(2005) 12 CAL CK 0033

Calcutta High Court

Case No: F.A. No. 435 of 1967

Atindra Nath Chakrabarty		APPELLANT
	Vs	
Anil Kumar Chakravarty and Others		RESPONDENT

Date of Decision: Dec. 2, 2005

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10

Citation: AIR 2006 Cal 88 : (2006) 1 CHN 521

Hon'ble Judges: Pravendu Narayan Sinha, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: S.P. Roy Chnwdhury and Dipak Paul, for the Appellant;Harinarayan Mukherjee and Amit Dey, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.

This first appeal is at the instance of the plaintiff No. 2 in a suit for partition and is directed against the judgment and decree dated 18th September, 1965 passed by the learned Subordinate Judge, Nadia in Title Suit No. 20 of 1962 thereby declaring eight annas share of the plaintiffs in the suit property with a finding that the remaining eight annas share are held by defendant No. 1, the pro forma defendant Nos. 2, 5 and 6 jointly.

2. Two plaintiffs filed a suit for partition against the defendant No. 1 claiming that they had jointly acquired twelve annas share in the property and that the defendant No. 1 had the balance four annas share. In the said suit, the pro forma defendant Nos.2 and 4 were made parties because the name of pro forma defendant No. 2 figured as purchasers along with plaintiffs and defendant No. 1 and the pro forma defendant No. 4 was the mother of the proforma defendant No. 2 who was admittedly a minor at the time of acquisition of the suit property. Proforma

defendant No.3 was made party because she allegedly purchased a portion of the property from the pro forma defendant No. 2. The pro forma defendants Nos.5 and 6 are the brothers of the defendant No. 1.

3. The case made out by the plaintiffs in the plaint was that immediately after the partition of India, the plaintiffs decided to come over to the West Bengal from the District Rajsahi, their place of residence and at that point of time, they along with the defendant No. 1 jointly purchased the suit property in the District of Nadia. According to plaintiffs, the defendant No. 1 was the son of their uncle and was minor at the time of purchase and four annas share of the consideration money was paid by his father. The plaintiffs further averred that the father of the pro forma defendant No. 2 was their brother who died at that point of time at a premature age and as such, out of love and affection, they included the name of pro forma defendant No. 2 as a co-purchaser in the deed although neither he nor his mother contributed any amount.

4. The sum and substance of the plaintiffs'' case is that two plaintiffs contributed twelve annas share of the total consideration money whereas the father of the defendant No. 1 contributed the balance amount of four annas. The plaintiffs, accordingly, filed the present suit for declaration of their joint twelve annas share and for partition.

5. The aforesaid suit was contested by both the defendant No. 1 and defendant No.2 by filing separate written statements alleging that all the parties to the deed namely, the two plaintiffs, the father of the defendant No. 1 and the mother of the pro forma defendant No. 2 had contributed equally and therefore had four annas share each and as such, the plaintiffs are merely entitled to get declaration of their eight annas share in the property.

6. At the time of hearing of the suit, the plaintiff No. 2 and his wife''s brother deposed in support of the plaint case while the pro forma defendant No. 4, the mother of the pro forma defendant No. 2 and one Rananendra Nath Majumder, the son-in-law of the pro forma defendant No. 4 and the husband of the pro forma defendant No. 3, deposed in opposing the claim of the plaintiffs. In addition to that, Nil Gopal Chakraborty, the uncle of two plaintiffs and the father of the defendant No. 1, and the pro forma defendant Nos. 5 and 6 deposed on commission on behalf of the defendants.

7. The learned Trial Judge on consideration of the materials on record disbelieved the case of the plaintiffs that they contributed twelve annas share of the total consideration money and specifically came to the conclusion that by virtue of the disputed deed, the four purchasers named therein acquired equal share with a further finding that the defendant No. 1 was a benamdar of his father and as such, the said four annas share was jointly held by the defendant No. 1 and the pro forma defendant Nos. 5 and 6. The learned Trial Judge, therefore, partly decreed the suit in

favour of the plaintiffs thereby declaring their joint eight annas share in the property.

8. Being dissatisfied, the plaintiff No. 2 alone has preferred the present first appeal. It may be mentioned here that plaintiff No. 1 during the pendency of this appeal has transferred his share in the property in favour of defendant No. 1 and such fact has been brought on record by filing an application under Order 22 Rule 10 of the Code of Civil Procedure.

9. Mr. Roy Chowdhury, the learned Senior Advocate appearing on behalf of the plaintiff No. 2, has contended before us that the learned Trial Judge erred in not considering the fact that although the defendant No. 2 took specific defence that his mother, the pro forma defendant No. 4, contributed 1/4th of the consideration money, failed to prove such fact, and consequently, in this case, it was the duty of the learned Trial Judge to declare twelve annas share of the plaintiffs in the property.

10. Mr. Roy Chowdhury contends that undisputedly at the relevant point of time in the year 1948, the pro forma defendant No. 2 was hardly three or four years old and it has also come in evidence that his father having recently died, his mother had no financial ability to contribute 1/4th of the consideration money at that point of time. Mr. Roy Chowdhury contends that the pro forma defendant Nos. 2 and 4 having failed to prove the specific plea taken by them that they contributed four annas share of the consideration money, the learned Trial Judge ought to have believed his client''s case. He, thus, prays for modification of the judgment and decree passed by the learned Trial Judge by declaring twelve annas share of the plaintiffs in the suit property.

11. Mr. Mukherjee, the learned Senior Advocate appearing on behalf of the defendant No. 1, has supported the judgment and decree passed by the learned Trial Judge.

12. After hearing Mr. Roy Chowdhury appearing on behalf of the appellant and Mr, Mukherjee appearing on behalf of the respondent No. 1 and after going through the materials on record we find that admittedly both in the agreement for sale and in the actual sale-deed by virtue of which the suit property was acquired in the names of two plaintiffs and defendant No. 1 and pro forma defendant No. 2, there is no indication that plaintiffs contributed 75 per cent of the consideration money as alleged in the plaint. The deed, as it stands, or the agreement which preceded the said deed, disclosed that properties were purchased jointly by all the four purchasers. It is now settled position of law that if a property is purchased jointly by four persons by a common deed without indicating the amount of contribution of the parties, the presumption is that each of the purchasers has equal share in the property. It is for the person who claims that one of the purchasers did not acquire title but was a mere name lender, to prove that such person was really a benamdar.

The law is equally settled that in order that a transaction may be held to be benami, the motive behind such benami transaction must be proved. In this case, in the plaint no reason has been shown why the pro forma defendant No.2 was unnecessarily shown as a co-purchaser, though according to the plaintiffs, he did not contribute any amount. In paragraph 3 of the plaint, the plaintiffs have stated that although the name of pro forma defendant No. 2 was mentioned in the Kobala, he did not pay a single farthing out of the consideration at that time and as such, the pro forma defendant No. 2 did not acquire any title in the suit property.

13. In our view, the aforesaid averment is not sufficient to dislodge the claim of the pro forma defendant No. 2 who is apparently shown to be a co-purchaser not only in the deed but also in the agreement for purchase which preceded the transaction. Even if, one of the co-purchasers does not pay any amount towards consideration, for that reason he cannot be deprived of the legal right as a co-sharer. If a person agreed to pay his share of contribution as mentioned in the deed but did not pay that amount, the other co-sharers may recover that amount from the defaulting purchasers but the moment the property is purchased in the joint names of all the four persons in the absence of a successful plea of benami, for mere non-payment of consideration money, title of the defaulting co-sharer is not affected in any way.

14. In this case, the learned Trial Judge from the evidence on record has come to the conclusion that the father of the defendant No. 2 had been drawing Rs.150/- to Rs.200/- a month as salary at the time of his premature death as he was in the Government service and it appears that he was the most well-off amongst the three brothers. The learned Trial Judge has further found that the parties had joint income from the joint family property in the East Bengal and at the relevant point of time the said amount was between Rs. 5,000/- and Rs. 6,000/- a year. The learned Trial Judge further pointed out that the plaintiff No. 1 did not come in the witness box to assert the claim of the plaintiffs and he disbelieved the evidence of PW-1, the appellant herein who was drawing a meagre amount of Rs. 40/- a month at that time as a clerk in a private company. The learned Trial Judge has further relied upon Ext.-7 series and the other letter showing that it was the father of the defendant No. 1 who advanced the earnest money of Rs.1,000/-, although PW-1 tried to maintain that his brother- in-law, the PW-2, paid that amount. Therefore, the learned Trial Judge came to the conclusion that the assertion of both the witnesses for the plaintiffs that the earnest money of Rs. 1,000/- was paid by PW-1 through PW-2 was a concocted story. We find that from the materials on record there is no reason to disturb the well-reasoned findings recorded by the learned Trial Judge.

15. We have already indicated that even if it is proved that the pro forma defendant No. 2 did not contribute any amount towards the consideration money, there being no motive for taking defendant No. 2 as a benamdar co-sharer, it should be concluded that the property was jointly purchased by four persons and each of them had four annas share. We also find that although the transaction was of 1948

and the plaintiffs from the very beginning were well aware that the pro forma defendant No. 2 was shown in the deed as a co- purchaser, no step having been taken for rectification of such deed till 1962 when the pro forma defendant No, 2 earlier in the year 1957 had sold a part of the property to his sister, the pro forma defendant No. 3, the claim of the plaintiffs that the pro forma defendant No.2 was their mere benamdar was clearly barred by limitation.

16. On consideration of the entire materials on record, we, thus, find no reason to interfere with the findings of the learned Trial Judge that each of the parties to the deed acquired four annas share and that the defendant No. 1 was a benamdars of his father. The defendant No. 1 has not challenged such finding of benami. We have already indicated that during the pendency of this appeal, the plaintiff No. 1 has conveyed his share in the property in favour of defendant No. 1 and as such, we modify the preliminary decree by directing that plaintiff No. 2 has four annas share in the property and parties are directed to partition the property amicably within three months from today; in default, plaintiff No. 2 will be entitled to separate his share of four annas by applying for final decree. The judgment and decree passed by the learned Trial Judge is modified to the extent indicated above. In the facts and circumstances, there will be, however, no order as to costs.

Pravendu Narayan Sinha, J.

17. I agree.