APPELLATE CIVIL

Before Mr. Justice Niamat-ullah and Mr. Justice Bennet

1932
December, 20

ABDUS SATTAR (PLAINTIFF) *v.* HIRA DEI (DEFENDANT)*

Civil Procedure Code, order XXI, rule 63—Claimant's suit to establish his title to attached property—Burden of proof —Benami purchase—Decree-holder's allegation that claimant is a benamidar.

An ostensible owner of the property whose objection to attachment has been dismissed under order XXI, rule 58 of the Civil Procedure Code, and who therefore brings a suit under order XXI, rule 63, for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original owner, but also that he was not the *benamidar* for the judgment-debtor as alleged by the decree-holder. The initial onus undoubtedly rests on the plaintiff and he has to establish his title to the property; but having established the due execution of the deed of conveyance by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible owner is only a *benamidar*. The fact that the plaintiff's objection under order XXI, rule 58, was dismissed does not add to the quantum of the onus resting on him.

V. E. A. R. M. Firm v. *Maung Ba Kyin* (1), followed. *Nannhi Jan* v. *Bhuri* (2), considered overruled.

Messrs. *A. M. Khwaja* and *Muhammad Yasin* ...*nus*, for the appellant.

...essrs. *P. L. Banerji* and *Shabd Saran*, for the res...nt.

...MAT-ULLAH and BENNET, JJ.:—This is a plain... appeal arising out of a suit for declaration that ...cca house, described in the plaint, is his property ...s not liable to be attached and sold in execution ...ee No. 32 of 1926 obtained by the first defendant ... the plaintiff's father, the second defendant.

Appeal No. 4 of 1931, from a decree of Pran Nath Aga, Additional ...udge of Moradabad, dated the 2nd of December, 1930, reversing ...z-ud-din Ahmad, Munsif of Nagina, dated the 2nd of June,

...P. C., 237. (2) (1908) I.L.R., 30 All., 321.

The plaintiff's objection to attachment under order XXI, rule 58 of the Code of Civil Procedure was dismissed. He then filed the present regular suit for the relief above mentioned. The court of first instance decreed the suit. On appeal by the first defendant the lower appellate court upheld the defence that the house in dispute belonged to the second defendant, the judgment-debtor. Accordingly it dismissed the suit; hence this appeal.

The house in dispute stands on the site of an old kachcha house which was purchased in the name of the plaintiff on the 25th of January, 1891, for a small sum of Rs.140. It is common ground that the whole construction was pulled down and the house that now stands was erected at a cost of nearly Rs.2,000. The plaintiff's case is that the sale deed was not *benami*, and that the present house was built with funds belonging to him. In elaborating his claim the plaintiff alleged in his plaint that his maternal grandfather, Ghulam Sarwar, had supplied the consideration of the sale deed, and that the subsequent construction of the house was likewise made with funds supplied by Ghulam Sarwar. It is not disputed that the plaintiff was 7 years old when the house was purchased in his name. The defence, on the other hand, was that the sale deed had been taken by Abdul Samad, defendant No. 2, *benami* in the name of his son, the plaintiff, and that it was defendant No. 2 who erected the present building. The lower appellate court has discussed the evidence bearing on the question of ownership thus raised in the pleadings and arrived at a finding that "The plaintiff has failed to prove that his maternal grandfather, Ghulam Sarwar, supplied the money for purchase of the site or constructions of the building. It is more natural under the circumstances to hold that it was Abdul Samad who defrayed the costs. The mere fact that the land was purchased in the name of the plaintiff does not mean that

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the plaintiff became the owner of it." This finding of fact would have been conclusive in second appeal and not open to discussion, but the appellant has seriously challenged it on the ground that the burden of proof has been wrongly thrown on the plaintiff. It is argued that the sale deed of the 25th of January, 1891, being in favour of the plaintiff he is *ex facie* the owner of the property conveyed thereby, and that the burden of proving that it was *benami* for defendant No. 2 lay on the first defendant who impugned the ostensible character of the deed. As regards the building subsequently erected on the site of the kachcha house acquired under the aforesaid sale deed, it is contended that the ownership of the superstructure follows the ownership of the land on which it stands, and that *prima facie* the owner of the land also owns everything permanently attached to it.

On behalf of the respondent we have been referred to a number of decisions of various High Courts in which it was held that the ordinary rule as regards burden of proof does not apply where the plaintiff who unsuccessfully objected to attachment under order XXI, rule 58 of the Code of Civil Procedure institutes a suit for the establishment of his right to the attached property, relying on a deed of transfer which is impugned by the successful decree-holder on the ground that it is *benami* for his judgment-debtor. It is said that in such a case the plaintiff ought to establish not only the due execution of the deed of transfer in his favour, but he should go further and establish that the ostensible transferee under the deed is also the real transferee. In other words, it should be presumed after the plaintiff's objection to attachment has been dismissed that the deed is *benami* for the judgment-debtor unless the contrary is proved by the plaintiff. This contention finds support from the case of *Govind Atmaram* v. *Santaï* (1), in which a Division Bench of the Bombay High Court held, relying on two earlier cases of that Court,

(1) (1887) I.L.R., 12 Bom., 270.

that: "The defendant had obtained an order maintaining his attachment, and it was incumbent on the plaintiff, who impugns that order by the present suit, to prove her case. For this purpose it would be necessary for the plaintiff to prove the payment of the purchase money, and that she had since been in possession." This case was followed in *Nannhi Jan* v. *Bhuri* (1), in which a Division Bench of this Court held "that a party intervening in the execution department, and failing in his objection to an attachment, and consequently being obliged to bring a suit under section 283 of the Code of Civil Procedure (order XXI, rule 63 of the Code of Civil Procedure, 1908) must give *prima facie* evidence to establish the genuineness of the document upon which he relies." The report shows that "genuineness of the document" was meant by the learned Judges to indicate real character of the deed and not due execution of the document. The learned Judges referred to several earlier cases of this Court in which the same view had been taken as in *Govind Atmaram* v. *Santai* (2). The learned Judges also noted the case of *Suba Bibi* v. *Balgobind Das* (3), in which a Division Bench of this Court had taken a contrary view. Following the Bombay High Court and this Court it was held by the Calcutta High Court in *Jamahar Kumari Bibi* v. *Askaran Boid* (4) that "a suit under order XXI, rule 63 of the Code of Civil Procedure is a suit to alter or set aside a summary decision or order of the court, and is a method of obtaining review". It was further observed that "the plaintiff in the circumstances of this case cannot discharge the burden of proof cast on her by merely pointing to the innocent appearance of the instruments under which she claims; she must show that they are as good as they look." A learned single Judge of the Madras High Court took the same view in *Modadugu Perayya* v. *Peroli Venkayamma* (5).

(1) (1908) I.L.R., 30 All., 321.
(2) (1887) I.L.R., 12 Bom., 270.
(3) (1886) I.L.R., 8 All., 178.
(4) (1915) 22 C.L.J., 27.
(5) (1924) 47 M.L.J., 14.

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A comparatively recent pronouncement of their Lordships of the Privy Council made in *V. E. A. R. M. Firm* v. *Maung Ba Kyin* (1) has definitely laid down that "the plaintiffs being the ostensible owners of the property under a duly registered deed and a deed of transfer, the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration." The case was one in which the ostensible owner had objected to the property in dispute being attached and, on an order under rule 58 of order XXI of the Code of Civil Procedure being passed against him, instituted a regular suit under order XXI, rule 63 of the Code of Civil Procedure to establish his right.

A Division Bench of the Patna High Court has held, following the above Privy Council ruling, in *Gillu Mal* v. *Firm Manohar Das Jai Narain* (2) that where a suit is brought under order XXI, rule 63 of the Code of Civil Procedure by a party against whom an order was made in a claim case the plaintiff would not be in a worse position as regards burden of proof than that in which he would have been if no claim case had been brought at all.

There is no doubt that the Privy Council case to which reference has been made above is an authority for the proposition that an ostensible owner of the property whose objection has been dismissed under order XXI, rule 58 of the Code of Civil Procedure, and who, therefore, brings a suit under order XXI, rule 63 of the Code of Civil Procedure for establishment of his right, is not called upon to establish not only the due execution of the deed of conveyance by the original owner but also that he was not the *benamidar* for the judgment-debtor as alleged by the decree-holder. The

(1) A.I.R., 1927 P. C., 237. (2) (1928) I.L.R., 7 Pat., 777.

rule that in such a case the plaintiff must establish his title is not departed from. The quantum of onus is, however, the same as in an ordinary case in which the *benami* character of an instrument is in question. The initial onus undoubtedly rests on the plaintiff. He has to establish his title to the property; but having established the due execution of the deed of conveyance by one who admittedly owned the property, the apparent tenor of the deed must prevail unless it is established by the defendant that the ostensible owner is only a *benamidar*. The onus cannot rest on the plaintiff *ad infinitum* and shifts according to the ordinary rules of evidence.

Govind Atmaram v. *Santai* (1) and *Nanhi Jan* v. *Bhuri* (2) were both decided under the Code of Civil Procedure of 1882, section 283 of which was somewhat differently worded from the corresponding provision in the Code of 1908, namely order XXI, rule 63. It might have been permissible under the older Code to hold that if the court executing the decree dismissed the claimant's objection to attachment, expressly holding that the deed relied on by him was *benami*, he must establish in the regular suit that the decision of the court executing the decree was incorrect. Section 283 ran as follows: "The party against whom an order under section 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." It was held repeatedly in cases arising under the old Code that if the objection was not inquired into and decided on the merits, the claimant was not bound to institute a regular suit within the shorter period of one year provided by article 11, Schedule I of the Indian Limitation Act. This view was based on the wording of section 283, which was construed as implying that the order must be "under section 280, 281, or 282", that is, it

(1) (1887) I.L.R., 12 Bom., 270. (2) (1908) I.L.R., 30 All., 321.

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must expressly decide the objection on its merits in terms of the one or the other of the sections referred to. Order XXI, rule 63 of the Code of Civil Procedure of 1908 runs as follows: "Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive." The scope of rule 63 is wider than that of section 283 of the old Code. The former makes a title suit within the period of one year necessary by a person who preferred an objection and "against whom an order is made". To our minds this is the only ground on which it is possible to reconcile the view taken in the cases decided by the Indian High Courts with the view now expressed by their Lordships of the Privy Council. Whether the ground suggested above is well founded or not, we must follow the Privy Council case, which, if not reconcilable in the manner suggested above, should be deemed to have overruled the contrary opinion previously expressed by the High Courts. We must take it to be the law that, in a case like this, the plaintiff having established due execution of the sale deed in his favour by a person who was admittedly the owner of the property to which it relates, he should be deemed to have discharged the initial onus which lay upon him, and the burden of proof being thus shifted on the defendant, the latter must establish the *benami* character of such deed by showing that the consideration proceeded from the alleged owner, or otherwise.

In the case before us the old house purchased in the name of the plaintiff no longer exists and the question is whether the house as it now stands belongs to the plaintiff. We do not think that the matter should be approached as the plaintiff desires us to do. We cannot split the controversy into two distinct portions,

first, to hold that the site belonged to the plaintiff by virtue of the sale deed,—the defendant having failed to establish that defendant No. 2 paid the consideration,—and then to presume that the building standing on it belongs to the owner of the site. The more important part of the controversy is as to who constructed the house. In view of the finding arrived at by the lower appellate court that the house was constructed by defendant No. 2, it may be inferred that he had a right to build on the land in dispute. It is common ground that the plaintiff, who was only seven, had no funds of his own. The question is whether his maternal grandfather, or his father the defendant No. 2, supplied the fund. The fact that he, subsequent to the purchase, built the house gives rise to the inference that the latter had paid for the site. *Prima facie* where a person makes a costly building on a site and remains in possession of the building for a considerable length of time, the presumption is that he had a right to build on the land. In the circumstances of this case such right can only be referable to the circumstance that he was the owner of the land. He could be the owner of the site if the sale thereof in 1891 was *benami* for him In other words, the fact that defendant No. 2 built the house and remained in possession rebuts the presumption arising in plaintiff's favour. It is possible to read the judgment of the learned Subordinate Judge as if he proceeded on some such reasoning. It is true he discusses in the first instance the question whether the plaintiff is the real owner of the site, throwing the burden on him, and then proceeds to consider the second question as to whose funds were employed in building the house. It is likely that his finding on the latter question influenced his judgment on the first. In all the circumstances of the case we are not disposed to interfere with his finding of fact as regards the ownership of the house in dispute. The result is that the appeal fails, and is dismissed with costs.