Vallabhdas Mulji Vs Pranshankar Narbheshankar

Court: Bombay High Court

Date of Decision: March 15, 1926

Acts Referred: Transfer of Property Act, 1882 â€" Section 69
Trusts Act, 1882 â€" Section 94

Citation: (1928) 30 BOMLR 1519

Hon'ble Judges: Fawcett, J

Bench: Single Bench

Judgement

Fawcett, J.
This suit relates to a house in Bazaar Gate Street, Bombay, which in 1907 was owned by the plaintiff, On July 8, 1907, he

executed two mortgage deeds in respect of this property. The first mortgage was for a sum of Rs. 30,000, to Mulji Meghji and Narbheshankar

Ghellabhai.

2. The first defendant Pranshankar is the son of Narbheshankar, and defendants Nos. 2 arid 3 are the sons of Mulji Meghji. He and

Narbheshankar are dead.

3. On the same day the plaintiff mortgaged the property, subject to the first mortgage, to defendants Nos. 4 and 5 for Rs. 3,000. The due date for

payment under these mortgages was July 17, 1908, and both the documents contain the usual power of sale, subject to the provisions of Section

69 of the Transfer of Property Act, in default of payment of the mortgage debt.

4. About April 1908 the plaintiff admittedly was in monetary difficulties and left Bombay for Morvi and Kathiawar; and he was away from

Bombay till some time in 1918. No payments were made on account of the mortgage debt by the plaintiff, and the property was put up for sale by

auction by the mortgagees in exercise of their power of sale. It is alleged that this was done after a notice had been served on the plaintiff in

accordance with the provisions of Section 69 of the Transfer of Property Act, but this is a point in dispute. The auction was held on November 18,

1909, and the property was bought by one Dayashankar Dev-Shankar for Rs. 22,500. A deposit was made of Rs. 5,625. Dayashankar was a

constituent of the firm of Meghji Parmanand, the two principal partners of which were Mulji Meghji and Narbhe-ahankar. The case of the plaintiff

is that Dayashankar was a mere nominee of the mortgagees, or at any rate, of Narbheshankar, and that it was accordingly a benami purchase. On

December 1, 1909, Messrs. Shroff, Dinsha & Dharamsi, solicitors, purporting to act for the plaintiff, sent a notice (Exhibit 7) to the mortgagees

complaining that the sale of the property had not been sufficiently advertised, in consequence of which the property was sold at a considerable

under-value, and, secondly, that the mortgagees had fraudulently purchased the property in the name of their nominee, in consequence of which the

sale was not in any way binding upon the; plaintiff, No reply was given to this notice. But from certain correspondence that has been filed in the

case it appears that an amicable settlement was attempted. This, however, did not fructify, and, on November 4, 1910, a conveyance was

executed by the mortgagees in favour of defendant No. 1, Pranshankar with Dayashankar aa a confirming party. The conveyance recites that

Dayashankar Devshankar had purchased the property at the auction sale as the agent for and on behalf of Pranshankar. The balance of the

purchase money, Rs. 22,500, was paid, and the mortgagees were given credit for their respective shares in the accounts of the firm of Meghji

Permanand.

5. Before the couveyance the building in question had been in a dangerous state. A big crack appeared in one of the walls, and it actually fell down

on July 12, 1919. The Municipality took action, and notices were issued about it both to the plaintiff at Morvi and to Narbheshankar. The plaintiff

refused to accept his notice, while Narbhoshankar took action to comply with the requirements of the Municipality. Considerable work was done,

and the house was repaired and partly rebuilt. The cost of these alterations is debited in the books of Meghji Permanand to an account of

Pranshankar, defendant No. 1, which will be referred to in more detail later on.

6. Pranshankar got the property transferred to his name in the records both of the Municipality and of the Collector, On September 14, 1920, he

sold the property to defendants Nos. 6, 7, and 8 for the sum of Rs. 85,000. On November 4, 1920, the plaintiff" sent a notice to defendants Nos.

6, 7, and 8 challenging the sale to them, and on April 5, 1921, he sent a notice to all the other defendants requiring them to reconvey the property

to him on payment by him of the mortgage debt and to furnish a detailed statement of account. These notices were not complied with, and in

November 1921 the present suit was brought.

7. The hearing of the suit has been delayed by a consent decree that was passed before Kajiji J. It is stated that the consent decree was

subsequently cancelled, as there had been misapprehension among the parties on a question of interest; but the suit as against defendants Nos. 6,

7, and 8 was dismissed with costs on the ground that plaintiff could not prove that they had notice of the alleged illegality of the auction at the date

of their purchase.

8. The contesting defendants are Nos. 1, 4, and 5. They contend that the auction sale was properly held, that the property was purchased by

Pranshankar through his nominee Dayashankar, and that the conveyance was a legal transfer in his favour. Defendants Nos. 2 and 3 have not

appeared, and it is alleged by the other defendants that their whereabouts are not known. It is obvious, however, that their failure to appear is

mainly, if not entirely, due to certain allegations made by them in a suit No. 881 of 1919 brought by them against defendant No. 1. Those

allegations favour the plaintiff''s case that the purchase of the property at the auction sale was one by Narbheshankar and not by Pranshankar.

9. The issues raised are as follows:Ã¯Â¿Â½

Issues for defendant No. 1. [The material issues are only reproduced.]

(1) Whether the plaintiff had notice of the intended Bale in terms of the mortgage deed ?

(4) Whether defendant No. 1 purchased the property as nominee of his father ?

(5) Whether the sale dated November 18, 1919, is valid and binding on plaintiff ?

(6) Whether the said sale being in pursuance of the authority conferred on defendants Nos. 4 and 5 as mortgagees to sell under the said mortgage

deed dated July 8, 1007, is valid ?

Issues raised by defendants Nos. 4 and 5 [The material issue is only reproduced.]

(1) Whether the said auction sale was with the knowledge and consent of the plaintiff ?

10. The main question in the suit is whether the purchase by Dayashankar Devshankar in the first instance, and subsequently by Pranehankar, is a

benami purchase on behalf of one or more of the mortgagees? The plaintiff''s case rests on the law, for which there is a clear authority in England

that, where a mortgagee puts up the mortgaged property for sale under a power given him by his mortgage deed, he cannot sell it to himself, either

alone or with others, nor to a trustee for himself: (cf. Halsbury''s Law of England, Vol. XXI, Article 458, at p. 257). It is contended that as a result

of such purchase the sale was entirely inoperative and did not affect the relations between the plaintiff-mortgagor and his mortgagees.

Consequently the plaintiff is entitled to the sum of Rs. 85,000, obtained by the second sale, subject to his paying all that may be due to the

mortgagees in respect of the mortgage debt and the cost of any proper repairs to the property that they might make as mortgagees. For the other

side it is argued that the alleged benami sale would at most only be voidable and not void, and that consequently the plaintiff"s suit is barred as he

has not brought a suit to set aside the sale within the proper period of limitation. It has been held by a Full Bench of this Court in Naraaagownda v.

Chawagounda ILR (1918) 42 Bom. 638 that if an instrument is entirely void or inoperative, then Article 91 of the Indian Limitation Act does not

apply to the case. There certainly is very strong authority for saying that a sale of the kind this one is alleged to be is an entire nullity and needs no

such setting aside. To take only two authorities, that are important as being those of the Privy Council, I may refer to National Bank of Australasia

v. United Hand-in-Hand and Band of Hope Company (1879) 4 App. Cas. 391 and Henderson v. Astwood [1894] A.C. 150.

11. In the latter case the facts were somewhat similar to the alleged facts in the present case. It was held there that the sale to a nominee of the

mortgagee was inoperative, as a man cannot contract with himself and cannot sell to himself, either in his own person or in the person of another.

Certainly on these authorities the benami sale would be a void one, falling under the Full Bench ruling. But the defendants'' counsel rely upon a

passage in Williams'' ""Law of Vendor and Purchaser,"" second Edition, Vol. II, at p. 984, where it is said:Ã¯Â¿Â½

The transaction is voidable on the more proof that the vendor or purchaser wag acting in exercise of such an authority and in effect sold to or

bought from himself.

12. Also at p. 986 it is stated:

And for this reason the sale so purported to be made is voidable in equity at the instance of those by or on whose behalf the authority was

conferred.

13. It seems to me, however, that the word ""voidable"" as there used is merely equivalent to the word ""impeachable,"" which is used by their

Lordships of the Privy Council in National Bank of Australasia v. United Hand-in-Hand and Band of Hope Company (1879) 4 App. Cas. 391;

and that it does not signify that the transaction is a voidable one as opposed to one that is entirely void. In such cases the transaction, if there is a

dispute, has to be brought before the Court, and it can legitimately be said that, therefore, it is voidable at the instance of such and such a parson.

This seems quite clear from the ground on which such a sale is held to be void, namely, that a man cannot contract with himself. The result is that

there is no actual contract, and the question whether the contract is void or voidable accordingly does not arise at all, the transaction being, as the

Privy Council says, entirely inoperative. Such a transaction is clearly ineffective under the law in India, having regard to Section 2(a) of the Indian

Contract Act, and which Bays ""when one person signifies to another"" etc., and Clause (0) which says ""the person making the proposal is called the

''promissor'' and the person accepting the proposal is called the ''promisee"""". The Act clearly contemplates those being two different parsons, and

unless there are these two persons there can be no contract. In Williams'' ""Vendor and Purchaser"", at page 997, it is stated that the sale can be

either affirmed or avoided at the option of the person affected. No doubt the latter can consent to the transaction in the sense that he raises no

objection and the sale therefore operates. But it seems to me clear that his consent cannot really operate to make the mortgagees'' title a good one,

any more than would the consent of a minor operate to make a minor''s contract otherwise than void, It was at one time held that a minor could

ratify such a contract, but this view was definitely rejected by the Privy Council in Mohori Bibee v. Bharmodas Ghose ILR (1903) Cal. 539. L.R.

421, p.c. I know of no clear authority in England for a contrary view, and none at any rate is stated in the paragraph of Halsbury''s ""Laws of

England"" that I have referred to. And the two Privy Council rulings of 1879 and 1894 are not, in my opinion, shaken in 1926

14. No doubt in the case of a sale through a civil Court a benami purchase of this kind by a mortgagee is not an absolute nullity is treated as an

irregularity which at the moat makes the sale voidable : see Khiarajmal v. Daim ILR (1904) Cal. 296 Ashutosh Sikdar v. BehariLal Kirtania ILR

(1907) Cal. 61 Sahadu Manaji v. Devlya Jaba (1911) 24 Bom. L.R. 254 Ganesh Narayan v. Gopal Vishnu I.L.R (1916) . 41 Bom. 357. But

such a case is on an entirely different footing because a mortgagee can obtain leave to bid, and his failure to apply and obtain such leave can clearly

be treated as an irregularity. There is a clear difference between a sale in execution of a decree, where the Court is responsible for conducting the

sale, and a sale under a power contained in a mortgage. Thus Lord Hobhouse says in Mahomed Meera Ravuthar v. Savvasi Vijaya Raghunadha

Gopalar (1988) L.R. 27 IndAp 17 2 Bom. L.R. 640: ""The conduct of the sale gives opportunities for influencing its course one way or another,

which do not follow on the mere leave to bid."" In my opinion, therefore, the contention of the defendants is not sound.

15. It follows that, if the sale is benami as alleged, the pleas of estoppel, limitation, and acquiescence, cannot avail the defendants as defences to

the suit. In regard to estoppel the letter of Narbhe-shankar, Exhibit E, which was written after the receipt of the notice Exhibit 7, shows that he was

fully aware of the invalidity of the sale if it was one to himself; and the principle applies that, where the statement relied upon is made to a party

who knows the real facts and is not misled, there can be no estoppel. (See Mohori Bibee v. Dharmodas Ghose ILR (1903) 30 Cal. 539 5 Bom.

L.R. 421, p.c. Similarly, as held in Rhiirajmal v. Daim ILR (1904) 32 Cal. 296 7 Bom. L.R. 1 p.c. where the effect of an inoperative sale is to

leave the relationship of mortgagor and mortgagee intact, no possession short of the statutory period of sixty years, nor any acquiescence of the

mortgagor not amounting to a release of the equity of redemption, would be a bar to a suit for redemption.

16. On the other hand I think the defendants'' counsel are right in contending that the case is one which does not fall u/s 90 of the Indian Trusts

Act, 1882. The ordinary case of a mortgage, to which that section is applicable, is the one stated in illustration (c) to that section, that is to say,

where the wilful default of the mortgagee leads to a sale in which he purchases the proparty either himself or through a nominee. Oases of this kind

are Chhita Jihula v. Bai Jamni ILR (1916) 40 Bom. 48318 Bom. L.R. 438 and Deo Nandan Prashad v. Janki Singh ILR (1916) Cal. 573, p.c. but

that is not the case here. In my opinion it cannot be said that Narbheshankar, if he bought the property through Dayashankar or Pranshankar,

availed himself"" of his position as mortgagee to buy the property. No doubt he had the conduct of the sale, and the remarks of Lord Hobhouse

that I have mentioned are applicable, But the conduct of the sale did not give him any special advantage in regard to buying the property, and as a

bidder be was just in the same position as any stranger present at the auction. On the other hand, I think that Section 94 of the Indian Trusts Act

would be applicable, because on the view taken above the sale was inoperative and the plaintiff was still the owner of the property, subject to the

mortgages. The purchaser Narbheshankar had not the whole beneficial interest and was not a trustee but merely a mortgagee, so that that section

can apply.

17. It was contended for the defendants that by virtue of proviso (b) to Section 95 of the Indian Trusts Act the purchase by Narbheshankar would

be valid, but that provision is clearly inapplicable as Narbheshankar did not hold the property by virtue of contract with the person for whose

banefit he held it. He was in fact a mortgagee without possession, and even if he had had possession he would not have held it for the benefit of the

plaintiff but in order to exercise rights of ownership for his own benefit as mortgagee. He would in effect be acting against the contract with the

plaintiff, if he bought the property for himself, as is pointed out in Williams'' ""Vendor and Purchaser"" at page 986, where it is stated that the

authority to sell a property implies a bargain between the person authorised and some other person acting independently of him. In follows that

Section 96 of the same Act cannot be applicable, for Narbheshankar was not a bona fide purchaser within the ambit of that section.

18. The main question, therefore, is whether this transaction is proved to have been benami for Narbheshankar or any other of the mortgagees?

The main contention of counsel for the plaintiff is that Dayashankar bought as a nominee of Narbheshankar, The burden of proving this lies upon

the plaintiff, and the main test is of course the source whence the purchase-money came, as laid down in Dhurm Das Pandey v. Musaumat Shama

Soondri Dibiah (1843) 3 M.I.A. 229 and Bilas Kunwar v. Desraj Ranjit Singh ILR (1915) All. 557. The question is tried under considerable

disadvantage. Narbheshankar died in 1918, so the Court has not the advantage of having his evidence in the matter, Dayashankar, although

present in Court during the part of the trial, was called by neither aide, and I did not think it desirable to try and call him myself, as his evidence

would probably be coloured by his siding with one party or the other. Defendant No. 1, Pranshankar, was only twenty-one at the date of the

auction. He says he was not present at it, and speaking generally, he says that he cannot remember the material events of that time. The other two

witnesses namely, the plaintiff and defendant No. 4, were away in Kathiawar at the time of this transaction, and their evidence does not help much

except in regard to certain correspondence which has been put in. This correspondence is certainly of considerable use in an endeavour to

ascertain the real truth of the matter, and it is a fortunate circumstance that some of these letters were disclosed by defendants Nos. 4 and 5 in

interlocutory proceedings and so have become available at the trial. Most of the correspondence was put in by consent of the parties, and the

letters of Narbheshankar, in my opinion, fall generally under Clause (2) of Section 32 of the Indian Evidence Act as being made in the ordinary

course of business, for Narbheshankar was the managing partner in the firm of Meghji Parmanand and corresponded on behalf of the firm in the

business of safeguarding their interests in respect of their mortgage security. The only objection taken was by counsel for the defendants in respect

of a portion of Exhibit E, which I held to be admissible as a statement of Narbhesliankar against his interest for the reasons that are given in my

notes of the proceedings. The letters are diffuse and often obscure. [After discussing the evidence furnished by the letters his Lordship proceeded

:]

19. Then coming to the accounts, which are an important piece of documentary evidence in this case, these to some extent support the defendants''

case and to some extent the plaintiff''s. Undoubtedly it is proved that in May 1902 Narbheshankar arranged with Mulji Meghaji to set aside Ks.

25,000 which stood to his credit with the firm, to be put in a separate account in the name of Pranshankar, under an agreement that Pranshankar

alone was to operate on that account. Narbheshankar also the next day added a postscript to his will, under which in very clear language he makes

an irrevocable gift to Pranshankar of this and the account in respect of it. There are two views that can be taken about this transaction. One is that

this was a bona fide gift by Narbheshankar to his eon made out of affection and as a provision for him when he attains majority. That is certainly an

explanation, which prima fade, at any rate, is entitled to consideration, though in India there is no presumption in favour of an advancement to a

child in such a case as there is in England: cf. Moulvie Sayyud Uzhur Ali v. Mussumat Bebee Ultaf Fatima (1869) 13 M.I.A. 232 and Kerwich v.

KerwicK () 1920h ILR 48 Cal. 260 Bom. L.R. 730. It may also be said that in form there was a valid gift u/s 126 of the Transfer of Property Act,

for no power of revocation was reserved to Narbheshankar and only delivery and acceptance were necessary to complete the gift. Such requisites

after this lapse of time require little evidence to prove them, and Pranshankar''s evidence would ordinarily suffice to show that he got control of this

account and accepted the gift. On the other hand, an opposing view is covered by the following remarks of Sir George Campbell on the benami

system which are cited in Mayne''s Hindu Law, 9th Edition, p. 628 :Ã¯Â¿Â½

The most respectable man feels that if he has no need to cheat any one at present, he may some day have occasion to do so, and it is the custom

of the country. So he puts his estate in the name of his wife''s grandmother, under a secret trust. If is pressed by creditors or by opposing suitors, it

is not his. If his wife''s grandmother plays him false, he brings a suit to declare the trust.

20. There certainly are circumstances which support the contention of the plaintiff''s counsel that the transaction was a cloak of this kind. At its date

the plaintiff was a boy of about fourteen. The amount transferred to Pranshankar''s name is very considerable and the recital of Narbheshankar''s

assets in his will seems to show that it was considerably more than he would naturally settle on his son, if it were intended to be a genuine

transaction. Admittedly, he died in debt to the firm Meghji Parmanand, and, admittedly, the plaintiff had to pay Rs. 1,60,000 to defendants Nos. 2

and 3 in consequence of their claim in suit No. 881 of 1919. In 1902 Narbheshankar, according to the recitals in his will, was merely a munim, in

the firm with a four anna share of profits; and his financial position, as given in the will, was not such as to make it likely that he would really give

practically the whole of his liquid assets to his son. It is also noticeable that para. 3 of the will says he had accounts in two other firms in the name

of his son Pranshankar, which he treats as his own property. [After discussing the evidence relating to accounts his Lordship proceeded:]

21. Finally, we have the evidence given by Narbheshankar in a Civil suit of 1915 in the Cufch Court at Mandvi. The alleged circumstances, under

which that deposition was given, are that Pranshankar had advanced certain moneys to Dayashankar, who as security for repayment mortgaged

some property to him in Cutch. That property was attached by one Amratlal, and on the objection being raised that the property was already

mortgaged, he brought a suit against Dayashankar and Pranshankar. The contention of Amratlal was that this mortgage of Pranshankar was a

nominal one and not binding on the property. Narbheahankar gave evidence that Pranshankar was separate from him and had an account with the

firm of Meghji Parmanand, from which he could make advances such as led to the mortgage. Presumably ha referred to the account gifted to

Pranshankar in 1902. In the course of the evidence he nays that the property in question in this suit was purchased by Pranshankar in the nams of

Dayashankar. Subsequently, however, he says: ""I purchased it in the name of Dayashankar, therefore in the company"" (that is to say, the

auctioneers) ""the name of Dayashankar was entered. The moneys have been paid in the name of Dayashankar. As we were the mortgagees, we

could not purchase it in our name. Therefore the house was purchased in the name of Dayashankar, and in the puccs deed my name was written.

The document is not made out in the name of Dayashankar."" The last statement, viz., that his name was entered in the conveyance, is of course

wrong; but that does not affect the clear fact that ""he stated that he purchased the property in the name of Dayashankar. Pranshankar himself, in his

evidence, did not contest the fact that his father made such a statement, and could give no satisfactory reason for his father making a false

statement on the point. There is no apparent reason why he should have made this admission if it was not the real truth; and it supplies cogent

evidence that this was a benami purchase, as alleged by the plaintiff. The document has no doubt not been certified by the Political Agent of Cutch

in a manner which fully satisfied the requirements of Sections 76(a) and 86 of the Indian Evidence Act; and an attempt to get this defect rectified in

a reasonable time failed. (See the correspondence. Exhibit Y-10). But, as ruled by the Privy Council in Haranund Ohetlangia v. Bam Gopal

Ghetlangia ILR (1899) Cal. 639 Section 86 does not exclude other proof. In the present case Pranshankar''s admission as to his father giving this

evidence suffices to meet any doubts that might otherwise arise; and u/s 114 a presumption arises that the document, purporting to be a copy of

Narbheshankar''s deposition in the suit is a correct copy of the record of that deposition as recorded by or under the supervision of the Judge who

tried the suit. The fact that the certificate as to its being a ''true copy'' is given by a higher officer of the State than the trial Judge is really an

additional reason for accepting its authenticity and there is no reason to suppose that the mode of certificate, viz., '' true copy '' is not the one

ordinarily in use in Cutch, just as it is in British India. Therefore I have admitted the document in evidence as Exhibit Y-9. Even, however, if it were

excluded, this would not alter my conclusion, which, in my opinion, has ample other evidence to support it.

22. The result is that I hold that the purchase was in fact a benami one for Narbheshankar. It does not, I think, matter whether the state of affairs at

the date of the auction or at the date of the conveyance is considered. In either case the purchase was a benami one, as already mentioned. If the

account of Pranshankar had been the result of a genuine gift, then no doubt it might afford a good ground for rejecting the plaintiff''s claim; for

during the interval between the auction sale and the conveyance it would, I think, be open to Narbheshankar to substitute for himself, or rather for

Dayashankar, the nominal purchaser, a stranger-purchaser. As stated by Jessel M.K. in Earl of Egmont v. Smith (1877) 6 Ch. 469: ""An ordinary

contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct."" Section 55(1)(f) of the Transfer of Property

Act recognises such a right on the part of a person who contracts to buy. A reference may also be made to the remarks of Byrne J. in Delves v.

Gray [1902] 2 Ch. D. 606 as to the general practice that a purchaser may, in ordinary cases, take a conveyance to a nominee for himself. The

mortgage-deeds contain nothing to the contrary : indeed they gave the mortgagees power ""to vary any contract for the sale"" at the auction. This

does not help defendants, however, in this case, in view of my finding that Pranshankar was not really a stranger-purchaser but merely a nominee

of his father Narbheshankar. [After recording the findings on the issues the matter was referred to the Commissioner.] Attorneys for plaintiff:

Edgelow, Gulabchand & Co. Attorneys for defendant Nos. 1, 4 and 5 : Pandia & Co.