

Raghunath and Others

Vs

Kedar Nath

Civil Appeal No. 457/58 of 1968

(J.C. Shah, V. Ramaswami - I, A.N. Grover JJ)

03.02.1969

JUDGMENT

RAMASWAMI, J. -

1. In the suit which is the subject-matter of these appeals the plaintiff alleged that one Dwarka Prasad took a loan of Rs. 1,700/- from Madho Ram, father of the defendants, and that on 27th July, 1922, Dwarka Prasad along with one Mst. Kunta, his maternal grandmother, executed a possessory mortgage deed of the disputed house for Rs. 1,700/- in favour of Madho Ram. The terms of the mortgage deed were that the mortgagor was to pay interest of Rs. 12/12-per month out of which the rent amounting to Rs. 6/- which was the agreed usufruct of the house in suit was to be adjusted and the mortgagor was to pay Rs. 6/12/- per month in cash towards the balance of the interest. The parties agreed that the mortgage would be redeemable within twenty years after paying the principal amount and that portion of interest which was not discharged by the usufruct and other amounts. When Dwarka Prasad was unable to pay the amount of Rs. 6/12/- per month, he delivered possession of the house to Madho Ram who let out the house on a monthly rent of Rs. 25/-. The mortgagors Dwarka Prasad and Mst. Kunta died leaving Mst. Radha Bai as Dwarka Prasad's heir. Radha Bai sold the house in dispute to the plaintiff on 2nd February, 1953, and executed a sale deed. The plaintiff, therefore, became entitled to redeem the mortgage and asked the defendants to render accounts. The defendants contested the suit on the ground that Madho Ram was not the mortgagor nor were the defendant mortgagees. It was alleged that in the locality where the house was situated, there was a custom of paying Haqechaharum and to avoid that payment, the original deed, dated 27th July, 1922, was drafted and executed in the form of a mortgage though it was actually an outright sale. According to the defendants, the house was actually sold to Madho Ram and was not mortgaged. The defendants also pleaded that if the deed, dated 27th July, 1922, was held to be a mortgage, the mortgagees were entitled to get the payment of Rs. 6,442/8/- as interest, Rs. 2,315/- as costs of repairs etc. The trial Court held that the deed, dated 27th July, 1922, was a mortgage deed, that Dwarka Prasad did not sell the house to Madho Ram and that the plaintiff was entitled to redeem the mortgage on payment of Rs. 1,709/14/-. The trial Court accordingly decreed the plaintiff's suit for redemption on payment of Rs. 1,709/14/-. Against the judgment of the Trial Court, the defendants preferred an appeal before the District Judge, Varanasi, who allowed the appeal and dismissed the plaintiff's suit. The plaintiff took the matter in second appeal to the High Court which framed an issue and remanded the case back to the lower appellate court for a fresh decision. The issue framed by the High Court was "Have the defendants become the owners of the property in dispute by adverse possession" ?. The High Court also directed the lower appellate court to decide the question of admissibility of Exts. A-25 and A-26. After remand the lower appellate court held that the deed, dated 27th July, 1922, was a mortgage deed and not a sale-deed, and, therefore, the plaintiff was entitled to redeem the mortgage. The lower appellate court further held

that the defendants had failed to prove that they had acquired title by adverse possession. The lower appellate court made the following order :

"The appeal is allowed with half costs in this way that the suit is decreed for the redemption of the mortgage in question if the plaintiff pays within six months Rs. 1,700/- as principal, Rs. 9.87 nP. Prajawat paid before this suit and any Prajawat paid by the defendants during the pendency of this suit till the plaintiff deposits the entire sum due under this decree and the interest at the rate of Rs. 6/12/- per month from 27th July, 1922, till the plaintiff deposits the entire sum due under this decree. The costs of the Trial Court are made easy. Let the preliminary decree under Order XXXIV, Rule 7, C.P.C., be modified accordingly".

Against the judgment and decree of the lower appellate court both the plaintiff and the defendants filed appeals before the High Court. The plaintiff prayed that the decree of the lower appellate court should be set aside and the decree of the Trial Court should be restored. The defendants, on the other hand, prayed that the decree of the lower courts should be set aside and the plaintiff's suit should be dismissed with costs. By its judgment, dated 27th April, 1964, the High Court dismissed the second appeal preferred by the defendants but allowed the plaintiff's appeal and set aside the judgment of the lower appellate court and restored the judgment of the trial court. The High Court further remanded the case to the lower appellate court with the direction that "the defendants be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage". The present appeals are brought by special leave against the judgment of the Allahabad High Court, dated 27th April, 1964, in Second Appeal Nos. 4940 and 3660 of 1961.

2. In support of these appeals it was contended by Mr. Sinha that the deed, Ex. 4, dated 27th July, 1922, was a sale deed and not a mortgage deed. It was pointed out that there was a subsequent deed of sale, dated 8th October, 1922, Ex. A-26 which is named 'Titimma Bainama'. The contention was that the document Ex. 4, dated 27th July, 1922, must be construed along with Ex. A-26 which forms part of the same transaction and so construed the transaction was not a usufructory mortgage but was an outright sale. We are unable to accept the argument put forward on behalf of the appellant. Ex. A-26, dated 8th October, 1922, is not a registered document, and is hence not admissible in evidence to prove the nature of the transaction covered by the registered mortgage deed, Ex. 4, dated 27th July, 1922. If Ex. 4 is taken by itself, there is no doubt that the transaction is one of mortgage. The document Ex. 4 recites that in consideration of money advanced the executants mortgage the said house 'Bhog Bhandak' Bearing No. 64/71, situate Mohalla Gola Dina Nath. Clause 2 provides a period of twenty years for redemption of the mortgage. Clause 6 of the document stipulates that the cost of repairs will be borne by the mortgagors. Clause 1 states :

"That the said sum of rupees seventeen hundred half of which is rupees eight hundred and fifty will carry interest at the rate of twelve annas per cent monthly. The sum of rupees six will be deducted towards rent monthly from the interest which will accrue. The possession of the house has been delivered to the said mortgagee Mahajan (money lender). The mortgagors will pay the balance of rupees six, annas twelve, month by month, to the said mortgagee, after deducting the rent of rupees six after giving the possession of the said house and shop."

Clause 4 provides :

"That we well go on paying the said Mahajan the sum of rupees six twelve annas the balance of the interest monthly. If the whole or part of the interest remains unpaid we will pay at the

time of redemption. If this amount of interest is not paid the said house shall not be redeemed."

The reading of these terms clearly show that Ex. 4 was a mortgage deed and not a sale deed. It was contended on behalf of the appellants that in order to avoid the payment of Haqe-chaharum, the original deed, dated 27th July, 1922, was drafted and executed in the form of a mortgage but it was actually meant to be an out right sale. In support of this argument reference was made to Ex. A-26, dated 8th October, 1922. As we have already said Ex. A-26, was required to be registered under Section 54 of the Transfer of Property Act. In the absence of such a registration this document cannot be received in evidence of any transaction affecting the property in view of Section 49 of the Registration Act. It was, however, urged on behalf of the appellants that the effect of Section 4 of the Transfer of Property Act was not to make Section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of Section 54, Paragraph 2 of the Transfer of Property Act. In support of this contention reliance was placed on the decision of the Full Bench of the Allahabad High Court in Sohan Lal & Others v. Mohan Lal & Others. (ILR 50 All 986)

3. Section 4 of the Transfer of Property Act states :

"The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Registration Act, 1872.

And Sections 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908."

Section 54 of the Transfer of Property Act reads :

" 'Sale' is a transfer of ownership in exchange for a price paid or promised or part paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property."

Section 17 of the Registration Act states :

"17. (1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864 or the Indian Registration Act, 1866 or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely -

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property."

Section 49 of the Registration Act prior to its amendment in 1929 read :

"No document required by Section 17 to be registered shall -

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

By Section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, Section 49 was amended as follows :

"No document required by Section 17 or by any provision of the Transfer of Property Act, 1882, to be registered shall -

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered :

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument."

The inclusion of the words "by any provision of the Transfer of Property Act, 1882", by the Amending Act, 1929, settled a doubt entertained as to whether the documents of which the registration was compulsory under the Transfer of Property Act, but not under Section 17 of the Registration Act, were affected by Section 49 of the Registration Act. Section 4 of the Transfer of Property Act enacts that "Section 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908". It was previously supposed that the affect of this

section was merely to add to the list of documents of which the registration was compulsory and not to include them in Section 17 so as to bring them within the scope of Section 49. This was the view taken by the Full Bench of the Allahabad High Court in Sohan Lal's case (supra). The same view was expressed in a Madras Case Rama Sahu v. Gowro Ratho (ILR (1921) 44 Mad 55) and by MacLeod, C.J., in a Bombay case Dawal v. Dharma. (ILR (1918) 41 Bom 550) We are however absolved in the present case from examining the correctness of these decisions. For these decisions have been superseded by subsequent legislation, i.e. by the enactment of Act 21 of 1929, which by inserting in Section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882", has made it clear that the documents in the supplemental list, i.e. the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act fall within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. We are accordingly of the opinion that Ex. A-26 being unregistered is not admissible in evidence. In our opinion, Mr. Sinha, is unable to make good his argument on this aspect of the case.

4. Mr. Sinha contended that in any event the High Court should not have remanded the case to the lower appellate court with a direction that the defendants should be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. It was pointed out that the plaintiff did not file an appeal against the decree of the Trial Court and in the absence of such an appeal the High Court was not legally justified in giving further relief to the plaintiff than that granted by the Trial Court. In our opinion, there is justification for this argument. We accordingly set aside that portion of the decree of the High Court remanding the case to the lower appellate court with a direction that the defendants should be asked to render accounts. Otherwise we affirm the decree of the High Court allowing the plaintiff's appeal with costs and setting aside the judgment and decree of the lower appellate court and restoring judgment and decree of the Trial Court, dated 31st October, 1956.

Subject of this modification we dismiss these appeals. There will be no order as to costs in this Court.

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