Privy Council Appeal No. 65 *of* 1933.

Bengal Appeal No. 1 *of* 1932.

Sailendra Nath Das and another - - - - - - *Appellants*

v.

Saroj Kumar Das and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND JANUARY, 1935.

Present at the Hearing:

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD TOMLIN.]

This is an appeal from a decree of the High Court at Fort William in Bengal varying a decree of the Subordinate Judge in a suit in which the respondents (the plaintiffs) were seeking, against the two appellants and other defendants, certain declarations of title in regard to properties and to have a partition of the estate of which they alleged those properties were part.

The state of the family, with the affairs of which this suit is concerned, is this: One, Haralal, who died in 1874, had three sons, Mahendra, Narendra (who was a defendant) and Kedar. Kedar died in October, 1918, leaving two sons, who are the defendants in the suit and appellants before their Lordships. Mahendra died on the 21st November, 1902, leaving a widow, Anandamoyi, who was a *pro forma* defendant in the suit, but has since died, and a number of children, of whom three were daughters and one was a son. The son was Kalipada. On the death of Mahendra, Anandamoyi became the guardian of Kalipada. Kalipada died on the 26th September, 1909, and thereupon Anandamoyi took out administration in respect of the estate of Kalipada,

and, as his administratrix, became representative of the estate of Mahendra. Anandamoyi had a limited interest in the estate of Kalipada, who was the heir to Mahendra, and, subject to that limited interest, the estate of Kalipada belonged to respondents Nos. 1–3, who are children of sisters of Kalipada.

Before her death, which occurred on the 19th November, 1932, namely, on the 8th August, 1923, Anandamoyi had surrendered her limited interest to respondents Nos. 1–3.

There are three matters the subject-matter of the present appeal. These matters do not cover all the grounds covered by the decrees in the courts in India.

The first point relates to property which is called No. 1, and the nature of the point is this. The property stood in the name of the widow of Haralal, and the question was whether it was part of Haralal's estate, so that one-third of it belonged to the estate of Mahendra, or whether it was part of the estate of the widow of Haralal; in other words, whether she held it as *benami* for Haralal or not. Both the courts in India have held that the property belonged to the estate of Haralal, but it is said that, although in one sense that is a concurrent finding of fact, it has been reached in fact upon a misconstruction of the relevant document. The relevant document is dated the 27th August, 1894, and is a deed signed by Haralal's widow by which she released her interest to her three sons, Mahendra, Narendra and Kedar. It is in these terms :—

> " I have been in possession of the lands and buildings with all rights and appurtenances therto, which my husband, Babu Haralal Das, acquired during his lifetime, in my own name with my Nij funds given by him for the purpose of my maintenance and religious rites; and my acts are being performed, carried on with the profits, that is, rents, etc., thereof. My husband is dead. You, three brothers, enjoy the profits of the immovable properties that stand in his own name by possessing the same in equal shares as his heirs. There is no other heir besides you three brothers. I cease to have any claim to the profits of the properties that stand in the name of my husband, the late Haralal Das, and which are enjoyed and possessed by you three brothers, as charge for my maintenance and religious rites, etc., save and except in the properties that stand in my own name and enjoyed and possessed by me. If I put forward any claim to profits arising out of the properties that stand in my husband's own name, it will be null and void."

Now the question is whether on the true construction of that document the widow of Haralal in effect admitted that the property was property which belonged to Haralal, subject to her rights for maintenance and religious rites, so that in effect she held it as *benami* for his estate ? There is, in substance, no other material than this document upon which a conclusion can be reached.

The courts below have come to the conclusion that on the language of this document the property was held by the lady as *benami* for Haralal. Their Lordships are of opinion that the language of the document is consistent only with that view,

especially having regard to the latter portion of the instrument, where the phrase occurs: "I cease to have any claim to the profits of the properties that stand in the name of my husband, the late Haralal Das, and which are enjoyed and possessed by you three brothers, as charge for my maintenance and religious rites, etc., save and except in the properties that stand in my own name and enjoyed and possessed by me." It seems to their Lordships that that language can only mean that all the properties were the properties of Haralal, subject only to the right of the widow to maintenance and charge for religious rites, and that she was releasing her interest in the properties that stood in Haralal's own name, while still retaining her right to be maintained and have the expenses of religious rites provided for out of the property which had been placed in her name by her husband.

In their Lordships' opinion, the appeal on this point fails.

Now the second point arises in connection with two properties, one known as 62, Police Hospital Road, Calcutta, and the other known as 24, Police Hospital Road, Calcutta. The case in regard to these two properties is shortly this: Anandamoyi, as administratrix of her son, Kalipada, made application in the District Court for leave to sell his shares of these properties for payment of certain debts. She first applied on the 20th December, 1917, and she then stated that Mahendra, that is, her deceased husband, had died after having incurred a vast amount of debt due to different creditors, and amongst the creditors were Kedar—that is, one of the brothers of her husband—for the sum of Rs.14,057-9 annas, and Provabati for mortgage debt, principal and interest, Rs. 6,706-2 annas-5 pies; and she stated that if the creditors sued to obtain decrees and put up the properties of the deceased to sale, then valuable properties would be sold for small values, and substantial loss would be caused to the petitioner.

On that there was no order, and she was directed to submit accounts for the period of her administration and to explain how she proposed to deal with other debts.

In consequence, on the 5th June, 1918, she presented another petition in which she gave a fuller account of her husband's debts, and made a more far-reaching proposal. The application states that Mahendra contracted debts from different creditors, that over and above the debts already paid off out of the debts due to the above creditors, the total sum of Rs. 29,629-1 anna-10 pies was the debt due from the estate of the aforesaid deceased, namely, the sum of Rs. 14,008-7 annas-4 pies, due to Kedar, the sum of Rs. 7,052-4 annas due to Provabati, and the sum of Rs. 8,568-6 annas-6 pies due to Mukerji and Chatterji. Then she referred to her previous application and said that there was a mortgage decree for the sum due to Mukerji and Chatterji in a suit in the Court of the Subordinate Judge of the district, which was passed on the 10th November, 1914, and that the sum of Rs. 8,568-6 annas-6 pies was a debt due from her husband,

Mahendra, being the moiety of the decretal sum, including interest up to date, and that the decree was about to be put into execution. Then she said that it was necessary to sell the Police Hospital Road properties and another property, otherwise the amounts due to the creditors would be increased by interest, and valuable properties would be sold away in liquidation and serious loss would be occasioned.

Then with regard to No. 62, Police Hospital Road, she said that other purchasers were not willing to purchase the same, and that Kedar, who was the creditor for Rs. 14,000 odd, was ready and willing to purchase the petitioner's own share in the said property at its highest price of Rs. 5,000.

With regard to 24, Police Hospital Road, she said that Kedar was willing to purchase this also for Rs. 5,333.

Next she referred to another property known as the Abad property, and said that Narendra was ready and willing to purchase it for Rs. 15,000. Then she said that her own maintenance could be met out of the income of the properties left, free from incumbrance, besides the three properties aforesaid, and that the whole of the debts due to the aforesaid creditors would be paid off with the sale proceeds of the properties.

Then she prayed that the court would be pleased to grant permission to sell the Police Road properties and the Abad property.

That application was referred to the reporter, and he in due course made his report on the 17th June, 1918. He refers to the fact that as the result of her first application Anandamoyi had been ordered to submit accounts, and that he had been directed to report. Then he refers to the debts which had been mentioned by Anandamoyi, amounting to Rs. 29,629-1 anna-6 pies, and then states the further petition for permission to sell, which covered the Abad property, proposed to be sold for Rs. 15,000, and that he had, again, been directed to report. Then he says this: "It is proposed that the one-fourth share of the property No. 1, and the one-third share of the property No. 2" (those are the two properties which constitute the matter under the second head of the appeal) "will be sold to the co-sharer Kedar for Rs. 10,333, and that the one-half share of the Abad property—that is, the property No. 3—will be sold to Narendra for Rs. 15,000; it is further proposed that with the consideration money received from Kedar his dues will be paid off" (that means the Rs. 14,000 odd) "and that with the consideration money received from Narendra the debts due to Provabati and the debt due to Mukerji and Chatterji will also be paid off."

Next, he says that the debt to Kedar is Rs. 14,008-7 annas-4 pies—that is the sum which is mentioned in the second petition —but the consideration to be paid by him is Rs. 10,333. Then he proceeds as follows: "I told the pleader that the price of the properties should be more. The pleader explains that the municipal assessment will show the price to be not more than

that offered and that the property is undivided, and that there is the idol established in premises No. 62, Police Hospital Road, which is also her only family residence, and that the creditor Kedar, who is the purchaser also, will not press for the remainder of the debt and will gave a remission. So I think this value may be accepted." He further points out that as regards the Abad property Rs. 15,000 will not cover the total of the two debts, which is Rs. 15,620-10 annas-6 pies, and says that he had asked the pleader to raise the price of this property to Rs. 15,621, so that the two debts may be fully satisfied. "The pleader informed (*sic*) that under the circumstances the purchaser, who is a co-sharer, has agreed to raise it as suggested." He concludes as follows: "There is no possibility of paying off the debts from the small income of the estate. Under the circumstances, permission may be granted to sell one-fourth share of premises No. 62, Police Hospital Road, for Rs. 5,000, and one-third share of premises No. 162, Lower Circular Road for Rs. 5,333 to the co-sharer Kedar on condition that the debts due to him be satisfied in full as proposed and to sell the half share of lands"—that is Abad land—"for Rs. 15,621 on condition that the debts due to the estate of 'Provabati and Mukerji and Chatterji' be paid in full and on condition that proofs be filed within three months."

As the result of that report, on the same date, the 17th June, 1918, an order was made in these terms:

> "Permission is granted to sell one-fourth share of premises No. 62, Police Hospital Road, for Rs. 5,000, and one-third share (5 Cottas 5 Chittaks 15 sq. feet) of the easternmost bare land measuring 16 Cottas of premises No. 162, Lower Circular Road with brick-built boundary wall and a one-storied house, &c., for Rs. 5,333, to the co-sharer Kedar Nath Das on condition that the debts due to him be satisfied in full as proposed and to sell the half-share of lands 1,472 Bighas in Mouzas Gopalpur, Arapunch and Gillender Abad, Thana Baruipur and Sonarpur for Rs. 15,621 on condition that the debts due to the estate of Arka Prosad Ganguli and Keshab Chandra Mukherji and others be paid in full and on condition that proofs be filed within three months."

On the 31st July, 1918, in pursuance of the order, the share in No. 62, Police Hospital Road, was conveyed to Kedar by Anandamoyi, the consideration being expressed to be Rs. 5,000. It recites what had taken place in regard to the matter. Apparently the conveyance of the other property was not executed until a later date, namely, the 3rd December, 1918. In the meantime, on the 21st October, 1918, Kedar had died, and, therefore, the parties to this second conveyance were his sons, the present appellants. It was made between Anandamoyi on the one part, and the appellants on the other part, and it conveyed to them the share in the property, No. 24, Police Hospital Road. In the course of that conveyance it recited that the sons and heirs of Kedar had requested the vendor to sell and convey to them the one-third share in the premises for the sum of Rs. 5,500, to be appropriated in full of the balance of the said debt of

Rs. 14,008, and that Anandamoyi had agreed to execute the conveyance ; and the indenture witnessed that in consideration of Rs. 5,333 being in full satisfaction of the balance of the debt retained by the purchaser, Anandamoyi conveyed and confirmed unto the appellants the property in question.

Now it appears from the order paper that after those conveyances had been executed, the matter came before the court again for proof of the due satisfaction of the debt, and that on the 11th April, 1919, the translator reported on the matter, and that the permission for the sale of the shares in the two Police Hospital Road properties on the terms which had already been sanctioned was confirmed. The report is of some importance, because it refers to some documents with reference to which something will have to be said later. It says : " The first two properties were sold and the purchasers have put in the sale deeds "—those are the two conveyances to which reference has been made—" and a paid off hatchitta. It appears from those documents that the properties were sold at Rs. 10,333 and that the debts due to the purchasers (Rs. 14,509-12 annas) were paid off in full according to the terms of the order, dated 17th June, 1918." Then after referring to the sale of the other properties not having been completed, it concludes thus : " As the debts due to Kedar have been paid off in full as directed by order, dated 17th June, 1918, the permission for sale of the aforesaid properties may be confirmed." That was submitted for the judge's order, and it was in due course confirmed by the judge.

It is to be observed that so far as the plaint is concerned, the claim was by respondents Nos. 1–3 to have those conveyances set aside for fraud, misrepresentation and undue influence. The learned Subordinate Judge has taken a course which appears to be somewhat unusual. He has confirmed the conveyances, but has arrived at the conclusion that the purchaser, that is Kedar, now represented by his sons, the appellants, ought to pay in respect of those conveyances a sum of Rs. 2,300. As their Lordships understand it, he has reached that conclusion by examining some of the materials in connection with the accounts between the parties. He has gone behind the order of the court, and he has said that certain matters lead him to entertain doubts as to the *bona fides* of the entries in certain hatchittas, which are accounts stating the amount due to Kedar in making up the Rs. 14,000 odd, the release of which was to be the consideration for these properties. Those accounts were not framed at one time, but they were a series of continuous accounts over a number of years, and were signed by Anandamoyi ; but the matters to which he refers, he said, led him to entertain doubts as to the *bona fides* of the entries in the hatchittas, so that he excluded them from consideration altogether, and, having excluded them from consideration altogether, he was left only with certain receipts for payments made by Kedar in respect of a mortgage on the

joint estate, which were included in the entries in the hatchittas but did not include all the entries in the hatchittas. The total of those receipts before the Subordinate Judge was Rs. 24,000, or thereabouts, and the learned judge took the simple course of saying : " Well, Mahendra's estate was only liable for one-third, therefore the debt due to Kedar could not have been, if I exclude consideration of the hatchittas, more than Rs. 8,000." Then he comes to the conclusion, that that being so, the purchaser's representatives ought to find in cash the difference between Rs. 8,000 and Rs. 10,333, which was the total of the expressed price of the two properties. Accordingly, he declared that they were liable to pay that amount.

Now when the judgment of the High Court is turned to, it will be found that they took the view that it was not possible on the materials before them to ascertain what the debt due to Kedar really was. The judgment contains this passage :

> " It is possible that on accounts being taken on a proper footing, not so much as Rs. 14,000 and odd or even Rs. 10,333 was due to Kedar ; but the fact that he had made some and considerable payments to discharge what was justly due by Anandamoyi upon Provabati's mortgage cannot be doubted. To that extent and in that way she was indebted to Kedar, and a consideration which absolved her liability so far as that indebtedness was concerned cannot be regarded as any but a good consideration. It is possible, we cannot say that it was so, that on a proper accounting Kedar stood indebted to Anandamoyi [called by the Judge in error "Provabati "] on other hands, but for that Anandamoyi had her ordinary remedies, and the fact of such indebtedness can, in our opinion, on no principle, vitiate these transactions. Kedar might have kept Anandamoyi ignorant of her dues from him, if there were any ; but, if treating his own dues from her separately from her dues from him, he went in for these transactions, it cannot be said that he practised any fraud on Anandamoyi so far as these transactions are concerned. Nor, again, can it be said that there was a collusion between the parties to defraud the Court, for the Court would have granted the permission in any case as soon as the debt was shown to exist, regardless of the fact that as the result of a proper accounting or of a litigation Anandamoyi stood a chance of recovering some money from Kedar. We hold, therefore, that there was no collusion nor any fraud such as would entitle the plaintiffs to be relieved of the transactions of which they complain."

It might have been expected at that point that it would follow that the claim of the respondents Nos. 1 to 3 to have this transaction set aside would have failed ; but in a later passage the judgment of the High Court states this :

> " As regards the hatchitta we agree with the Subordinate Judge, for reasons we have already given, for viewing Kedar's and Narendra's dealings with Anandamoyi with suspicion, that it is not such a piece of evidence on which we can implicitly rely. The learned judge has given good reasons for his conclusion on this point, and the plaintiffs have supplemented these reasons by pointing out at least one other item which is inexplicable. A few more receipts have been produced before us, and their genuineness has not been disputed on behalf of the plaintiffs. They show a further payment of Rs. 1,320 on account of Srimati Provabati's mortgage, in which

Anandamoyi's share would be Rs. 440. Our conclusion is that the transactions as to properties Nos. 3 and 4 "—those are the shares in the Hospital Road properties—" should be upheld, and the only modification that should be made in the decree of the Subordinate Judge, so far as these transactions are concerned, is that the defendants 2 and 3 should get a credit for a sum of Rs. 440 against the order of payment of Rs. 2,300 which the learned judge has made."

The actual formal decree of the High Court varied the decree of the court below by directing the defendants to " refund to the plaintiffs the sum of Rs. 1,860 with interest thereon at the rate of six per cent. per annum from December, 1918, until realisation, and that the total amount of the principal and interest do form a charge on properties Nos. 3 and 4."

In their Lordships' view, the conclusions at which the courts in India have arrived on this head of the appeal cannot be supported.

No attempt has been made to set aside the order of the District Court which sanctioned the sale. That order was made after inquiry and report by the reporter. The High Court themselves pointed out that the permission to sell would have been granted in any case as soon as the debt was shown to exist, and, although their Lordships have been invited to say that there was no proper inquiry, in the court which gave the permission, as to the real existence of the debt, it is impossible for them to reach that conclusion having regard to the language employed by the reporter in his original report of the 17th June, 1918, and having regard, not only to the order which was made upon that report, but to the subsequent order confirming the sale after the conveyances had in fact been executed.

It seems to their Lordships impossible in this suit to reach the conclusion which the learned judges in India have reached. Their Lordships take the view that upon the evidence there was no justification for rejecting the hatchittas, and, therefore, quite apart from the question as to whether the courts in India were entitled to go behind the order of the District Court, their Lordships are of opinion that they reached a wrong conclusion in regard to the fact as to the debt, and that the hatchittas ought to have been regarded in considering what the amount of the debt was. What the learned judges in India, in fact, have done is to confirm the transaction and force upon the parties different terms. The sale, in fact, was a sale of the property in consideration of the release of a debt of Rs. 14,000 odd. The courts in India have treated it as though it were a sale for cash amounting to Rs. 10,333, and as though only Rs. 8,000, or some figure of that sort, had in fact been paid, and that, therefore, there remained a balance of unpaid purchase money. That seems to their Lordships to be giving to the transaction a wholly different shape to that which it in fact bore, and not, in the circumstances of the case, to be justified. It is,

in their Lordships' opinion, inconceivable, whatever the machinery and methods of the courts in India may be, that the learned judge could have sanctioned a transaction in which the consideration was the release of a debt without having first satisfied himself that the debt in fact existed. That view seems to be the view which the High Court themselves took in the passage to which reference has been made.

For those reasons, in their Lordships' judgment, the appeal in this regard must succeed.

Now there remains one other point, and that arises in connection with a share in the property, No. 41, Market Street. The conveyance was dated the 10th November, 1918, between the two conveyances before referred to, Kedar being then dead. By it Anandamoyi conveyed to the appellants the share of No. 41, Market Street. The consideration was expressed to be Rs. 1,000. After reciting that Kedar had paid from time to time a large amount in respect of the mortgage debt due to Provabati, the conveyance was made in consideration of Rs. 1,000 and concluded with these words : " To this effect I execute this deed of sale of my own free will and in sound mind and on getting a set-off of the consideration money mentioned in the kabala against the sum due to your father." That transaction was carried out without any application to the court, or any permission from the court authorising Anandamoyi to convey to the appellants. The Subordinate Judge took the view that it was a valid transaction. The High Court have reversed him in that regard, and they have reached the conclusion that there was no consideration for the conveyance, and that the conveyance cannot stand. Their Lordships are of opinion that the High Court reached a proper conclusion in regard to this matter. It seems to their Lordships quite plain, having regard to what took place in connection with the properties, the subject-matter of the second head of the appeal, that all the money which had been paid by Kedar at the date when this conveyance was executed to discharge liability under the Provabati mortgage was covered and satisfied by the conveyances which were the subject-matter of the transaction under the second head of the appeal. The receipts for Kedar's payments end on 12th August. Kedar himself died on the 21st October. There had already been in July a conveyance of one of the properties, the subject-matter of the second head of appeal, and the present conveyance took place in November, 1918. There is no evidence that between the 12th August, 1918, and the 21st October, 1918, when he died, Kedar had made any further payment at all, and in those circumstances there seems to have been, in their Lordships' judgment, no proof of any consideration given for this conveyance. In this respect the High Court were right, and their Lordships are of opinion, therefore, that the appeal under this head also must fail.

The result of that is that the appeal fails on the first point and on the third point, and succeeds on the second point. It is to be observed that the first point covers a matter which, in point of value, is of the most importance ; the second point is relatively small, and the third point is not nearly so great as the first point.

Their Lordships are of opinion that the proper order to make is to direct that the decree of the High Court be varied by substituting for the first operative part thereof an order and decree that the decree of the court of the Subordinate Judge be varied by directing that the plaintiffs' suit for a declaration of title to and recovery of possession of the properties Nos. 3 and 4 be dismissed, and that in other respects the decree of the High Court stands.

Their Lordships will humbly advise His Majesty accordingly.

The appellants are to pay to the respondents 1 to 3 one-third of their costs of this appeal, and there will be no other order as to costs.

In the Privy Council.

SAILENDRA NATH DAS AND ANOTHER

v.

SAROJ KUMAR DAS AND OTHERS.

DELIVERED BY LORD TOMLIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1925.