Tiruvenibai & Another

Vs

Smt. Lilabai

Civil Appeal No. 239 of 1955

(P. B. Gajendragadkar, M. Hidayatullah JJ)

21.01.1959

JUDGMENT

GAJENDRAGADKAR, J. -

This is an appeal by the widow, and the minor son of Mangilal, defendant 1, and it has been filed with a certificate by the High Court of Judicature at Nagpur. It arises out of a suit filed by the respondent Shrimati Lilabai w/o Vrijpalji, for the specific performance of a contract to lease or in the alternative for damages and for a declaration against defendant 2, the daughter of defendant 1 that she has no right, title or interest in the property in suit. The respondent's case was that defendant 1 had executed an instrument (Ex. P-1) in favour of the respondent by which he had contracted to lease to her in perpetuity in occupancy right his four khudkasht lands admeasuring 95.19 acres situated in Mouza Mohammadpur in consideration of the debt of Rs. 8,700. According to the respondent the instrument had provided that, if defendant 1 did not repay to her the said debt on June 1, 1944, the said contract of lease would be operative on and from that date. Defendant 1 did not repay the loan by the stipulated date and so he became liable to perform and give effect to the said contract of lease on June 1, 1944. The respondent repeatedly called upon defendant 1 to perform the said contract, but defendant 1 paid no heed to her demands and so she had to file the present suit for specific performance. The respondent had been and was still ready and willing to specifically perform the agreement and to accept a deed of lease for the lands in question in lieu of the said debt of Rs. 8,700. Defendant 1, however, had been guilty of gross and unreasonable delay in performing his part of the contract and that had caused the respondent the loss of the benefit of the lease and consequent damage. On these allegations the respondent claimed specific performance of the contract and an amount of Rs. 2,340 as compensation or in the alternative damages amounting to Rs. 11,080.

To this suit Mst. Durgabai, the daughter of defendant 1 had been impleaded as defendant 2 on the ground that she was setting up her own title in respect of the lands in suit and a declaration was claimed against her that she had no right, title or interest in the said lands. Defendant 2 filed a written statement contesting the respondent's claim for a declaration against her but she did not appear at the trial which proceeded ex parte against her. In the result defendant 1 was the only contesting defendant in the proceedings.

Several pleas were raised by defendant 1 against the respondent's claim. He denied the receipt of the consideration alleged by her and he pleaded that the document (Ex. P-1) was a bogus, sham and collusive document which had been brought into existence for the purpose of shielding his property from his creditors and it was not intended to be acted upon. It was also urged by him that the said document, if held to be genuine, was an agreement to lease under s. 2(7) of the Indian Registration

Act, and since it was not registered it was inadmissible in evidence.

The learned trial judge framed appropriate issues on these pleadings and found against defendant 1 on all of them. Accordingly a decree was passed ordering defendant 1 to execute a lease-deed in respect of the fields mentioned in the plaint on a proper stamp paper in occupancy right in favour of the respondent and to put her in possession of them. A decree for the payment of Rs. 2,316 by way of compensation was also passed against him. The declaration claimed by respondent against defendant 2 was likewise granted.

This decree was challenged by defendant 1 by his appeal before the High Court of Judicature at Nagpur. Pending the appeal defendant 1 died and his widow and his minor son came on the record as his legal representatives and prosecuted the said appeal. The High Court held that the document was supported by consideration, that it was not an agreement to lease under s. 2(7) of the Indian Registration Act and therefore it did not require registration and was admissible in evidence. In the result the decree passed by the trial court was confirmed and defendant 1's appeal was dismissed.

The present appellants then applied to the High Court for leave to appeal to this Court and the High Court granted leave because it held that the basic question involved in the decision of the appeal was the legal effect of Ex. P-1 and that the construction of a document of title is generally regarded as a substantial question of law. It is with this certificate that the present appeal has come before this Court, and it raises two questions for our decision : Is the document (Ex. P-1) an agreement to lease under s. 2(7) : If not, does it require registration under s. 17 of the said Act ? All other issues which arose between the parties in the courts below are concluded by concurrent findings and they have not been raised before us.

Before dealing with these points, we must first consider what the expression "an agreement to lease" means under s. 2(7) of the Indian Registration Act, hereinafter referred to as the Act. Section 2(7) provides that a lease includes a counterpart, kabuliyat, an undertaking to cultivate and occupy and an agreement to lease. In Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd. (1919 L.R. 46 I.A. 240.) the Privy Council has held that "an agreement to lease, which a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease." In other words, an agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included under s. 2, sub-s. (7). In Hemanta Kumari Debi's case (1919) L.R. 46 I.A. 240.) a petition setting out the terms of an agreement in compromise of a suit stated as one of the terms that the plaintiff agreed that if she succeeded in another suit which she had brought to recover certain land, other than that to which the compromised suit related, she would grant to the defendants a lease of that land upon specified terms. The petition was recited in fall in the decree made in the compromised suit under s. 375 of the Code of Civil Procedure, 1882. A subsequent suit was brought for specific performance of the said agreement and it was resisted on the ground that the agreement in question was an agreement to lease under s. 2(7) and since it was not registered it was inadmissible in evidence. This plea was rejected by the Privy Council on the ground that the document did not effect an actual demise and was outside the provisions of s. 2(7). In coming to the conclusion that the agreement to lease under the said section must be a document which effects an actual demise the Privy Council has expressly approved the observations made by Jenkins, C.J., in the case of Panchanan Bose v. Chandra Charan Misra ((1910) I.L.R. 37 Cal. 808.) in regard to the construction s. 17 of the Act. The document with which the Privy Council was concerned was construed by it as "an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a

lease would be granted"; and it was held that "until the happening of that event, it was impossible to determine whether there would be any lease or not". This decision makes it clear that the meaning of the expression "an agreement to lease" "which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land". Ever since this decision was pronounced by the Privy Council the expression "agreement to lease" has been consistently construed by all the Indian High Courts as an agreement which creates an immediate and a present demise in the property covered by it.

It would be relevant now to refer to the observations of Jenkins, C.J., in the case of Panchanan Bose ([1910] I.L.R. 37 Cal. 808.). In that case, a solehnama by which no immediate interest in immovable property was created was held not to amount to a lease within the meaning of cl. (d) of s. 17 of the Act but merely an agreement to create a lease on a future day. "Such a document", it was observed, "fell within cl. (h) of s. 17 and as such was admissible in evidence without registration". Jenkins, C.J., held that "on a fair reading of the document, no immediate interest was created, there was no present demise, and the document was merely an agreement to create a lease on a future day, the terms of which were to be defined by documents to be thereafter executed". "This being so", said the learned C.J., "I think the appellants have rightly contended before us that the document was admissible in evidence as it falls within cl. (h) of s. 17 of the Indian Registration Act". This decision would show that an agreement which creates no immediate or present demise was not deemed to be a lease under s. 2(7) and so it was held to fall within s. 17(h) of the Act and this view has been specifically affirmed by the Privy Council in Hemanta Kumari Debi's case ([1919] L.R. 46 I.A. 240.).

It is true that in Narayanan Chetty v. Muthiah Servai ((1912) I.L.R. 35 Mad. 63.) a Full Bench of the Madras High Court had held that an agreement to execute a sub-lease and to get it registered at a future date was a lease within s. 3 of the Indian Registration Act of 1877 (III of 1877) and was compulsorily registrable under cl. (d) of s. 17. Such an agreement to grant a lease which requires registration, it was held, affects immovable property and cannot be received in evidence in a suit for specific performance of an agreement. The question which was referred to the Full Bench apparently assumed that the agreement in question required registration and the point on which the decision of the Full Bench was sought for was whether such an agreement can be received in evidence in a suit for specific performance (1) where possession is given in pursuance of an agreement, and (2) where it is not; and the Full Bench answered this question in the negative. "An agreement to lease", it was observed in the judgment of the Full Bench, "is expressly included in the definition of the lease in the Registration Act while it cannot be suggested that an agreement to sell falls within any definition of sale". It is clear that the question about the construction of the words "agreement to lease" was not specifically argued before the Full Bench, and the main point considered was the effect of the provisions of s. 49 of the Act. In that connection the argument had centered round the effect of the provisions of cl. (h) of s. 17 of the Registration Act and s. 54 of the Transfer of Property Act. In that Full bench took the view that in enacting s. 49 of the Act the Legislature meant to indicate that the instrument should not be received in evidence even where the transaction sought to be proved did not amount to a transfer of interest in immovable property but only created an obligation to transfer the property. A contract to sell immovable property in writing, though it may affect the property without passing an interest in it, is exempted from registration by clause (h) (now cl. 2(v)) of section 17 but an agreement in writing to let, falling within cl. (d) of s. 17, is not. That is why, according to the Full Bench, such an agreement cannot be received in evidence of the transaction which affects the immovable property comprised therein. Thus this decision does not directly or materially assist us in construing the expression "agreement to lease".

Besides, the said decision has not been followed by the Madras High Court in Swaminatha Mudaliar v. Ramaswami Mudaliar ((1921) I.L.R. 44 Mad. 399.) on the ground that it can no longer be regarded as good law in view of the decision of the Privy Council in Hemanta Kumari Debi's case ((1919) L.R. 46 I.A. 240.), and, as we have already pointed out, all the other High Court in India have consistently followed the said Privy Council decision.

The learned Attorney-General has, however, contended before us that the correctness of the decision of the Privy Council in Hemanta Kumari Debi's case ((1919) L.R. 46 I.A. 240.) is open to doubt and he has suggested that we should re-examine the point on the merits afresh. We do not think there is any substance in this contention because, if we may say so with respect, the view taken by the Privy Council in the said case is perfectly right. Section 17(1) of the Act deals with documents of which registration is compulsory. It is obvious that the documents falling under cls. (a), (b), (c) and (e) of sub-s. (1) are all documents which create an immediate and present demise in immovable properties mentioned therein. The learned Attorney-General's argument is that cl. (d) which deals with leases does not import any such limitation because it refers to leases of immovable properties from year to year or any term exceeding one year or reserving a yearly rent; and the Act deliberately gives an inclusive definition of the term 'lease' in s. 2(7). This argument, however, fails to take into account the relevant provisions of the Transfer of Property Act. Section 4 of the said act provides that s. 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908. Section 107 is material for our purpose. Under this section a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent can be made only under a registered instrument. This section also lays down that where a lease of immovable property is made by a registered instrument, such instrument, or, where there are more instruments than one, each instrument, shall be executed by both the lessor and the lessee. It would be noticed that it s. 107 has to be read as supplemental to the Act, the definition of the word 'lease' prescribed by s. 105 would inevitably become relevant and material; and there is no doubt that under s. 105 a lease of immovable property is a transfer of right to enjoy such property made in the manner specified in the said section. Therefore, it would not be right to assume that leases mentioned in cl. (d) of s. 17, sub-s. (1), would cover cases of documents which do not involve a present and immediate transfer of leasehold rights. It would thus be reasonable to hold that, like the instruments mentioned in cls. (a), (b) and (c) of s. 17(1), leases also are instruments which transfer leasehold rights in the property immediately and in presenti. We have already referred to the requirement of s. 107 of the Transfer of Property Act that a lease must be executed both by the lessor and the lessee. It may be pertinent to point out that an instrument signed by the lessor alone which may not be a lease under s. 107 may operate as an agreement to lease under s. 2(7) of the Act.

The legislative history of the provisions of s. 17(2)(v) may perhaps be of some assistance in this connection. Section 17(h) of Act III of 1877 which corresponds to the present s. 17(2)(v) did not appear in the earlier Registration Acts of 1864, 1866 and 1871. Its introduction in Act III of 1877 became necessary as a result of the decision of the Privy Council in Fati Chand Sahu v. Lilambar Singh Das ((1871) 9 Beng. L.R. 433; 14 M.I.A. 129.) in which it was held that an agreement to sell immovable property for Rs. 22,500 coupled with an acknowledgment of the receipt of Rs. 7,500 and a promise to execute a sale-deed on the payment of the balance was compulsorily registrable under s. 17 of the Act (Act XX of 1866.). Section 17(h) was therefore enacted in 1877 to make it clear that a document which does not itself create an interest in the immovable property does not require registration even if it expressly contemplates and promises the creation of that interest by a subsequent document; in other words, contracts of sale and purchase of which specific performance would be granted under certain circumstances fall within this provision and would no longer be governed by the said decision of the Privy Council in the case of Fati Chand Sahu v. Lilambar Singh

Das ((1871) 9 Beng. L.R. 433; 14 M.I.A. 129.). Thus the policy of the Legislature clearly is to exclude from the application of cls. (b) and (c) of s. 17(1) agreements of the said character. On principle, there is no difference between such agreements of sale or purchase and agreements to lease. Under both classes of documents no present or immediate demise is made though both of them may lead to a successful claim for a specific performance. That is why the Privy Council observed in the case of Hemanta Kumari Debi ((1919) L.R. 46 I.A. 240.) that the context and the scheme of the statute justified the view taken by Jenkins, C.J., in the case of Panchanan Bose ((1910) I.L.R. 37 Cal. 808.).

It may also be relevant to bear in mind that the other documents which are included within the word 'lease' by s. 2(7) of the Act support the same conclusion. A counterpart, as it is usually understood, is a writing by which a tenant agrees to pay a specified rent for the property let to him and signed by him alone. It is thus in the nature of a counterpart of a lease and as such it is included within the meaning of the word 'lease' under s. 2(7). Same is the position of a kabuliyat and an undertaking to cultivate or occupy. In other words, it is clear that all the four instruments which, under the inclusive definition of s. 2(7), are treated as leases satisfy the test of immediate and present demise in respect of the immovable property covered by them. We must, therefore, hold that the expression "an agreement to lease" covers only such agreements as create a present demise.

Let us now proceed to deal with the question as to whether the document (Ex. P-1) constitutes "an agreement to lease". It purports to be a receipt executed in favour of the respondent by defendant 1 and bears a four anna revenue stamp. "I have this day given to you", says the document, "the land described below which is owned by me. Now you have become occupancy tenant of the same. You may enjoy the same in any way you like from generation to generation. My estate and heirs or myself shall have absolutely no right thereto. You shall become the owner of the said land from date 1-6-1944. I will have absolutely no right thereto after the said date". Then the document proceeds to mention the properties and describes them in detail, and it adds "all the above fields are situate at Mouza Mohammadpur, mouza No. 312, tehsil Arvi, district Wardha. The estate described above has been given to you in lieu of your Rs. 8,700 due to you, subject to the condition that in case your amount has not been paid to you on date 1-6-1944, you may fully enjoy the estate described above in any way you like from generation to generation". The question for our decision is : Does this document amount to an agreement to lease under s. 2(7) of the Act ?

In construing this document it is necessary to remember that it has been executed by laymen without legal assistance, and so it must be liberally construed without recourse to technical considerations. The heading of the document, though relevant, would not determine its character. It is true that an agreement would operate as a present demise although its terms may commence at a future date. Similarly it may amount to a present demise even though parties may contemplate to execute a more formal document in future. In considering the effect of the document we must enquire whether it contains unqualified and unconditional words of present demise and includes the essential terms of a lease. Generally if rent is made payable under an agreement from the date of its execution or other specified date, it may be said to create a present demise. Another relevant test is the intention to deliver possession. If possession is given under an agreement and other terms of tenancy have been set out, then the agreement can be taken to be an agreement to lease. As in the construction of other documents, so in the construction of an agreement to lease, regard must be had to all the relevant and material terms; and an attempt must be made to reconcile the relevant terms if possible and not to treat any of them as idle surplusage.

The learned Attorney-General contends that this document is not a contingent grant of lease at all.

According to him it evidences a grant of lease subject to a condition and that shows that a present demise is intended by the parties. He naturally relies upon the opening recitals of the document. According to him, when the document says that defendant 1 has given to the respondent the land described below and that the respondent has become occupancy tenant of the same, it amounts to a clear term of present demise. A similar recital is repeated in the latter part of the document where it is stated that the estate described above has been given to the respondent in lieu of Rs. 8,700 due to her. In our opinion, it would be unreasonable to construe these recitals by themselves, apart from the other recitals in the document. We cannot lose sight of the fact that the document expressly states that the respondent shall become the owner of the land from 1-6-1944 and that defendant 1 would have no title over it after that date. This recital also is repeated in the latter part of the document; and it makes the intention of the parties clear that it is only if the amount of debt is not repaid by defendant 1 on the date specified that the agreement was to come into force. In other words, reading the document as a whole it would be difficult to spell out a present or immediate demise of the occupancy rights in favour of the respondent. In this connection the fact that the document is described as a receipt may to some extent be relevant. It is clear that by executing this document the defendant wanted to comply with the respondent's request for acknowledging the receipt of the amount coupled with the promise that the amount would be repaid on 1-6-1944. The defendant also wanted to comply with the respondent's demand that, if the amount was not repaid on the said date, he would convey the occupancy rights in his lands to her. Besides, it is significant that the document does not refer to the payment of rent and does not contemplate the delivery of possession until 1-6-1944. If the document had intended to convey immediately the occupancy rights to the respondent it would undoubtedly have referred to the delivery of possession and specified the rate at which, and the date from which, the rent had to be paid to her. The stamp purchased for the execution of the document also incidentally shows that the document was intended to be a receipt and nothing more. Under s. 2 of the Central Provinces Land Revenue Act, 1917 (C.P. II of 1917) an agricultural year commences on the first day of June and it is from this date that the agreement would have taken effect if defendant 1 had not repaid the debt by then. It is clear that the respondent was not intended to be treated as an occupancy tenant between the date of the document and June 1, 1944. During that period the agreement did not come into operation at all. In other words, it is on the contingency of defendant's failure to repay the amount on June 1, 1944, that the agreement was to take effect. We have carefully considered the material terms of the document and we are satisfied that it was not intended to, and did not, effect an actual or present demise in favour of the respondent. In our opinion, therefore, the High Court was right in holding that the document was not an agreement to lease under s. 2(7) of the Act and so did not require registration.

We would now briefly refer to some of the decisions on which the learned Attorney-General relied in support of his construction of the document. In Purmananddas Jiwandas v. Dharsey Virji [(1886) I.L.R. 10 Bom. 101.], the agreement between the parties had expressly provided that the lease in question was to commence from October 1, 1882, though the agreement was executed seven days later, that the rent was to commence from that day and the rent then due was to be paid by the next day. It is in the light of these specific terms that the Bombay High Court held that the relevant words in the document operated as an actual demise. None of these conditions is present in the document with which we are concerned.

Similarly in Poole v. Bentley [(1810) 12 East. 168; 104 E.R. 66.], by the instrument in question, Poole had agreed to let unto Bentley, and Bentley had agreed to take, all that piece of land described for the term of 61 years at the yearly rent of pounds 120 free and clear of all taxes, the said rent to be paid quarterly, the first quarter's rent with in 15 days after Michaelmas 1807, and that in consideration of the lease, Bentley had agreed within the space of four years to expend and lay out

in 5 or more houses of a third-rate or class of building pounds 2000 and Poole had agreed to grant a lease or leases of the said land and premises as soon as the said 5 houses were covered in. In dealing with the construction of this document Lord Ellenborough, C.J., observed that the rule to be collected from the relevant decisions cited before him was that the intention of the parties as described by the words of the instrument must govern the construction and that the intention of the parties to the document before him appeared to be that the tenant, who was to have spent so much capital upon the premises within the first four years of the term, should have a present legal interest in the term which was to be binding up on both parties; though, when certain progress was made in the building, a more formal lease or leases might be executed. This decision only shows that if the intention is to effect a present demise the fact that a further formal document is contemplated by the parties would not detract from the said intention. It would, however, be noticed that the document in that case contained a stipulation for the payment of the rent and the tenant was to be let into possession immediately. This case also does not assist the appellant.

In Satyadhyantirtha Swami v. Raghunath Daji [A.I.R. 1926 Bom. 384.] the contract of lease was contained in two documents which showed that the lands were being cultivated by Appaji and Ravji who had signed the first document and that they were authorised to continue in occupation of the lands on terms mentioned in the first document. The argument that a part of the agreement would not come into operation till some years later, it was held, did not operate to make the document other than a present demise. It is difficult to appreciate how this decision can assist us in construing the present document.

In Balram v. Mahadeo [I.L.R. 1949 Nag. 849.] the Nagpur High Court was dealing with an instrument which purported to be a receipt and the terms of which seemed to contemplate the execution of a sale-deed in respect of the properties covered by it. Even so, the material clause was that "it is agreed to give to you both the above fields in occupancy rights". It was held that, on a fair and reasonable construction, the document was intended to affect a transfer of the occupancy right in presenti and was as such an agreement to lease. No doubt, as observed by Bose, J., "on a superficial view of the document it would not appear to be an agreement to lease. But in construing a transaction one has to look beneath the verbiage and ascertain what are the real rights which are being transferred. When that is done, we consider that this document is an agreement to lease despite the fact that it calls itself a receipt and speaks throughout of a sale". It is unnecessary to consider the merits of the conclusion reached by the Nagpur High Court in this case. It would be enough to say that the said decision would not afford any assistance in construing the document before us. Besides it is obvious that in construing documents, the usefulness of the precedents is usually of a limited character; after all courts have to consider the material and relevant terms of the document with which they are concerned; and it is on a fair and reasonable construction of the said terms that the nature and character of the transaction evidenced by it has to be determined. In our opinion, the High Court was right in holding that the instrument (Ex. P-1) was not an agreement to lease under s. 2(7) of the Act.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

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