

Lalta Prasad vs Brahmanand And Ors. on 14 November, 1952

Equivalent citations: AIR1953ALL449, AIR 1953 ALLAHABAD 449

JUDGMENT

Brij Mohan Lall, J.

1. This is an appeal by one of the defendants against a decree of the learned Civil Judge of Kanpur.
2. It appears that one Debi Din owned an area of one 'biswa' out of plot No. 840 abutting on a public road in Juhi Khurd, Kanpur. By means of a registered deed dated 29-5-1914 he dedicated this area for the purpose of establishing a 'gaushala'. One Shyam Lal alias Shamlu Baba, who was the 'pujari' of Maha-birji's temple in Cooperganj at Kanpur, was appointed a trustee under this deed. Shyam Lal agreed to construct a 'gaushala', a well, a cattle trough & four pucca shops "with his own money". He did erect certain constructions. Sometimes later he hypothecated the land and the constructions to the appellant. The latter is the natural born son of one Ram Asrey, but has been adopted by his (Ram Asrey's) brother Bisheshwar Prasad. Ram Asrey, Bisheshwar Prasad and their sons form a joint Hindu family.
3. Ram Asrey had a simple money decree against Shyam Lal and in execution thereof he got the disputed land and constructions put up for sale in 1933. He purchased the said property in the auction sale. After the purchase he erected 13 'Kothris' thereon. A few years later Shyam Lal died.
4. The suit which has given rise to this appeal was instituted by one Brahamanand (hereafter described as respondent) within 12 years of the auction sale. He claimed to be Shyam Lal's 'chela' and the present trustee of the 'gaushala'. He contended that the property in suit was trust property and as such it could not be sold in execution of a decree obtained against Shyam Lal personally. He prayed for possession of the property in suit after demolition of the constructions erected by the appellant and also sought a decree for Rs. 1,080/- as mesne profits. The defendants to the suit were Ram Asrey, his son, Satya Narain, and the appellant.
5. The appellant alone contested, the suit. He contended that the land in question was conveyed to Shyam Lal personally, that the trust sought to be created was not valid and that in any case the constructions put up by Shyam Lal were his personal property and did not form part of the trust. It was urged that a valid title had passed to Ram Asrey as auction purchaser. Limitation and Section 41, T. P. Act, were also pleaded in defence. Another plea taken in defence was that in the event of the respondent's suit being decreed he should pay the costs of the constructions put up by the appellant. Lastly, respondent's status as trustee was disputed and it was contended that he had no right of suit.

6. The learned Civil Judge overruled the defence and decreed" the suit for possession of the property in dispute and for recovery of a sura of Rs. 540/- as mesne profits. He directed the appellant and his co-defendants to remove the 13 'kothris' put up by them on the disputed land within a period of six months.

7. Dissatisfied with this decree the appellant alone has preferred this appeal. Ram Asrey and his son, Satya Narain, have been impleaded as 'pro forma' respondents. Four points were urged by the learned counsel for the appellant in his arguments, viz.;

1. The constructions made by the appellant had not been impressed with the character of a trust and were his private property.

2. The claim for demolition was barred by the doctrine of acquiescence.

3. In any event the appellant was entitled to claim compensation for the buildings constructed by him.

4. The respondent has no right of suit.

8. It may be pointed out at the outset that the appellant has two independent titles, viz., (1) as mortgagee and (2) as auction purchaser. His mortgage was a simple mortgage and gave him no right of possession. Moreover, this mortgage has, on his own showing, been satisfied. A suit on its basis, if now instituted, would be time-barred. It is, therefore, clear that he has no right to remain in possession on the basis of this mortgage-deed and cannot, therefore, resist the respondent's suit on this ground. If he has any title, it is as an auction purchaser. Being a member of the joint Hindu family with Ram Asrey he can rely on that title, although the purchase was not made in his name. It has to be seen how far can that title furnish a good defence to the respondent's claim. '

9. It has not been denied before us that a valid trust of the site was created by Debi Din, What was contended was that the constructions put up by Shyam Lal did not partake of the nature of the trust. It was argued that if a trustee (and such was admittedly the status of Shyam Lal) puts up constructions on the trust land the constructions would not become part of the trust property. In deciding this question one has to bear in mind the intention of the trustee in erecting those constructions. In order to gather this intention it is necessary to examine the trust deed executed by Debi Din because, obviously, Shyam Lal accepted the terms of this deed and secured the land from Debi Din on terms mentioned in this document. Debi Din expressed himself thus: "I have of ray own accord and free will without compulsion or coercion on the part of any one else made a perpetual wakf, with respect to, and subject to the terms which have been set up and are given below for the purpose of (construction of) a 'gaushala', a well, a 'charhi' and four pucca shops with his (Shyam Lal's) own money under the mutwalliship of Shyam Lal." Thereafter, he goes on to mention the terms and says that Shyam Lal shall be the manager and 'sarbarakar' and shall "cause a 'gaushala', a well,, a 'charhi' and four shops to be constructed on the land with respect to which wakf is made at his own cost". Further on he forbids him to erect any other kind of building. He directs that the rent recovered from the shops shall be used to provide fodder, etc., for the cows. He goes on to add that:

"Shyam Lal shall at no time have the power and title to make any sale, mortgage or gift, etc., or to transfer the property in any other way. Shyam Lal aforesaid shall always make great efforts for improvement and betterment of 'gaushala' and he shall maintain it intact. He shall not do anything; contrary to the terms of this wakf, nor shall he have any power to bring the property made a wakf of to his own use." It was on these terms that Shyam Lal agreed to take the property. He was debarred from alienating it in any manner. He was directed to keep it intact and to make constant endeavours for its betterment. These terms gave a clear indication that Debi Din and Shyam Lal had both agreed to bring the gaushala into existence and to maintain it. Debi Din made his contribution in the shape of the site, Shyam Lal agreed to provide funds for the construction of a 'gaushala' and further agreed to maintain it and to act as its trustee. In the circumstances, we have no doubt in our minds that the constructions were made by Shyam Lal in pursuance of the agreement arrived at between him and Debi Din. We have no doubt that his intention was to make the constructions a part and parcel of the trust property. In the circumstances, the constructions did partake of the nature of trust property. At the time of making the constructions it was not Shyam Lal's intention to treat the said constructions as his personal property. His subsequent conduct in raising money on the security thereof was an act in breach of the trust and it could not retrospectively operate to alter the nature of the constructions from one of the trust property to that of personal property.

10. It was pointed out by the learned counsel for the appellant that the trust deed was executed by Debi Din alone and not by Shyam Lal. It was contended that without a document in writing Shyam Lal could not create a trust of the buildings made by him. Section 5, Trusts Act (2 of 1882) lays down the method for creating a trust of immoveable property, but it is provided by Section 1 of the said Act that the Act does not apply to public or private religious or charitable endowments. Therefore, the rule laid down in Section 5 regarding the execution of a registered document in writing does not govern a case like the present. There can be no doubt that the trust for maintaining a 'gaushala' is a trust for a charitable purpose. According to strict Hindu notions, it is a religious trust also because maintenance and breeding of cows is an act of religious merit according to Hindu belief. The creation of a trust whether for charitable or religious purpose is governed by rules of Hindu law and not by the provisions of the Trusts Act. The Hindu law does not require a registered deed.

The essentials of a valid trust of a charitable or religious nature under Hindu law are that-

- (1) the object or the purpose of the trust must be a valid religious or charitable purpose according to the rules of Hindu law;
- (2) the founder should be capable under Hindu Law of creating a trust in respect of the particular property which is the subject matter of trust;
- (3) the founder should indicate with sufficient precision the purpose of the trust and the property in respect of which it is made and the trust must comply with the requirements of law, as regards the form, in which it is to be made; and (4) the trust must not be opposed to the provisions of law for the time being in force an infringement of which makes it void or voidable in law (Mukherjea's Hindu Law of Religious and Charitable Trust, 1952 ed. p. 52).

If the above requirements exist, a valid trust comes into existence and no document in writing need be executed. It is not necessary that somebody should accept the transfer. Nor is it necessary that the religious or charitable purpose should be in existence from before.

Reference may, in this connection, be made to the case of -- 'Chaturbhuj v. Chatarjit', 33 All 253 (A). In that case a gift of certain Zamindari property was made to an idol which was not in existence at the time of the gift. Possession was handed over to a certain person as pujari. It was held that the deed of gift was valid and was not vitiated by the fact that the idol had not come into existence till then. This case was based on an earlier Full Bench decision of the Calcutta High Court (which was a case of a will) viz., -- 'Bhupati Nath v. Ram Lal', 37 Cal 128 (B).

The Privy Council case of -- 'Gangi Reddi v. Tammi Reddi', AIR 1927 P C 80. (C) may also usefully be referred to. Their Lordships remarked on page 82 as follows;

"A dedication of a portion of the family property for the purpose of a religious charity (and the chanty which Gangi Reddi purported to endow is of this nature) may, according to Hindu law, be validly made without any instrument in writing, even if it be an appropriation of some landed property."

Their Lordships were discussing as to what proportion of the joint family property a Karta could dedicate. This question, however, is not before us. "We are concerned with only that portion of their Lordships' remark which lays down that a written instrument is not necessary for the creation of a Hindu charitable or religious trust. We are, therefore, of the opinion that a valid trust did come into existence notwithstanding the absence of any registered instrument in writing by Shyam Lal.

11. That the intention of the ounder was actually carried into effect is proved beyond a shadow of doubt. (Evidence gone through), It is thus clear that the trust which was the outcome of the joint efforts of Debi Din and Shyam Lal did come into existence and it did function for a long number of years. The constructions in question were, therefore, trust property and could not be sold in execution of a personal decree against Shyam Lal.

12. After the purchase the appellant or Ram Asrey constructed 13 'Kothris'. It is suggested that Shyam Lal saw the constructions but did not object and, therefore, the appellant could invoke the doctrine of acquiescence in this case. It may be pointed out that the respondent was made a trustee in 1935, i.e., two years after the purchase. There is no evidence on the record to prove that the constructions were made after 1935 and it cannot, therefore, be seriously contended that the doctrine of acquiescence will operate against the respondent. The essentials of doctrine of acquiescence were laid down in the case of -- 'Willmott v. Barber', (1880) 15 Ch D 96 (D), and they require 'inter alia' that the person, who wants to plead that doctrine, must have been under a mistaken belief about his rights and the person against whom the doctrine is sought to be invoked should be aware of this mistaken belief. In the present case, it cannot seriously be contended that the auction purchaser was under a mistaken belief about the nature of the property. Had he taken the trouble to examine the title he would have come to know that Debi Din had created a trust. Moreover, even if it be assumed that there was such a mistaken belief on the part of the auction

purchaser, there is no evidence whatsoever to prove that the respondent was aware of the existence of this mistaken belief in the auction purchaser's mind. Therefore the plea of acquiescence has no place in a case like the present.

13. It is unnecessary to decide whether or not this doctrine could be invoked against Shyam Lal. The respondent is not claiming through Shyam Lal. On the contrary, he is seeking redress against the unlawful acts of Shyam Lal. Even assuming that the plea could be successfully raised against Shyam Lal it would not ipso facto, operate against the respondent.

14. Learned counsel for the appellant next contended that the principle of Section 51, T. P. Act, should be applied to this case. This section runs as follows:

"When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market-value thereof, irrespective of the value of such improvement.

The amount to be paid to or secured in respect of such improvement shall be the estimated value thereof at the time of the eviction. When under the circumstances aforesaid, the transferee has planted or sown on the property crops which are growing when he is evicted therefrom, he is entitled to such crops and to free ingress and egress to gather and carry them."

It is conceded that this section does not in terms apply because Section 2 of the Act clearly lays down that the provisions of the Act do not apply to a transfer in execution of a decree or order of a Court of competent jurisdiction. But it is contended that although the section may not in terms apply the principle thereof will apply. With this contention we do not agree. A transfer by act of parties stands on a totally different footing from an execution sale. In a private transfer the transferor expressly or impliedly assures the transferee that he has a valid title to the property. An equity, therefore, arises against him and he is by the application at rule of estoppel precluded from denying his title afterwards. No such considerations arise in the case of an auction sale. It may be repeated at this stage that were considering the appellant's title as an auction purchaser in a simple money decree. There was no contract between the auction purchaser and the judgment-debtor. The purchase was made neither at the request nor with the consent of the judgment-debtor, but very likely contrary to his wishes. There was no warranty of title by judgment-debtor. The maxim applicable to auction sales is 'caveat emptor'. The purchaser makes the purchase at his own risk. In the circumstances, it is not possible to apply the principle of Section 51 T. P. Act, to auction purchases. In the Full Bench case, -- 'Nannu Mal v. Ram Chander', AIR 1931 All 277 (E), the auction purchaser was held not entitled to the benefit of Section 51. In that case benefit of Section 70 was given to him because he was a purchaser in execution of a mortgage decree. As already stated more than once, the appellant is not enforcing the rights under the mortgage. He has to take his stand on the auction purchase

only. In the circumstances, we hold that the appellant is entitled to no compensation for the buildings erected by him, nor can he compel the respondent to purchase the said buildings. He has been permitted by the learned Civil Judge to remove his materials and that he certainly can do.

15. Last of all comes the question about the respondent's competence to maintain this suit. In this connection reference is to be made again to the deed of endowment executed by Debi Din. The relevant passage in this deed runs as follows:

"Secondly, if God forbid, Shyam Lal aforesaid dies at any time his senior and competent disciple shall become the manager and mutwalli of the property made a wakf of, provided that he follows the 'Panth' (Sect) of Shyam Lal, resides in Kanpur proper and is considered by four respectable Hindus to be fit and capable for that purpose."

16. It is conceded that the respondent is the only disciple of Shyam Lal, that he belongs to his sect and he resides in Kanpur proper, but it is pointed out that he has not been elected by respectable Hindus to the office of the trustee. The respondent has produced a document executed by Shyam Lal in which he declares that the respondent is his only disciple and in which he appoints him as his successor both to the office of Mutwalli of his trust and as priest of Mahabirji's temple. It is true that the deed of endowment executed by Debi Din conferred no power on Shyam Lal to appoint his successor. The nomination by Shyam Lal does not by itself help the respondent except that it proves that Shyam Lal, as one of the Hindus, approved of his appointment. But it may be pointed out that ever since the death of Shyam Lal, which took place 8 or 9 years before the tearing of the suit, the respondent has been acting as the priest of the temple of Mahabirji and has been making customary collections from the grain market, where the owner of every cart-load of grain has to contribute a cupfull of the grain towards the temple. It is in this temple that the cows are being kept after the auction sale held in 1933. He is thus running this 'gaushala' and managing the affairs of the temple with the tacit approval of the Hindu public in general who have been making contributions towards the temple and placing the same in his hands. The Hindu public in general has impliedly approved of his appointment. In the circumstances, the requirements of the deed, which lays down the conditions of his appointment, have been complied with.

17. Even if it be assumed that he is not a 'de jure' trustee, he is certainly a 'de facto' trustee who has been carrying on the work as such. A 'de facto' trustee can maintain a suit.. This was laid down by their Lordships of the Privy Council in -- 'Mahadeo Prasad Singh v Karia Bharti', AIR 1935 P C 44 (F). Reference may also be made to the cases of -- 'Gopal Dutta v. Babu Ram', AIR 1936 AH 653 (G); -- 'Subramania Gurukkal v. Srinivasa Rao Sahib', AIR 1940 Mad 617 (H) and -- 'Sheo Ramji v. Sri Ridhnath Mahadeoji', AIR 1923 All 160 (I). In all these cases persons who were not 'de jure' trustees were permitted to institute suits not for their own benefit but for the benefit of the trust. On the same principle the respondent who had been performing the duties of a trustee for about 8 or 9 years prior to the institution of the suit could validly institute this suit, for the benefit of the trust.

18. For the above reasons, we are of the opinion that the view taken by the learned Civil Judge was correct. We find no force in this appeal. It is hereby dismissed with costs,. The stay orders are

vacated.