Neutral Citation Number: [2014] EWCA Civ 1650

Case No: A3/2014/1364

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
SIR WILLIAM BLACKBURNE
HC11C00268

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 December 2014

Before :

LORD JUSTICE PATTEN

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Between :

BAL MOHINDER SINGH	**Claimant/ Appellant**
- and -	
(1) JASMINDER SINGH **(2) HERINDER SINGH**	**Defendants/ Respondents**

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John McDonnell QC (instructed by **Richard Slade & Company**) for the **Appellant**
Daniel Lightman (instructed by **Orrick Herrington & Sutcliffe (Europe) LLP**) for the **First Respondent**

Hearing date : 20 November 2014

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Approved Judgment

Lord Justice Patten :

1. This is a renewed application by the claimant, Mr Bal Mohinder Singh, for permission to appeal against the order of Sir William Blackburne dated 30 April 2014 dismissing his claim in these proceedings. In summary, the claimant sought a declaration that property comprising a large house in Ascot called Tetworth Hall and shares in a hotel group, Edwardian Group Limited ("EGL"), are held on a common intention constructive trust to give effect to a Hindu principle of joint family ownership known as the *Mitakshara*.

2. The defendants to the claim are the claimant's two sons but the real dispute is between the claimant and Jasminder, his eldest son, who is the registered proprietor of Tetworth Hall and the chairman and chief executive of EGL. According to the share register, 5.28% of the issued shares are held by Jasminder. A further 90.7% is registered in the name of various Singh family trusts. Herinder has 0.36% and his parents 0.13% each.

3. The Singh family are Sikhs but there is no dispute that the principle of *Mitakshara* applies to both Sikhs and Hindus. When applicable, the beneficial interest in the property belongs jointly to the male members of the family down to the third generation from a common ancestor. The male members are commonly referred to as coparceners.

4. Although the *Mitakshara* principle of joint family property can be given effect under English law through the medium of a common intention constructive trust, the existence of such a trust depends upon proof of the necessary shared intention that the relevant property should be held on those terms. This was a question of fact for the trial judge.

5. After a trial held over several weeks, Sir William Blackburne conducted a painstaking analysis of the evidence. The history leading up to what is now the extremely successful business of EGL is not uncomplicated. The claimant was born in the Punjab and in 1946 moved to East Africa where he married the defendants' mother. The two older children were educated in East Africa but came to England for their 'A levels and in 1974 the whole family moved to London. In 1976 they entered into a joint venture with the Vohra family (the family of the claimant's wife) to purchase the Edwardian Hotel in South Kensington. The business was carried on through a company called Edwardian Hotels Limited ("EHL"). Jasminder was allotted a third of the issued share capital which the claimant alleges was intended to be family property.

6. In 1977 the Singh family sold some property in London and purchased a property at 6 Collingham Road, South Kensington through a company called Patentgrade Limited. The property was used to provide serviced holiday flats. In 1978 EGL sold the Edwardian Hotel and bought another property in the Cromwell Road. In 1979 Patentgrade Limited sold 6 Collingham Road and invested the proceeds in another hotel called the Savoy Court Hotel off Oxford Street. The Vohra family subsequently sold their shares in EHL to Patentgrade and in 1986 Jasminder transferred his shares in EHL into the same company. Patentgrade Limited then changed its name to EGL.

7. By about 1987 EGL, either directly or through EHL, was running six hotels. In 1989 Tetworth Hall was purchased in Jasminder's name for use as a family home where he and the claimant still live. Later there were disputes about the running of EGL which resulted in the removal of Jasminder's parents from the board of the company. The present litigation commenced in 2011.

8. The judge held that there was no documentary evidence to support a common intention that, through these transactions, the shares in the company and the various properties owned and sold by members of the family were intended to be held beneficially in accordance with the *Mitakshara* principle. The holding of shares by female members of the family was in itself inconsistent with this. Many of the witnesses involved in the transactions said that the matter had never been mentioned. The father, mother and the two defendants all made wills which dealt with the alleged family property as if it were their own to dispose of free of any trust.

9. The judge (at [190]-[193]) also took into account the fact that the claimant had not "thrown in" any of his property into a common pot so as to make it joint family property. The judge was unwilling to accept that, from the mere fact that they lived together as a joint Hindu family, it followed that their respective assets (or some of them) became joint family property under the *Mitakshara* principle.

10. The judge also considered the evidence about the hotel companies and how they were financed. Reliance was placed on the fact that the claimant made what the judge found was an interest-free loan of £30,000 to assist with the acquisition of the Edwardian Hotel. But this was a loan to EHL, not to Jasminder, and the loan was in due course repaid. Jasminder paid for his own shares in EHL. Jasminder disagreed in evidence with the suggestion that his parents would not have lent the company £30,000 unless they were thereby financing what was to become a joint family company. Indeed the judge said:

> "203. I see nothing inherently irrational in Father (and, insofar as she had any share of it, Mother) lending money interest-free and unsecured to a start-up company such as EHL and allowing Jasminder to reap any benefit from this investment through his shareholding in the company. Jasminder said that they were willing to do so to give him a start in the world of business. It is perfectly natural for parents to wish to do this for one of their children, especially (in those days) in the case of a son. If Father had been able to demonstrate that the £30,000 which he provided came from joint family property – some common pot – and that this was made clear to Jasminder at the time of the investment of that money the claim would have had more force. But, as I understood it and as I think the evidence indicated, the £30,000 came in part from the sale of 25 Princes Avenue and in part from a loan raised on the security of the Post Office. There was no suggestion that these were joint family properties and certainly no evidence to indicate, if they were, how that had come about. As I have mentioned, there was no evidence, and no plea of any kind, that Father ever "threw in" any property.

> 204. Nor do I see anything significant in the fact that EHL was a new company and that the loan was unsecured and interest-free. It was Jasminder who pointed out that his parents had confidence in the commercial ability of the Vohras who, after all, were Mother's brothers and had had past dealings with them going back to their shared lives in Kenya. In short, Father trusted the Vohras and their business judgment and had good reason to do so. So there was nothing particularly unusual about lending on such apparently risky terms. In any event, in so far as any part of Father's case sought to rely on what the Vohras collectively were willing to do or what they must be taken to have intended or expected or understood I am simply not prepared to reach any finding on a disputed matter of this kind in the absence of any evidence from any of them."

11. In relation to Patentgrade and the Collingham Road property, the judge also rejected the suggestion that there was anything to support a common intention that the shares should be jointly owned. The claimant gave no evidence of any such intention or agreement. There were, however, some difficulties about Jasminder's own evidence. The judge said:

> "211. In their written closing submissions Mr McDonnell and Mr Burkitt pointed to a passage in the course of Jasminder's cross-examination in which he agreed that at the time the shares in Patentgrade were being allotted he spelled out that they would be held as separate property by each of them. He appeared to repeat this when the matter was put to him again a little later. He could not explain why, if he was ignorant at the time of the notion of joint family property (as distinct from separately owned property), he felt the need to spell this out. It was suggested to him that he was being dishonest in saying that he had said this and that the reason why he had felt the need to say so was because, contrary to his denials, he was aware at the time of the concept of joint family property and that that was how, in the understanding of the Singh family (including himself), a family investment such as this (and the earlier shares which he had acquired in EHL) should be held. Jasminder denied that this was so.
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> 212. Having carefully reviewed this part of Jasminder's evidence I am of the view that he was going beyond honest recollection at this point. I am of the view that he was doing so in his anxiety to make clear that the shares in question were the shareholder's own property and not joint family property as he had since come to understand the concept. To be fair to him he did so in answer to a question by Mr McDonnell in which he was asked if he had spelled out to the others that the shares would be their separate property. This was the only significant point in Jasminder's evidence where I thought that he was consciously venturing beyond either genuine recollection or an

> honest attempt to reconstruct what he thought had occurred. That said, I am none the less unable to accept that any common intention existed at this time between Father (with or without Mother) and Jasminder that the shares in Patentgrade should be treated by them as joint family property or that, in some way, they, Mother and Herinder should be taken to have "thrown in" their respective shares so that they became joint family property or that Father and Jasminder did so in relation to what each lent to Patentgrade to set it up and enable it to acquire 6 Collingham Road."

12. The skeleton argument and the grounds of appeal prepared on behalf of the claimant raise a very large number of challenges to the findings which the judge made. Since most (if not all) of these were findings of fact, an appeal has no real prospect of success unless it can be shown that the judge had no evidence on which to base his findings, ignored or misunderstood important aspects of the evidence, or made findings on it which were plainly wrong. Lewison LJ considered that the appeal would be an attempt to re-argue the facts and refused permission on a consideration of the papers.

13. Mr McDonnell QC recognised the difficulties which an appeal of this kind inevitably faces and therefore invited me to consider what he described as his best four points. He accepts that if he cannot persuade me to grant leave on those points then the remainder of his grounds of appeal will not fare any better.

14. The first point concerns the judge's apparent reliance on the claimant's failure to "throw in" any property into a common pot. The judge, says Mr McDonnell, fell into error in thinking that this was a pre-requisite to the application of the *Mitakshara* principle to a common intention constructive trust. He referred to *Mayne's Treatise on Hindu Law and Usage* which draws a distinction between blending private property into already existing joint family property and declaring self-acquired property as joint family property in the first instance.

15. Mr McDonnell submits that the claimant did not have to throw property into an existing family pool. Such a pool was created when the claimant made the loan of £30,000 I referred to earlier. This established a family owned business by 1980 which was afterwards grown with the support of the banks.

16. The judge's view of the law is said to have been an important factor in reaching his conclusion that there was no common intention constructive trust. But it was based on his acceptance at [103] of the expert opinion of Dr Mohan whose evidence he preferred to that of Professor Menski. This was clearly a matter for the judge and a challenge to his assessment of the expert evidence is likely to fail. But, in any event, the claimant's reliance on a loan constituting the nucleus of family property is not without its difficulties. I am not persuaded that a challenge to the judge's assessment of this point has a real prospect of success.

17. The second point relates to the transactions in 1976-77. The claimant accepts that none of the documentation relating to the development of the companies, their financial restructuring and the creation of the family trusts supports the existence of beneficial joint ownership of the relevant assets. But this is said to be irrelevant

because if the seed capital of the family property was provided to Jasminder as alleged, then nothing which followed was inconsistent with the existence of the alleged constructive trust.

18. I think this is too narrow a presentation of the exercise which the judge carried out. His examination of the facts covered the whole period both before and after the trust, as alleged, would have come into existence. The judge rejected the suggestion that the £30,000 was anything but an interest-free loan to EHL as shown in the accounts which the claimant approved. Jasminder provided the judge with an explanation for the loan which the judge accepted. See [203] of his judgment quoted earlier. The premise for this point is not made out.

19. The third point concerns Professor Menski's evidence. Both the claimant and his wife suffer from severe ill health and were unable to give any useful evidence at the trial. But in his first witness statement Professor Menski refers to an interview with the father and mother back in late 2009 and sets out what he says they told him about the money which they gave to Jasminder as seed capital for the *Mitakshara* assets. The judge, it is said, should have given proper weight to this evidence, particularly in the light of the state of health of the father and mother at the time of the trial. In fact he did not refer to it.

20. I am not persuaded that the judge can be criticised for giving this evidence little or no weight. He refers in [80] of his judgment to Professor Menski having taken a one-sided view of the facts based on his conversations with the father and mother rather than a more balanced view which would have involved discussing these matters with Jasminder. The judge said:

> "The uneasy feeling that I was left with as his evidence proceeded was that, given his interest in and wide knowledge of the customs of the Hindu and Sikh communities living in or originating from the historic Punjab, he was looking to find in Father's claim and his family origins what he expected to find in the Singh family and not what a dispassionate examination of the circumstances might have led him to find. The result of this was not in any sense to undermine Professor Menski's learning and very interesting insights into the history and development of Hindu law and its place in the lives of those affected by it but to highlight the fragility of the very impressionistic conclusions reached by him, in so far as it was appropriate for him to be doing so at all, concerning the extent to which Father and Mother ordered their financial arrangements in accordance with *Mitakshara* principles."

21. It is for the judge to decide what (if any) weight to give to evidence of this kind. There is no prospect of this Court interfering with his view that Professor Menski's evidence was inherently unreliable.

22. The fourth and last point was described by Mr McDonnell as perhaps his best. What is said is that the judge should have asked himself why Jasminder told a deliberate lie or lies as recorded in [211]-[212] of the judgment. The first lie was that in 1976 he told his father and mother that the 333 shares in EHL would be allotted to him and be

his property. The second was that in 1977 when the shares in Patentgrade were being allotted he told his parents that the shares which each member of the family would receive were to be held by them as separate property.

23. Mr McDonnell says that the judge should have treated those lies as determinative of the whole case in favour of the claimant because they indicate that Jasminder must have realised that his parents did assume back in 1976 and 1977 that the shares were being acquired as jointly owned family property. Shorn of this evidence, the judge should have applied what Lord Diplock said in *Gissing v Gissing* [1971] AC 886 at 906, i.e. that:

> "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some other intention which he did not communicate to the other."

24. The judge should therefore have found that, from Jasminder's silence in the face of his parents' expectation that the shares would be family property, there emerged an acceptance of that understanding which was sufficient to establish the trust alleged.

25. This line of argument requires one to treat the judge as falling into error by not inferring from the two lies told by Jasminder that he had understood his parents at that time to have intended the shares to be family property. But that is not the only possible inference which the judge could have drawn. He was equally entitled to treat the two lies (as he did) as an attempt by Jasminder to put beyond doubt the issue of whether there was in 1976-77 a common intention that the shares should be family property. If, as the judge found, Jasminder did not make the statements about separate property which he said he did, it does not inexorably follow that his parents had any such intention. The judge had to assess the significance of Jasminder's evidence in the context of the evidence as a whole, which is what he did.

26. For these reasons, I am not persuaded that an appeal on these grounds would have any real prospect of success and I dismiss the application.

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