

UGANDA / JUDGMENT

Chadha v Singh and Another (Civil Suit No. 654 of 1954) [1956] EACA 35 (1 January 1956) [1956] EACA 35

COURT

East African Court of Appeal

BEFORE

O'Connor CJ

CASE / FILE NUMBER

Civil Suit No. 654 of 1954

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ORIGINAL CIVIL

Before O'CONNOR, C. J.

BISHEN SINGH CHADHA

 $\mathbf{v}$ $\mathcal{L}^{\mathcal{A}}$

MOHINDER SINGH AND ANOTHER

Civil Suit No. 654 of 1954

Purchase by Sikh father of property in Kenya in name of son-Whether benami transaction-Whether presumption of advancement arises-Whether personal law applies-Kenya Order in Council, 1921, proviso to Article 4.

Held (4-7-56).—No presumption of advancement arises in Kenya in favour of a Sikh son of a Sikh father by reason of the father having paid the purchase price of property situate in Kenya and taken a transfer thereof in th

Cases referred to: Gopeekrist Gosain v. Gungarpersaud Gosain, (1854) 6 Moo. I. A. 53 (P. C.); 19 E. R. 20; Bilas Kunwar v. Desraj Ranjit Singh, 42 I. A. 202 (P. C.); Kerwick v. Kerwick, (1920) 47 I. A. 275 (P. C.); Sura Lakshmiya Fatima, 13 Moo. I. A. 232.

Referred to: Woodroffe and Amir Ali, 9th edn., 711, 712, 841, 842.

RULING.—This is a suit by a Sikh father against his son and another Sikh. The defendants are said to be registered proprietors as tenants in common in equal shares of two plots of land in Kisumu.

The plaintiff, Bishen Singh, the father, avers in his plaint that in or about the year 1929 he, with one Ram Singh, the predecessor in title of the second defendant, bought a plot of land in Kericho, now known as Plot 631/171-2, which was held by Ram Singh and himself as tenants in common in equal undivided half shares.

The plaintiff pleads that he paid for his half share out of his own moneys, but registered his share in the plot in the name of his son Mohinder Singh, the first defendant, who was then about ten years old. He pleads that he erected a building on the land with his own moneys, let the building and has been collecting rent and paying outgoings. The plaintiff avers that by taking a registered title in the name of his infant son, the first defendant, he did not intend to confer a beneficial interest on him, a fact of which he says that the second defendant had direct or constructive notice.

In March, 1954, the plaintiff says the second defendant informed him that the first defendant had sold to him (the second defendant) the first defendant's undivided share in the land.

The plaintiff accordingly lodged caveats against the titles and filed a plaint in this suit in June, 1954, claiming-

- (1) a declaration that the defendant (presumably the first defendant) holds the undivided half share in trust for the plaintiff;
- (2) an order to transfer the same to the plaintiff or a vesting order;
- (3) an injunction restraining dealings with the property;
- \$(4)\$ costs; and
- (5) further and other relief.

The defendants both plead that the transfer of the half share in the land which the plaintiff caused to be made to his son, the first defendant, was made by way of advancement and they rely on a presumption of advancement and say that the first defendant was not only the legal registered owner of the half share. but also its beneficial owner. They do not admit that the plaintiff paid for the land or erected a building on it or collected rent and paid outgoings. They plead further that an agreement was entered into between the defendants that the land should be partitioned and divided between them, the first defendant taking Plot 631/172 and the second defendant Plot 631/171, but no transfers were executed. They plead that on the faith of this agreement, the second defendant erected a building on Plot 631/171. The defendants say that if the plaintiff paid any of the outgoings of the property, these were paid as an advancement for his son, the first defendant, and so was any money spent by the plaintiff on erecting a building on Plot 631/172. The defendants deny the allegations in the plaint, rely on the registered title and also plead that the suit is barred by limitation.

At the outset, the Court enquired whether the limitation issued could be tried first as a preliminary issue under Order XIV, rule 2 of the Civil Procedure (Revised) Rules, 1948; but counsel stated that this issue could not be decided without hearing evidence.

Mr. Khanna, however, raised a preliminary point of law as to whether the English equitable presumption of advancement of a son by reason of his father purchasing property and taking a transfer in the son's name, applied to **Sikhs** in Kenya. Whether or not there was a presumption of advancement was clearly an issue in the case. This would affect the burden of proof, might affect the right to begin, and all the counsel engaged thought that the evidence might be shortened if Mr. Khanna's point was heard and decided as a preliminary issue of law.

Accordingly, the following agreed issue was framed and the court heard argument upon it:-

Issue. Does a presumption of advancement arise in Kenya in favour of a Sikh son of a Sikh father by reason of the father having paid the purchase price of property and taken a transfer thereof in the name of the son?

There is a long line of cases of unimpeachable authority to the effect that the presumption of intended advancement of a son which English Equity applies to a purchase by a father of property in the name of his son, is not part of the general law of India. In India, both among Hindus and Muslims the practice of purchasing property in the names of others is frequent. These transactions are called **benami** (i.e. "without name" or "fictitious name") transactions. The person in whose name the property is purchased is now known as the **benamidar**, and the result of a **benami** purchase is similar to the result of a purchase in England of property by A in the name of B out of moneys provided by A. Both in England and in India B holds the property as a trustee for A. The difference is that whereas in England if B is the wife or son of A, there is an exception to the rule raising a resulting trust in favour of A, it being presumed that A intended to benefit his wife or son; in India there is no such presumption.

"Where a purchase of real estate is made by a Hindoo in the name of one of his sons, the presumption of the Hindoo law is in favour of its being a benami purchase, and the burden of proof lies on the party in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate." (Gopeekrist Gosain v. Gunsapersaud Gosain, (1854) 6 Moore Ind. App. 53, 19 E. R. 20.)

In *Bilas Kunwar v. Desraj Ranjit Singh*, (1915) 42, I. A. 202 (P. C.) Sir George $\mathbb{R}$ $\mathbb{Z}$ Farwell said at page 205: $\mathbf{\mathbb{Z}}$ $\mathcal{L}(\mathcal{M})\mathcal{L} = \mathcal{L}$

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α ... the natural inference is that the purchase was a benami transaction, a dealing common to Hindus and Mohamedans alike, and much in use in India. It is quite unobjectionable and has a curious resemblance to the doctrine of our English law that the trust

of the legal estate results to the man who pays the purchase-money and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to a feoffor. The exception in our law by way of advancement of wife or child does not apply in India".

In *Kerwick v. Kerwick*, (1920) 47 I. A., 275, the facts were: The appellant bought land in Burma, and having caused it to be conveyed to his wife, the respondent, erected houses upon it at his own expense. Both husband and wife were born in India of English parents, but had resided during their whole lives in India save for occasional visits to England. The appellant sued the respondent in Burma for a declaration that she held the houses as his *benamidar* and for an order that they be conveyed to him. It was held that the rights of the parties were to be determined according to the law applied by the Court of Chancery in England whereby the respondent being the appellant's wife, there was a rebuttable presumption that the transaction was intended for her advancement; but that, upon the evidence, the appellant had discharged the onus upon him, since he had established with reasonable clearness that he had other specific motives for his action; and that the suit accordingly succeeded. Their Lordships of the Privy Council said at page 278:

"The general rule and principle of the Indian Law as to resulting trusts differs but little, if at all, from the general rule of English Law upon the same subject, but in their Lordship's view it has been established, by the decisions in the case of *Gopeekrist v. Gungapersaud*, 6 Moo. IA: 53 and *Uzhur Ali v. Bebee Ultaf Fatima*, 13 Moo. I. A. 232, that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mohamedan or Hindu, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by statute, no exception has ever been engrafted on the general law of India negating the presumption of the resulting trust in favour of the person providing the purchase-money, such as has, by the Courts of Chancery, in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England.

The question which of the two principles of law is to be applied to a transaction such as the present which takes place between two persons, born in India of English parents, and who have resided practically all their lives in India is of general importance."

It will be observed that in *Kerwick's* case, notwithstanding that benami transactions without any presumption of advancement were part of the law of India in which country the husband and his wife had been born and spent their lives and in which the property was situate, nevertheless it was their English personal law which was applied.

: In *Sura Lakshmiah Chety v. Kothandarama Pillai*, (1925) 52, I. A. 286, 289 (P. C.) Sir John Edge, delivering the judgment of the Board, said:

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"The question upon the answer to which this suit depends is whether Chockalingam had purchased that property in 1909 for his wife Lakshmi in performance of an ante-nuptial agreement alleged to have been made by him to settle a house upon her, or whether the purchase was made in her name as benamida for Chockalingam. There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a *benami* transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India."

In *Guram Ditta v. Ram Ditta*, (1928) 55 I. A. 235, 240 (P. C.) *Kerwick v. Kerwick* (supra) was approved and applied. Their Lordships said at page 240:

"The exception" (i.e. the presumption of advancement in favour of a wife which obtains in England) "has not been admitted in Indian law under the different conditions which attach to family life, and where the social relationships are of an essentially different character." $\$ \{x_1, \tau_2\} \$$

It will be observed that the reason for not importing the English presumption of advancement in favour of a wife seems to be the different customs, different conditions of family life and different social relationships which obtain in India and in England. This is a reason which would apply also to the Indian communities in Kenya, who, with few exceptions, notoriously cling to Indian ways of life, being little affected in their family life and social relations by English or African ideas and conceptions.

The Indian cases established beyond doubt that a presumption of advancement of the son would not arise in India by reason of a father having purchased property in India in the name of his son. This seems to apply not only to Hindus, but also to Mohamedans and other natives of India. I have no doubt that it applies to Sikhs in India in respect of property situate in India. The question, however, which here falls to be decided is whether or not there is a presumption of advancement in the case of a Sikh son of a Sikh father resident in Kenya in respect of property situate in Kenya.

Article 4 (2) of the Kenya Colony Order in Council 1921, provides inter alia that the jurisdiction of the Supreme Court shall, so far as circumstances admit, be exercised in conformity with certain applied Indian statutes "and so far as the same shall not extend or apply shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th day of August 1897. $\$ \cdot \$ \cdot \$ \cdot \$$. There follows a proviso:

"Provided always that the said common law doctrines of equity and the statutes of general application shall be in force in the Colony so far only as the circumstances of the Colony and its inhabitants permit and subject to such qualifications as local circumstances render necessary."

Under the similar words of the proviso to Article 17 (2) of the Tanganyika Order in Council 1920, the Court of Appeal for Eastern Africa considered that a divorce, according to Khoja Mahomedan law, of the Khoja Mahomedan domiciled in Uganda would be valid in Tanganyika. (Maleksultan wife of Sherali Jeraj v. Sherali Jeraj, (1955) 22 E. A. C. A. 142.) It seems that matters of marriage and succession depending on religious beliefs would also under the words of the proviso and in the absence of express statutory enactment be regulated by the personal law of the propositus. (*Maleksultan's case supra*).

In Mohamed Hassan v. Nana binti Mzee, (1944) 11 E. A. C. A. 4, the English law of guardianship had been applied by this Court to a Somali child and the Court of Appeal accepted this and did not apply Mohamedan law, but there was no argument in the Court of Appeal and no express decision of that Court that English law applied. Whitley, C. J., said at page 6: \$ —

"It having been held that English law applies and that ruling not having been challenged, we have to decide the case in the light of the English authorities."

Sheridan C. J. said:

"Even though the principles of English law may apply to such cases as the present, in considering the all-important question of the welfare of the child, the customs and habits of the community to which the child belongs must be given serious consideration."

Bartley J. said much the same.

Were the matter *res integra*, I might have had some hesitation in applying the proviso to Article 4 of the Order in Council to a matter which is admittedly not covered by any religious law, or belief of any community settled in Kenya. In particular, as benami purchases may be used as a cloak for fraud, I might have felt reluctant to apply the personal law of an Indian resident in Kenya so as to negative a presumption of advancement where a father purchases property in his son's name. But it seems that this Court has already negated such a presumption in two previous cases.

In Civil Case No. 117 of 1942 (O. S.) In the matter of a Vesting Order of the properties held by Amru alias Amarkaur the deceased wife of Jagat Singh s/o Atma Ram, Jagat Singh deposed that he had, out of his own moneys, bought properties in the name of his wife, then dead, and he sought a declaration that the properties were held by her as his nominee, and as a bare trustee for him and for a vesting order. A guardian **ad litem** was appointed to represent the interests of infant children and the matter seems to have been fully argued. Kerwick v. Kerwick and others of the Indian cases mentioned above being cited. Sheridan, C. J., made a vesting order as prayed. (It may be noted that "Jagat Singh" and "Amar Kaur" are common Sikh names and it would appear that the parties to that case were, as in the instant case. Sikhs.)

In Civil Case No. 864 of 1951 (O. S.) In the Estate of Lalitaben, a Hindu husband, Devji Hamir, alleged that he had bought, out of his own moneys, certain property in the name of his wife, who had subsequently died, and he sought an order that she had held it as nominee for and on trust for him and a vesting order. An order was made as prayed.

In neither of these cases was it held that any presumption of advancement of the wife was raised, nor was any evidence called to rebut such a presumption.

I see no valid reason for not following these cases and I, therefore, answer the preliminary issue "No".

The same result would be arrived at by another approach for which Mr. Khanna argued. Presumptions are, to some extent at least, part of the law of evidence. Evidence in Kenya is governed by the Indian Evidence Act. There is nothing in that Act which would justify a presumption of advancement being made where a father purchases property in the name of his son. As already pointed out, this is not law in India. (See, e.g. Woodroffe and Amir Ali, 9th edition, pp. 711, 712, 841, 842.) Accordingly, such a presumption is not justified in Kenya where the Indian law of evidence applies unless it can be imported (e.g. in the case of Englishmen) as part of the personal law of the persons concerned. I prefer, however, to rest my decision on the proviso to the Order in Council and to treat the absence of a presumption of advancement among Sikhs as an exception to the doctrines of equity in force in Kenya. The main relevance of this preliminary issue is that it affects the burden of proof.

Having read such of the Indian decisions as I can find, I have come to the conclusion that I should follow *Gopeekrist Gosain v. Gungapersaud Gosain* (supra) which decision was said by the Privy Council in *Nawab Azimut Ali Khan v. Hudwaree Mull*, 13 Moo. I. A. 395, to settle conclusively (in the absence of distinguishing circumstances) the law as to benami conveyances taken by a father in the name of a son. I, therefore, hold that if and when it is proved that the purchase-money was paid by the father in the instant case, a rebuttable presumption will arise that the suit property was purchased *benami*; and the burden will lie upon the persons claiming that property as their separate estate to establish the fact. The source of the purchase-money is not, of course, the only relevant factor determining the ownership of the beneficial interest. Receipt of rents and profits and payment of outgoings and other circumstances will be material.

As the Plaintiff has first to prove payment, out of his own moneys, of the purchase price of the property, and cannot split his case, he had better begin and continue.

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