

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

APPA DHOND SAVANT (ORIGINAL DEFENDANT No. 3), APPELLANT v.
BABAJI KRISHNAJI GHOGLE (ORIGINAL PLAINTIFF), RESPONDENT^a.

1921.

June 6.

Benami—Sale deed—Contention that transaction partly genuine and partly benami.

A question having arisen as to whether a Court should entertain a contention that a transaction regarding immovable property was in part genuine and in part benami,

Held, that the Court should not in the circumstances give effect to such a contention.

Per MACLEOD, C. J. :—"Benami transactions are generally effected to conceal some fraud, or in order to support some object of a discreditable nature. But though the Courts have in the past recognised that the ostensible owner in a benami transaction can be ordered to restore the property to its original owner, I would not be willing to extend that doctrine* and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion."

SECOND Appeal against the decision of D. A. Idgunji, Additional First Class Subordinate Judge, A. P., reversing the decree passed by R. K. Bal, Subordinate Judge at Malwan.

Suit to recover possession.

The field in dispute known as Thikan Modapa originally belonged to two brothers, Dhond and Vithal.

On the 9th February 1857, the brothers conveyed the field along with two other Thikans to their sister's husband Raghoji.

In 1913, Babaji, a grandson of Raghoji, sued to recover possession of the Thikan from Savitri and others, heirs of Dhond, alleging that he was wrongfully dispossessed in 1912.

*Second Appeal No. 535 of 1916.

(With Second Appeal No. 470 of 1916.)

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Appa Dhond (defendant No. 3) contended *inter alia* that though his father Dhond had sold the Thikan and other property to plaintiff's grand-father, the sale was nominal and benami in favour of Dhond.

The Subordinate Judge dismissed the suit on the ground that the sale deed on which the plaintiff relied conveyed no title.

On appeal, the First Class Subordinate Judge decided the suit on the ground that the plaintiff was in adverse possession.

Defendant No. 3 appealed to the High Court.

Coyajee with *D. G. Dalvi*, for the appellant.

A. G. Desai, for the respondent.

MACLEOD, C. J. :—These are two companion appeals in Original Suits Nos. 302 and 325 of 1913 filed in the Court of the Subordinate Judge of Malwan. The claims were rejected in the trial Court, but were decreed by the lower appellate Court. The property in suit belonged in 1857 to two brothers, Dhond and Vithal Savant. They conveyed the property together with two other Thikans, by a deed, dated the 9th February 1857, to their sister's husband Raghoji Ghogle for Rs. 225. The defendants who resist the claims of the plaintiffs, as the descendants of Raghoji, are the widow and children of Dhond Savant. They alleged that with regard to the Thikan in suit, which was called Thikan Modapa, the transaction with the Ghogles was *benami*, and they rely on certain transactions with that Thikan after 1857 to show that it was intended, when all the three Thikans were conveyed, that Raghoji should hold the Modapa Thikan *benami* for the vendors. The contention, therefore, is that the Court, upon considering the evidence, can split up the contents of a document relating to a transaction regarding immoveable property in order to hold that part of it was genuine, while the

other part was *benami*. Considering the time that has elapsed since these lands were conveyed to Raghoji, it seems in any circumstances a difficult task for the vendor's descendants to prove that that transaction was either wholly or partially *benami*.

But a question arises at the threshold whether a Court can entertain a contention of this description, which certainly would be, in my opinion, an extension of the law with regard to *benami* transactions. *Benami* transactions, it may safely be assumed, are generally effected in order to conceal some fraud, or in order to support some object of a discreditable nature. But though the Courts have in the past recognised that the ostensible owner in a *benami* transaction can be ordered to restore the property to its original owner, I for my part would certainly not be willing to extend that doctrine and to hold that a transaction can be partly genuine and partly unreal, unless there are very strong reasons for obliging the Court to come to such a conclusion. I should say, therefore, that in this case we should not allow the defendants to set up this particular contention that the transaction of 1857 was *benami* so far as the Modapa Thikan was concerned.

Undoubtedly the facts proved support the contention that there was some secret arrangement between these two families which were so closely connected. But I do not think that there is anything on the record to satisfy me beyond all doubt that there was an understanding between the parties in 1857 which can at the present day be reduced into words.

The question, therefore, resolves itself into a matter of adverse possession. If the defendants could prove that they had been in possession of Modapa Thikan for more than twelve years before this suit was filed, then the plaintiffs in spite of their title would be barred from

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bringing their suit for possession. The learned appellate Judge remarks that the question of possession is rendered somewhat complicated by the fact that different plots of the Thikan have been dealt with by different persons, and he has found that the plaintiff's family mortgaged certain portions of the Thikan, although Kashi, who was the widow of Appa Savant, the cousin of Dhond and Vithal Savant, appears to have mortgaged a small corner of the Thikan in 1900 for Rs. 10. The mortgage evidenced by Exhibit 44, which was dated the 17th February 1865, executed by Dhond and Vithal Savant in favour of Raghoji has been paid off, and I do not think that that mortgage requires any further consideration.

We have then the finding of the Judge from the evidence of the plaintiffs and their witnesses that the Ghogles had been in possession of the land in suit through their mortgagees or the persons who were managing the lands on their behalf; that there had been no adverse possession on the part of the Savants; and that the Ghogles were in possession within twelve years prior to the suit. In the face of those findings, which are findings of facts supported by the evidence, it would be difficult for us to come to a conclusion that the defendants had been in adverse possession of the suit property for more than twelve years before suit.

There is this further consideration that as the family was closely related, the mortgage by Kashi might have been for one family or the other, and the learned Judge said that Dhaku (the daughter of Appa Savant, the cousin of Dhond Savant) managed the property. She was assisted by her mother Kashi. Their possession was on behalf of Bala and his sons. It will be seen from the pedigree at page 2 of the print that Ramchandra, father of the plaintiff in Suit No. 325,

married Dhaku, the daughter of Kashi. Therefore, we cannot attach such importance to the mortgage of Kashi as might have been attached to it if the families had not been related. Considering the lapse of time since the properties were conveyed to the Ghogle family, and the uncertain nature of the evidence with regard to the dealings in respect of these properties and the finding of the Judge that the Ghogle family had been in possession within twelve years of the suit properties, it is impossible, in my opinion, to come to a conclusion that the decrees of the lower appellate Court are wrong. Therefore, Second Appeal No. 535 of 1916 must be dismissed with costs, and Second Appeal No. 470 of 1916 dismissed.

SHAH, J.:—I agree.

Decrees confirmed.

J. G. R.

APPELLATE CIVIL.

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VALI ASMAL, APPLICANT v. RAO BAHADUR A. U. MALJI, OPPONENT^o.

Civil Procedure Code (Act V of 1908), Order XVI, Rule 2—Bombay High Court Civil Circulars, 1912, Chapter I, Rule 55†—Pleader summoned as witness—Subsistence allowance.

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^o Civil Extraordinary Application No. 308 of 1920.

† The Circular runs as follows:—

55....As to travelling and other expenses the following rules having previously been made by the High Court are still in force and should be taken to have the place of rules specifically made under sub-rule (3) of Rule 2 of Order XVI:—

(a) European and East Indian witnesses are to be allowed their actual expenses for carriage when the same are not in excess of six annas a mile.