whether a document is a Benam or not and whether a document was executed by exercising fraud and / or undue influence and / or misrepresentation are questions of fact and that both the Courts below came to concurrent findings of fact on these issues and that there is hardly any scope for reopening the same during hearing of this second appeal.

16. In support of his contention he has referred case laws reported in 2002 WBLR (SC) 1 (Veerayee Ammal vs. Seenii Ammal), AIR 1996 SC 3521 (Navaneethammal vs. Arjuna Chetty), [Parsini \(dead\) through LRs. Vs. Atma Ram and others](#),), [Karbala Begum Vs. Mohd. Sayeed and Another](#), (Shri Dipak Kumar Mitra vs. Shri Basanta Kumar Misra), [Taherakhatoon \(D\) by Lrs. Vs. Salambin Mohammad, Panchugopal Barua and others Vs. Umesh Chandra Goswami and others](#), and [Rahul Amin and Others Vs. Chabbahan Bibi and Others](#),

17. Mr. Ghosal, learned counsel for the respondents, has next submitted that it was nobody's case that learned Courts below treated the deed of release as the source of title of Jatindra Mohan Ghosh. According to him, when a Benam transaction is made the title remains with the original owner though the property stood in the name of the Benamdar. The deed of release executed by Benamdar in favour of the real owner only established the fact that the person in whose name the property

stood was a Benamdar and that the person who paid the consideration money was the real owner. According to him, said deed of release is usually executed to dispel the cloud and to bring the real owner in the limelight. He has further submitted that deed of release was not meant to pass any title from Benamdar to the real owner but was meant to dispel the cloud over the ownership of the real owner through an admission of the Benamdar. According to him, as Jatindra Mohan Ghosh all along remained the real owner, no title was passed to him through said deed of release. As such, according to him, the case laws referred by Mr. Ghoshal, learned advocate for the appellant, have no application in the facts of the case.

18. From the case laws referred by Mr. Ghoshal, learned advocate for the appellant, in connection with tests to be made to ascertain whether a document is a Benam document or not, it is apparent that Hon"ble Courts held that there was a presumption of law that the person in whose name property stood was the real owner and that the person alleging Benami has to prove the same by establishing the source of money, intention of making Benam transaction, custody of the document and possession of the property. It was further held that the onus is upon the person who was alleging said document to be a Benam document, and that the Court will have to decide the case on the whole evidence and in the light of all the relevant circumstances and taking an overall picture of the entire evidence.

19. In this case admittedly, Subala, in whose name the kobala of 1935 stood, executed a deed of release in 1938 in favour of her husband Jatindra Mohan Ghosh declaring that said property in 1935 was purchased in her name with the money of her husband and that she was a mere name lender and that her husband was the real owner. If it is established that said deed of release was executed by Subala voluntarily then said averments in said deed of release may be treated as admission on the part of Subala and no further proof is required to establish the kobala of 1935 as a Benam document. In the case, however, there was specific allegation from the side of the original plaintiffs that said deed of release of 1938 was obtained from Subala by her husband by exercising fraud and undue influence. It was further case of the original appellant/plaintiffs that Subala was bed ridden since 1932 and was not mentally and physically fit to execute said deed of release in 1938. Learned Courts below made elaborate discussion of the evidence on record, both oral and documentary, on this score. It came out that no document of alleged illness of Subala was produced during evidence. In the release deed of 1938 P.W.4 Bikash Chandra Guha (brother of Subala) and one Nibaran Chandra Roy (Subala's sister's husband) were attesting witnesses. Said Bikash Chandra Guha also identified Subala before the District Sub-Registrar who held said registration on commission. At the time of said execution and registration of the deed of release as per rule Registrar examined the executant (Subala) as to whether she was executing the same after knowing its contents and then only it was registered. Learned Courts below also took note of signature of Subala appearing on each page of said deed of release to show that Subala was literate and that her signatures had no trembling to show

alleged illness of Subala at that point of time. In this connection it is pertinent to note that if the husband wanted to obtain a deed through his wife by exercising fraud and / or undue influence and / or misrepresentation then it was not expected that he would invite close relations of his wife to be attesting witnesses as well as identifier in said document. Apart from that if Subala was really very ill at the time of execution of said deed of release having no physical or mental capacity then certainly brother Bikash Chandra Guha and her sister's husband Nibaran Chandra Roy would not have agreed to be attesting witnesses of said document without perusing the contents of the same. The very presence of Bikash Chandra Guha and Nibaran Chandra Roy strongly supported the assertions of original defendant husband that the deed of release was not vitiated by fraud, misrepresentation or coercion. In the process learned Courts below explored the evidence on record both oral and documentary. As such their concurrent findings of fact on this issue cannot be said to be based on no evidence or perverse.

20. As it was established that the deed of release was not vitiated by any fraud, undue influence or misrepresentation the averments therein may be taken as admission on the part of Subala to show that the purchase deed of 1935 standing in her name was nothing but a Benam document. However, learned Courts below also examined the question of Benam independent of the deed of release. The original appellants (plaintiffs) tried to make out a case through Subala's brother Bomkesh (P.W.2) that Subala's father had a big zamindary and that at the time of his death in 1928 he made provision for payment of Rs. 5,000/- to each of his nine children including Subala and that Subala acquired the suit property out of said money of Rs.5,000/- and also constructed the ground floor out of the remaining amount of said money. Learned Courts below made threadbare discussion on this point and observed that no document was produced to show zamindary of Subala's father or of existence of Rs.45,000/- at the time of his death in 1928 for paying Rs.5,000/- each to his nine children including Subala. Learned Courts below also observed that all other brothers and sisters of Subala acquired property in Calcutta only in between 1949 and 1968 though it was claimed that their father kept for each of them Rs.5000/- in 1928. From the entire evidence on record learned Courts below came to concurrent findings of fact that story of acquiring Rs.5,000/- as "Stridan" property by Subala was not believable. Learned Courts below also marshalled other evidence on record and came to concurrent findings of fact that Subala's husband (original defendant No.1) was able to establish having sufficient means in 1935 for purchasing the suit property in the Benam of his wife Subala. Those findings of facts were based on evidence and cannot be said to be perverse. It is true that in the process learned Courts below disbelieved the evidence of Bomkesh (P.W.2) and other P.W.s. on this score for reasons recorded and the same cannot be said to be perverse.

21. There is no denial that no title passes by executing a deed of release by the owner of the property. Dharam Chand Baid's case (ibid) and Smt. Pankajini Debi's

case (ibid) have laid down this principle. But it was rightly submitted by Mr. Ghosal, learned advocate for the respondents, that when a Benam transaction is made, the title remains with the original owner though the property stood in the name of the Benamdar and that deed of release was not meant for passing of title but meant for dispelling the cloud and to bring the real owner in the picture.

22. I am in complete agreement with Mr. Animesh Kanti Ghosal on this issue. The deed of release of 1938 executed by Subala in favour of her husband was not meant for passing of title but only for declaring openly that real owner of said purchase of 1935 was her husband and that she was not the real owner.

23. Admittedly, the findings of learned Courts below that deed of 1935 was a Benam document and that deed of release executed by Subala in favour of her husband in 1938 was not vitiated by fraud, undue influence or misrepresentation are findings of facts based on evidence and calls for no interference by this Court in the second appeal.

24. The original plaintiffs of Title Suit No.92 of 1987 also took a plea that since 1962 Jatindra Mohan Ghosh developed eye problem and became blind and the alleged registered deed of gift dated 14th of December, 1963 executed by Jatindra Mohan Ghosh in favour of his second wife Basanti was vitiated by fraud and undue influence. There was no convincing evidence whatsoever in support of said claim of the plaintiffs. Rather Jatindra Mohan Ghosh while deposing as a witness categorically stated that he voluntarily executed said deed of gift dated 14th of December, 1963 in favour of his second wife Basanti. In view of the above concurrent findings of fact of learned Lower Courts that Basanti acquired full title to the entire suit building on the strength of said deed of gift dated 14th of December, 1963 executed by her husband Jatindra Mohan Ghosh in her favour the same calls for no interference by this Court.

25. Mr. Ghoshal, learned counsel for the appellant made a feeble attempt to canvas ejmentary right of one of the original plaintiff namely Abanindra Nath Ghosh in the first floor of the suit building on the plea that he constructed said first floor with savings of his income in 1955 while he was employed at Calcutta Port Commissioner. Learned Courts below also examined said plea and came to concurrent findings of fact that no document whatsoever could be produced by the plaintiffs to prove such alleged construction of first floor of the suit building in 1955. During evidence it was claimed that plaintiff Abanindra Nath Ghosh obtained sanctioned plan from the Calcutta Municipal Corporation for making said construction. Though said sanctioned plan was claimed to be under the custody of Abanindra Nath Ghosh but the same was not produced in Court during trial. Learned Courts below rightly observed that if said sanctioned plan issued by Calcutta Municipal Corporation in 1955 or prior to it was produced in Court by the plaintiffs then it would have revealed that the sanctioned plan was issued in the name of plaintiff's father Jatindra Mohan Ghosh being owner of the suit building on

the strength of purchased deed of 1935 coupled with deed of release of 1938. It also came into evidence that the initial tax of the building was paid in the name of Subala but later on there was mutation in favour of Jatindra Mohan Ghosh and taxes were paid in his name. Learned Courts below rightly observed that in 1955 or some time before when sanctioned plan was allegedly obtained by Abanindra Nath Ghosh from Calcutta Municipal Corporation from then the plaintiffs had knowledge that suit building was standing in the name of their father Jatindra Mohan Ghosh alone and not in the name of all heirs or legal representatives of Subala after her death. As the Title Suit was filed by the plaintiffs only in 1965 with a prayer for declaring their title in the suit property on cancellation of deed of release dated 20th of September, 1938 executed by their mother Subala in favour of their father Jatindra Mohan Ghosh it was hopelessly time barred also.

26. As it came out that Jatindra Mohan Ghosh was the original owner of the suit property and gifted the same to his second wife Basanti through a registered deed of gift dated 14th of December, 1963 Basanti became owner of the property. It also came out that since after execution of said deed of gift there was mutation of the name of Basanti in Calcutta Municipal Corporation and taxes were paid in her name. If that be the position then certainly the possession of original plaintiffs of Title Suit No.92 of 1987 in the respective portions of the suit building was that of a licensee under the owner of the property. On revocation of said licence by the then owner Basanti Ghosh, Abanindra Nath Ghosh and Jagadindra Nath Ghosh being defendants of Title Suit No.93 of 1987 and Title Suit No. 94 of 1987 were liable to be evicted from their respective possession of suit property. As such, learned Lower Appellate Court did not commit any mistake whatsoever by dismissing the three appeals filed by Abanindra Nath Ghosh and Jagadindra Nath Ghosh on affirming judgments of learned Trial Court passed in Title Suit No.93 of 1987, 94 of 1987 and 92 of 1987. As a result, all three second appeals stand dismissed on contest.

26. However, I pass no order as to costs.

27. Let a copy of this judgment be sent to the Lower Court along with Lower Court record expeditiously.

28. Urgent Photostat certified copy of this judgment be supplied to learned counsels of the parties, if applied for.