

Ahmed Bin Salah

Vs

Mohd. Basha

Civil Appeals Nos. 1723 of 1968 and 225 of 1969

(J. M. Shelat, G. K. Mitter, I. D. Dua, H. R. Khanna JJ)

05.01.1972

JUDGMENT

SHELAT, J. -

1. These two appeals founded on a certificate, are directed against the judgment and decree passed by the High Court of Andhra Pradesh by which it reversed the dismissal by the Trial Court of a suit for redemption filed by the respondent in Civil Appeal No. 1723 of 1968 and the appellant in Civil Appeal No. 225 of 1969 hereinafter for brevity sake called the plaintiff. The case of the plaintiff in the suit was that he was the owner of the mortgaged house in question and the site on which it was constructed. He purchased the said site for Rs. 8,000 and built thereon the said house. Having run into debts while constructing it, he borrowed from the defendant's father three sums, Rs. 8,000, Rs. 4,000 and Rs. 3,000 and executed three different documents of mortgage. His mother, Malan Be, was joined as a co-executant of those mortgages, as the property stood in her name as his benamidar and also as and by way of abundant caution. According to the plaintiff, his second wife, Yaseen Begum laid claim over the said house in lieu of dower due to her. To save the house from that claim, the plaintiff's mother executed a sale deed, Ex. B-1, in favour of the defendant's father mentioning therein Rs. 30,000 as the consideration for the sale. That amount, according to the sale deed, consisted of Rs. 15,000 being the mortgage debt and another sum of Rs. 15,000 said to have been paid in cash, though it was never paid and was shown as part of the consideration only to avoid a charge that the said sale was collusive. The plaintiff's case further was that the sale deed was fictitious and was never intended by the parties thereto to operate and being without consideration also was void and of no effect. According to him, he was absent at the time when his mother executed the said sale deed. Further, she could not pass any title in the said house as she was only his benamidar and had herself not title or interest therein. On December 19, 1938, the defendant's father, knowing that he had acquired no title under the said deed and on protest made by the plaintiff, executed a document, Ex. A-1, admitting that the said sale deed was fictitious, that he was in possession of the house as the mortgagee only and that he, and after him his heir, would restore it to the plaintiff on satisfaction of the said mortgage debt. The plaintiff's mother died in 1354 Fasli, leaving her surviving the plaintiff as her sole heir and legal representative. The plaintiff claimed that the defendant's father, and after his death the defendant, had in all collected Rs. 36,556.10 nP. by way of rents and that after deducting the municipal taxes and the mortgage amount of Rs. 15,000, the defendant was bound to restore the said property and pay the excess which, according to him came to Rs. 21,572.65 nP.

2. The defendant denied that the plaintiff, and not his mother, was the owner of the mortgaged property. He also denied that the sale deed, Ex. B-1, was fictitious, or that the plaintiff's mother had no right to execute it, or that she did so while the plaintiff was absent from Hyderabad. He further

denied that besides the mortgage amount, another sum of Rs. 15,000 was not paid to the plaintiff's mother. The defendant asserted that the said deed was valid and effective as it was executed by the plaintiff's mother, in whom the title in the property vested, and the transaction was for consideration. His case further was that Ex. A-1 was a fabricated document, in that, the signature on it was not of his father. In any event, the said document amounted to a will by which he was directed to restore the house to the plaintiff on satisfaction by him of the mortgage debt. That direction was, however, of no avail to the plaintiff as the defendant's father died leaving his last will and testament by which he had revoked all previous directions. There being thus a valid sale evidenced by Ex. B-1, there was no longer any subsisting mortgage on the basis of which redemption or accounts could be claimed, and that therefore, the suit was misconceived.

3. Both the parties led oral and documentary evidence. Upon that evidence, the Trial Judge gave the following findings -

- (1) that both the site and the house built thereon belonged to the plaintiff's mother;
- (2) that the fact that permission to build the house was issued by the municipal authorities in the plaintiff's name and the fact that the assessment register showed his name in the column for persons responsible for payment of municipal taxes did not mean that the plaintiff was the owner of the house and the site;
- (3) that the fact that the plaintiff was also made the executant of the mortgage deeds did not prove his title or his mother as his benamidar. The mortgage amounts on all the three occasions were paid to his mother in the presence of the Sub-Registrar before whom the mortgage deeds were registered;
- (4) that the plaintiff's contention that the sale deed, Ex. B-1, was executed by his mother during his absence was not true, as (a) he himself had purchased the necessary stamps, (b) he had signed the document as an identifying witness, and (c) the evidence adduced by him that he was not present at that time was unacceptable;
- (5) that in a deposition, Ex. B-4 given by him in an earlier proceeding, he had admitted that his mother had at first mortgaged and later on sold the property, and that he has not title in it;
- (6) that the sale was valid and effective inasmuch as it was made by the mother who held the title in the property. Even if the sum of Rs. 15,000, in addition to the mortgage amount, was not paid, failure to do so would not affect the validity of the sale, the remedy therefor being a suit to recover the unpaid purchase price;
- (7) that in view of the evidence of the two legal practitioners, Abdul Wahab, P.W. 2 and Dinkar Rao, P.W. 6 whose evidence that they were the attesting witnesses to the document Ex. A-1 and that the defendant's father had executed that document in their presence and which could not be discredited, the document Ex. A-1 could not be said to be a fabricated document;
- (8) that document, however, was partly a will and partly a deed promising to restore the property on satisfaction of the mortgage debt. That part of it which amounted to a will contained a direction to the defendant to restore the property but that direction was no longer effective, as the last will, Ex. B-6, which the defendant's father left,

had revoked all previous directions made by him;

(9) on the question of limitation, he held that limitation would commence only upon the refusal by the defendant to specifically perform Ex. A-1 namely, to reconvey the property on satisfaction of the mortgage debt and that such refusal being only in 1960 when the defendant refused to comply with the plaintiff's notice, the suit was not time barred.

4. His final conclusion was that the sale deed Ex. B-1 being valid, the said mortgages merged in the sale, and there were no subsisting mortgages. The suit for redemption, therefore, was misconceived and the proper suit would have been one for specific performance of reconveyance of the property in suit to the plaintiff. On this view he dismissed the suit.

5. In the appeal filed by the plaintiff in the High Court against the dismissal of his suit, the High Court pointed out that the real controversy between the parties turned on the sale deed, Ex. B-1. If the sale evidenced by that deed was real, there, obviously, could be no subsisting mortgage thereafter and no suit for redemption could possibly lie. Therefore, the crucial question, said the High Court, was about the character and effect of Ex. B-1. As appearing from the High Court's judgment, the argument addressed before it on behalf of the parties also was on the question whether Ex. A-1 was a genuine document. If that document was genuine, the statements made it by the defendant's father would inevitably affect the genuineness of the transaction of sale embodied in Ex. B-1. Therefore, if the sale evidenced by the document was a sham transaction, entered collusively by and between the plaintiff's mother and the defendant's father in order only to save the property from the claim made by the plaintiff's second wife and the sale was never intended to operate, there would be no question of the mortgage merging into the sale or the mortgages not continuing to subsist or the plaintiff having no longer the right to redeem them by satisfying the mortgage debt. After considering the document Ex. A-1 and the evidence led by the parties relating to it, the High Court came to the conclusion that besides the evidence of the plaintiff, there was the evidence of the two legal practitioners, P. Ws. 2 and 6, which was acceptable also to the Trial Court, and against which nothing substantial was made out to induce the High Court to reject it. The statements, made by the defendant's father in Ex. A-1 were clear and unambiguous and being against his own interest could not but be accepted. That being the position, and the defendant's case that the document was fabricated being unacceptable, the consequence was that there was in fact no sale and the deed, Ex. B-1 to evidence it was collusively made between the defendant's father and plaintiff's mother to frustrate any claim which the plaintiff's second wife would make against the property in question. The sale having thus never been intended to operate, no title passed to the defendant's father, and therefore, there could be no question of the property having to be reconveyed to the plaintiff or of there being any impediment against his right or redeeming the mortgaged property. On this reasoning the High Court reversed the Trial Court's judgment and decree dismissing the suit. The suit, however, was partially decreed to the extent of entitling the plaintiff to redeem the mortgaged property on his satisfying the mortgaged debt of Rs. 15,000. As regards his claim for accounts, the High Court rejected that claim holding that the defendant's father took over possession of the house only after Ex. B-1 was executed and collected rents from out of which he satisfied the municipal taxes and the costs of repairs, as stated in Ex. A-1 upon which the plaintiff himself had heavily relied. It is against the decree for redemption that the defendant has filed C. A. No. 1723 of 1968. The plaintiff's appeal No. 225 of 1969 is against the denial of the relief for accounts claimed by him.

6. It is true that the Trial Judge had disbelieved the plaintiff's case that it was he, and not his mother

who owned the property, and that his mother had executed the sale deed, Ex. B-1 while he was at Bidar. Assuming that it was his mother who had the title in the property and that it was as its owner that she had first mortgaged and subsequently executed the sale deed, that fact loses much of its importance, as admittedly on her death the plaintiff was her only surviving heir and legal representative. He was, therefore, the only person entitled to challenge the said sale deed, and if on such challenge he were to succeed, the mortgages would subsist and he would, undoubtedly, have the right to redeem them.

7. The cardinal question in these appeals, therefore, is whether the sale deed was a genuine document and whether the plaintiff's mother transferred and conveyed the property to the defendant's father. It is upon the answer to that question that these appeals must depend, the argument, both in the High Court and before us, of both the parties having been focussed on the question whether the property in question was actually sold to the defendant's father and whether the document Ex. A-1 was genuine.

8. Before we proceed to examine the sale deed, it is necessary first to read the mortgage deed, Ex. B-3, dated April 9, 1938, under which the property was mortgaged to secure the first loan of Rs. 8,000/-. Assuming that the title to the property was solely in the plaintiff's mother, the defendant's father was at that time careful to have that mortgage deed executed by both the plaintiff and his mother. Presumably, the plaintiff was asked to join in the execution of that document because apart from his claim that he was the owner, the property admittedly stood in his name in the municipal registers. Obviously, the defendant's father was anxious to join him in that mortgage deed so that in future the plaintiff would have no opportunity to challenge the transaction on the ground that his mother was not competent to mortgage the property as she had no title to it. The defendant's father was also careful to have a clear proof of the mortgage amount having been advanced by him, by having its receipt acknowledged in the body of the deed and also by having an endorsement by the Sub-Registrar before whom the document was registered that the mortgage amount was paid by him and received by the plaintiff and his mother in his presence at the time of registration.

9. It is somewhat strange that though the defendant's father had been careful enough to have made both the plaintiff and his mother execute the mortgage deeds, he was content to have the sale deed Ex. B-1 executed by the plaintiff's mother alone, although the plaintiff was present at that time and had in fact signed the document as a witness identifying his mother, she being a pardanashin lady. The sale deed, no doubt, recited the three mortgages for the total amount of Rs. 15,000, and also that another sum of Rs. 15,000 had been paid to and received by the plaintiff's mother, thus making Rs. 30,000 as the consideration for the sale. According to the defendant's evidence the additional amount of Rs. 15,000 was paid in cash to the plaintiff's mother in the morning and the sale deed was registered in the afternoon. No separate receipt was admittedly taken from the plaintiff or his mother when the amount of Rs. 15,000 was said to have been paid, although the said deed yet remained to be registered. No endorsement was also secured from the Sub-Registrar as regards the said payment as was done when the mortgage amount of Rs. 8,000 was paid and that mortgage deed was registered. The absence of a separate receipt or an endorsement by the Sub-Registrar as evidence of payment of Rs. 15,000 would perhaps have not acquired much significance if the events which subsequently took place had not occurred. Anyway, it is somewhat doubtful whether the defendant's father, who had taken all the precautions at the time when the mortgage for Rs. 8,000 was entered into would not take the same precautions when the sale deed was executed and registered, particularly when he was said to have paid in cash almost the double amount namely, Rs. 15,000.

10. As aforesaid, the defendant's evidence was that this amount was paid in cash in the morning and

the document was registered in the afternoon. He produced no other evidence by way of books of account or any other document to show that his father had kept with him such a large sum in cash ready to hand it over to the plaintiff's mother. The only evidence with regard to the payment, therefore, consisted of the defendant's word and the assertion in the sale deed as regards that payment. Ordinarily, such a recital in the sale deed would go a long way to corroborate the purchaser's word regarding payment of purchase price. But in the present case, such a recital does not have that effect since the defendant's father himself admitted in a subsequent document, Ex. A-1, that he had not paid any such amount, and further that he had executed the document Ex. A-1 at the instance of the to evidence the fact that the sale deed was fictitious as no sale had actually taken place. If Ex. A-1 were to be accepted as genuine, there would be no question of the defendant's testimony. There would then remain only his uncorroborated word as regards that highly disputed fact.

11. Ex. A-1 in clear terms declared that the sale deed was a fictitious document and that there was in fact no sale by the plaintiff's mother in favour of its executant, the defendant's father. It further declared that no amount, such as the amount of Rs. 15,000 was paid to the plaintiff's mother on that occasion, and that the only amount due to him was the mortgage debt of Rs. 15,000. The document also declared that the purpose for which the sale deed was executed was to save the property from a possible claim which the plaintiff's second wife might make in lieu of her dower and the fictitious amount of Rs. 30,000 had to be shown in the sale deed as consideration, so that the purported sale would not appear or be challenged as collusive. By that document the defendant's father further declared that the possession of the property which till then was occupied by the plaintiff had on the day of the sale deed been delivered to him, but that he would release it on satisfaction of the mortgage debt. If the mortgage debt was paid during his lifetime he would himself release the property. But, if that was not done, and the plaintiff or his mother were to pay it after his death, his son, the defendant, should release the property.

12. The document, Ex. A-1, was produced by and came from the plaintiff's custody, It was challenged by the defendant as being a forged document. That allegation obviously was reckless since the plaintiffs produced two witnesses, P.Ws. 2 and 6, who swore that they were the attesting witnesses and the defendant's father had executed it in their presence. There being no reason to reject that testimony, the defendant's challenge to the genuineness of Ex. A-1 was repelled concurrently by both the Trial Court and the High Court. In view of that evidence Ex. A-1 had to be accepted as genuine. Once that was done, its contents also had to be accepted, since the defendant's father was not likely to make admissions found in Ex. A-1 against his own interest, if the sale had in fact taken place, and Rs. 15,000 over and above the mortgage amount had been paid to make up the consideration of Rs. 30,000.

13. In face of the evidence of the two attesting witnesses and the other evidence showing that the amount of Rs. 15,000 was never paid, we must concur with the High Court's finding that no sale of the property had taken place and the sale deed Ex. B-1 was a fictitious document evidencing an equally fictitious sale entered into for the purpose stated in Ex. A-1. The logical result would be that the mortgages subsisted and so too the plaintiff's right as the only heir of his mother to redeem them, so long as that right was not foreclosed, even on the assumption that the mortgaged property solely belonged to her.

14. The Trial Court was in error to treat Ex. A-1 as a will containing a direction to the defendant to release the property on satisfaction of the mortgage debt and to find that direction was revoked by Ex. B-6, the last will and testament of the defendant's father. It appears that such a misapprehension

arose in the mind of the Trial Court because the document at one place has used the expression "by way of sale", and that meant that the title to the property had vested under the sale deed Ex. B-1, in the defendant's father, and therefore, the property had to be reconveyed to the plaintiff and hence a suit for redemption could not lie. Such a reasoning, however, is not tenable. Once the purported sale and the sale deed Ex. B-1 were found to be fictitious, and there was in reality no sale, there was no question of any title having passed to the defendant's father, which had to be reconveyed. There was equally no question of the defendant's father having in his last will and testament Ex. B-6 revoked any directions contained in Ex. A-1. Ex. A-1 cannot by any stretch of imagination be termed a will, although it is so described, since it did not dispose of any property of its executant nor was it to come into effect on and after his death. Ex. A-1 itself stated that if the mortgage debt was discharged during his lifetime, the executant himself would release the property. The document was a unilateral declaration made by the defendant's father putting on record the fact that no sale had taken place, and that therefore, neither he nor his son could claim the property as having been sold. Therefore, no question of reconveyance could arise and the only transactions which subsisted being the mortgages a suit for redemption was the proper and the only remedy of the plaintiff.

15. As regards the plaintiff's cross-appeal, there is no merit in it as the document Ex. A-1 on which he relied all throughout itself shows that he himself had occupied the property till the sale deed Ex. B-1 was executed, and that the rents received by the defendant's father and after him by the defendant were utilised towards meeting the costs of repairs and the municipal taxes. No question of defendant having to account for such rents or his having to pay the excess could arise and the plaintiff's claim was, therefore, rightly rejected.

16. The result is that both the appeals are dismissed with costs.

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