Sanjukta Chatterjee Vs Mrinmoy Chatterjee and Others

Court: Calcutta High Court

Date of Decision: June 25, 1980

Acts Referred: Evidence Act, 1872 â€" Section 115
Transfer of Property Act, 1882 â€" Section 122, 123

Citation: 84 CWN 688

Hon'ble Judges: S.M. Guha, J; N.C. Mukherji, J

Bench: Division Bench

Advocate: Amal Kumar Mukherjee and Monika Mitra, for the Appellant;Arun Kumar Motilal and Dipankar Chakravarty, for the Respondent

Judgement

Sudhindra Mohan Guha, J.
This appeal by the plaintiff is directed against the judgment and decree of dismissal passed by Shri R.K. Kar,

learned Sub-ordinate Judge, 1st Court. Alipore, in a suit for partition and accounts. The plaintiff sued her brothers on the allegations that the suit

premises no. 18, Kalighat Road were purpchased by her mother Khirod Kumari out of her own Joutuk Stridhan money in the benami of her

husband Upendra Nath Chatterjee under a registered sale deed dated 15th December, 1917. On or about 12th of August, 1930 Upendra Nath

executed a registered deed of release in favour of Khirod Kumari acknowledging that the said purchase was made by her in his benami. The

defendants nos. 1 and 2 were the attesting witnesses to the said deed. In or about 1938 Khirod Kumari died and on her death the suit premises

devolved upon her two unmarried daughters, namely, the plaintiff and her elder sister Bimala in equal shares. Upendra Nath died in or about 1940,

Bimala died a spinster in or about January, 1967 leaving the plaintiff and the defendants as her legal heirs. Accordingly to the plaintiff she inherited

half of Bimala''s 8 annas share. Thus the plaintiff claimed two third shares in the suit premises and the remaining one third share belonged to the

defendants, The defendant no. 1 being the eldest brother was in the management of the suit premises and rented out the same to certain tenants on

several occasions and derived rent and usufruct thereof. The defendant no. 1 also disposed of immovable property of the approximate value of Rs.

5, 000/- belonging into Khriod Kumari and misappropriated the sale proceeds. The plaintiff''s prayer for partition being refused by the defendants,

she was compelled to commence the present suit.

2. The suit was contested by the defendants on a joint written statement. They denied all the material allegations made in the plaint. It was asserted

by them that the suit properties had been purchased by Upendra Nath with his own money. On 15.12.1917 Upendra Nath sold his property at

131 B. Teliapara Road and paid off the sum of Rs. 560/- being the mortgage due in respect of the said property out of the consideration money.

On 17.12.1917 Upendra also sold the plot of land at Dihi Serampore for Rs. 750/- and in that sale deed Khirod Kumari was also made a party as

she was the benamder of her husband in respect of the said property. Thus, with the balance of the sale proceeds and also by taking a loan of Rs.

2, 250/-Upendra purchased the suit premises for Rs. 4, 000/-. The loan was repaid in 1922 by mortgaging the suit premises to one Anil Bhusan

Chowdhury. Thereafter, he renovated the existing structure and made some additions. He was in possession as absolute owner on payment of

Corporation tax and other charges till his death in 1940. The mortgage loan due to Anil Bhusan was repaid by Upendra Nath on 26, 4.1926 with

his provident fund money.

3. The deed of release dated 12.8.1930 was characterised as sham, fictitious and paper transaction. The defendants were attesting witnesses to

the said deed no doubt but without having knowledge of the contents thereof. In their additional written statement it was further pleaded by the

defendants that Upendra Nath executed the said deed of release under the undue influence and coercion of his wife. Upendra exercised possession

over the suit premises as the absolute owner and on his death the suit property devolved on his two sons in equal shares.

4. In 1968 the defendants purchased with their own money a strip of land to the immediate north of the suit premises and the same was made a

part of the suit property. Both Bimala and the plaintiff used to live as dependants on the defendants but on 17.11.1968 the plaintiff left the suit

premises and since then he had been living elsewhere. It was denied that Khirod Kumari had immovable property worth of Rs. 5, 000/- and the

defendant No. 1 had disposed of the same.

5. The learned Subordinate Judge on trial held that the plaintiff had miserably failed to prove that her mother was the real owner of the suit

premises and her father was mere benamdar. The suit was accordingly dismissed.

6. But as to the deed of release it was observed by the learned Court below that the defendants were not the strangers in respect of the subject-

matter of the Nadabi deed and they attested to it with full knowledge of its contents.

Being aggrieved by the said judgment and decree the plaintiff as stated above has come up in appeal.

7. Undisputedly, the onus was on the plaintiff appellant to prove that the sale deed dated 15.12.1917 Ext. A was a benami transaction and that

Khirod Kumari was the real purchaser. According to the plaintiff for the consideration of the sale deed her mother had disposed of her ornaments.

The evidence on the point according to the learned Court below was not trustworthy and as such he made no reliance on such evidence. We were

also taken through the evidence on record but we fully endorse the views of the learned trial Judge. The learned Advocates for the appellant being

conscious of the heavy onus which lay on the appellant and also having regard to the paucity of evidence on the point banked upon the recitals in

the Nadabi dated 12.5.1930 Ext. 1. It is argued that this document was executed between husband and wife who were no more in this world of

living. As the parties to the document and those who could have given evidence on the relevant points passed away the recitals in Ext. 1 assumed

greater importance and could not be lightly set aside. It is further contended that it was not possible to ascertain fully what the circumstances were

in which Ext. 1 was executed. In the circumstances the Court should assume that Ext. 1 was executed for the reasons stated therein. In support of

such submission reliance is placed on the decision in the case of Sree Sree Iswar Gopal Jieu Thakur Vs. Pratapmal Bagaria and Others, . It would

transpire from the Nadabi deed Ext. 1 that the plaintiff Upendra declared that Khirod Kumari was the real purchaser of the suit premises and he

was her benamdar. It was further stated by him that Khirod Kumari purchased the suit premises out of the sale proceeds of her ornaments and

immovable properties and also by her stridhan money. The recitals therein were disputed by the defendants and they adduced evidence to show

how Upendra had procured the consideration money for the sale deed Ext. A. The defendants produced the sale deed dated 15.12.1917 Ext. A-

1 to show that Upendra sold the Teliapara premises at Rs. 1, 800/- in order to pay off his martgage debt of Rs. 500/- in respect of the suit

premises and also to purchase a pucca house for his residence. Next the sale deed dated 17.12.1917 Ext. A-2 was produced to show that

Upendra Nath Chattarjee and Khirod Kumari sold the Kasba property at Rs. 750/- for paying off the mortgage debt of Upendra Chatterjee and

also for purchasing a new house. In this sale deed Khirod Kumari appears to have admitted that she was mere benamdar of her husband in respect

of the said property. The suit premises were purchased on 15.12.1917 under the sale deed Ext. A which was registered on 19.12.1917. The

mortgage deed Ext. B would go to show that on 15.12.1917 Upendra Chatterjee mortgaged the suit premises to one Matangini Debi for Rs.

2250/- and the recitals therein showed that the said amount was required for purchasing the suit premises. It would further appear that on

25.3.1922 Upendra Chatterjee borrowed Rs. 3, 500/- from one Anil Bhusan Chowdhury by mortgaging the suit premises to pay off the mortgage

debt due to Matangini Debi Vide Ext. B/1. Again it appears that on 26.4.1926 Upendra Chatterjee paid Rs. 4, 220/- to Anil Bhusan Chowdhury

towards full satisfaction of his mortgage dues and got release of the suit premises vide Ext. C. It further transpires in evidence that on 22.4.1926

Upendra withdrew the sum of Rs. 8, 141/- from his provident fund money. Thus it was abundantly clear how the money for the consideration of

the sale deed Ext. A was raised by Upendra. Upendra might have sold the ornaments of his wife but on the materials on record it could not be said

that the consideration for the sale deed Ext. A had been raised by disposing of the ornaments. Exts. B, A(1) and A(2) go to show that Upendra

collected about Rs, 4, 800-before 19.12.1917--the date of registration of sale deed Ext. A. Even after payment of loan of Rs. 500/- vide Ext.

A(1) Upendra had sufficient funds for payment of consideration for the purpose of Kalighat property. It was rightly pointed out by the learned

Judge below that the defendants were entitled to show that the recitals of the Nadabi were not true unless the same operated as an estoppel.

8. It was argued on behalf of the respondents that even after the execution of the Nadabi deed Upendra Math''s name continued as owner of the

suit premises in the Corporation Register and Upendra Nath paid Corporation tax in his own name. There was no dispute to the fact that the name

of Khirod Kumari was not mutated in the Corporation Register but on the death of Khirod Kumari or that of Upendra neither the names of the

sons nor that of the daughters were mutated. In our opinion this is not of much importance because in Hindu families property belonging exclusively

to a female member would also be normally managed by the head of the family. It was exactly the view expressed by their Lordships of the

Supreme Court in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another,

9. Ext. 1 as stated earlier was attested by the defendants. It is argued on behalf of the appellant that being attesting witnesses the defendants were

debarred from challenging the contents thereof. On behalf of the appellant it is contended that it would be presumed that an attesting witness was

fully aware of the nature and contents of the document. The decision in the case of Soni Lalji Jetha and Others Vs. Soni Kalidas Devchand and

Others, is referred to. But in this case through misconception one of the defendants figured as an attesting witnesses instead of a conveying party

and as such it was held that the defendant who was an attesting witness was made fully aware that sale deed conveying title to property was being

passed. On behalf of the respondents reliance is placed on the decision of Pandurang Krishnaji vs. M. Tukaram, reported in AIR 1922 P.C. 20. It

is held therein that the attestation of a deed by itself estops a man from denying nothing whatsoever excepting that he has witnessed the execution

of the deed. It conveys neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put forward alone

for the purpose of establishing that a man concented to the transaction which the document effects. In a subsequent case the Privy Council was

also of the same view--Bhagwan Singh vs. Ujagar Singh reported in AIR 1928 P.C. 20.

10. Again it is also contended having regard to the decision in Bennett Coleman and Co. (P) Ltd. Vs. Punya Priya Das Gupta, that the burden of

proving the ingredients of estoppel of section 115 of the Evidence Act lies on the party claiming estoppel. And the principle of estoppel can arise

only if a party to a proceeding has altered his position on the faith of representation of promise made by another, Mahindra and Mahindra Ltd. vs.

Union of India, reported in AIR 1979 S. C. 798. The law on the point was clearly enunciated by the Supreme Court in Gyarsi Bai and Others Vs.

Dhansukh Lal and Others, . It is hold that to invoke the doctrine of estoppel embodied in section 115 of the Evidence Act 1872, three conditions

must " be satisfied :--(1) representation by a person to another, (2) the other shall have acted upon the said representation, and (3) such action

shall have been detrimental to the interest of the person to whom the representation has been made. Where the first two conditions are satisfied but

the third is not, there is no scope to invoke the doctrine of estoppel. It is argued by Mr. Matilal that the defendants in this case were merely

attesting witnesses to the Nadabi deed Ext. 1 and the doctrine of estoppel cannot arise at all as there was no question of representation.

11. We would consider later on what was the effect of the attestation but it was the specific findings of the learned Court below that the defendants

were not the strangers in respect of the subject-matter of the Nadabi deed. The interest of their father as well as their own interest was going to be

vitally affected by the Nadabi deed. In the circumstances it was held by the learned Court below that the defendants attested Ext. 1 with full

knowledge of its contents. On the facts, circumstances and evidence we are fully in agreement with him. The nature of presumption would be that

they consented to and acquiesced in the Nadabi executed by their father and could not therefore, be allowed to challenge its validity. The decision

reported in AIR 1928 P. C. 20 (Supra) may be referred to. Thus there was a deed of release executed by the father of the parties in favour of

their mother but the documentary evidence on record belied the recitals therein that the consideration money for the kobala Ext. A had been raised

by disposing of the ornaments belonging to the mother. In such, a case it would be partinent to enquire what would be the nature and effect of such

deed of release. Such deed may very well be construed as a deed of gift. In support of such findings reliance may be placed in the of case

Kuppuswamy Chettiar Vs. A.S.P.A. Arumugam Chettiar and Another, . It is held therein that a registered intrument styled release deed releasing

right, title and interest of releasor without consideration may operate as transfer by way of gift when the document clearly shows an intention to

effect transfer and is signed by or on behlalf of releasor and attested by at least two witnesses. u/s 123 of the Transfer of Property Act, 1882 a gift

may be effected by a registered instrument signed by on or behalf of the donor and attested by at least two witnesses. Thus a deed of release may

operate as a deed of gift if the document clearly shows an intention to effect the transfer. In this case it transpires from evidence on record that the

consideration for the kobala Ext. 1 was raised by Upendra himself but still then he made a declaration that the consideration money had been paid

by his wife by selling her ornaments. Thus the intention was to benefit his wife and transfer the property by way of gift in favour of his wife. Under

the recitals therein he bound not only himself but his legal heirs namely, his both the sons for not claiming the property as their own. As such the

clear intention was to make a gift and so he had the document attested by his legal heirs namely, the two sons, the present defendants. It was

abundantly clear from the recitals in the Nabadi deed that it was the intension of the releasor to convey the title of the property to his wife. This

deed on construction should be taken as a gift. As already pointed out the defendants not only figured as attesting witnesses but they had

knowledge of the content thereof. In the above circumstances the defendants could not be allowed to challenge the validity of the gift.

12. According to Mr. Motilal the decision referred to above is not applicable to the present facts and circumstances of the case. According to him

the said proposition of law does not and cannot stand and be relied upon as and abstract proposition bereft of the factual context of that decision.

13. Again with reference to sections 122 and 123 of the Transfer of Property Act it is argued that mere execution of a registered deed by the

donor is no proof acceptance by the donee. Acceptance must be proved as an independent fact.

14. On the facts and circumstances stated above there would be no reason to hold that there was no acceptance. The relation between the donor

and the donee was that of husband and wife--and the subject matter of the gift was a dwelling house. It is not expected that the donee would

possess the property in exclusion of her own husband and children. It would also not be right to hold that the lady had not exercised any act of

possession over the subject matter of the gift. In the result we hold that the suit property passed to the mother of the plaintiff by way of gift.

15. On the death of the mother and the property being Ayantaka devolved on all her issues. Thereafter on the death of the eldest daughter Bimala,

her share was inherited by the plaintiff, sister and the defendants, brothers in equal shares. In the result the plaintiff would be entitled to one third

share in the suit property.

But the suit property being a dwelling house the plaintiff, a daughter cannot be allowed to enforce partition thereof.

16. In the premises the appeal is allowed in part. The judgment and decree passed by the learned court below is set aside. The suit is decreed in

part. Plaintiff''s one third share is found and declared in the suit property. She would be entitled to right of residence therein with the defendants.

Parties to bear their respective costs in both the Courts. Verbal prayer for stay of operation of the order is refused.

N.C. Mukherji, J.

I agree.