

Uday Chand Dutt (Deceased) Through His Lrs.

Vs

Saibal Sen (Deceased) Through His Lrs., and Another

Civil Appeal No. 691 (N) of 1980

(M. M. Dutta, M. H. Kania JJ)

01.12.1987

JUDGMENT

KANIA, J. –

1. This is an appeal against the judgment of a Division Bench of the Calcutta High Court on leave granted by this Court under Article 136 of the Constitution of India.
2. The appellants before us are the heirs and legal representatives of the original plaintiff who was unsuccessful in both the courts below. After the High Court decided the appeal the original defendant died and the respondents 1(a) to 1(c) are the heirs and legal representatives of the deceased defendant who has been mentioned as respondent 1. Respondent 2 is merely a pro forma respondent. It may be clarified that when the appeal was decided by the Division Bench of the Calcutta High Court the defendant was the only respondent.
3. The facts necessary for the disposal of this appeal are as follows :
4. The original plaintiff filed a suit in the court of the learned Subordinate Judge, Seventh Court, Alipore, District 24 Parganas, for a declaration that a certain transaction effected by a deed of sale dated February 28, 1968 executed by him in favour of the defendant, respondent 1 (deceased) herein, is, in substance, a loan transaction and for taking accounts under Section 36(1) of the Bengal Money-lenders Act, 1940. For the sake of convenience, we propose to refer to the parties, namely, the original plaintiff who was the predecessor in title of the present appellants and respondent 1 by their description in the suit.
5. The case of the plaintiff was that he was the owner of a certain lands situated at Biren Roy Road West in Mouza Sarkelatpur (commonly known as Gangarampur). This land was purchased by the plaintiff from his brother-in-law, Saral Kumar Mitra, by a deed dated March 12, 1954. In 1961 he constructed five shop rooms on this land and let out two of them to the defendant for carrying on the defendant's business of running a medicine shop there. Being in need of money for diverse causes and reasons, the plaintiff was indebted to the defendant, with whom he was on close terms, to the tune of Rs. 6000 up to January 1968. In February 1968 the plaintiff took a further loan of Rs. 9000 from the defendant to construct certain rooms on the first floor above the shop rooms for accommodation of the defendant. As a gesture of goodwill, the plaintiff wanted to secure the said loan by creating security on the said property by way of a mortgage. It is the further case of the plaintiff that his loan was secured voluntarily by the plaintiff by a sale deed of the part of his lands on which the said shops were constructed and some adjoining land described in the sale deed together with the constructions thereon to the defendant on the condition that the defendant would

execute an agreement for reconveyance of the same. We propose to refer to the said land and the constructions thereon as the suit property. It was agreed that the defendant would adjust and set-off all the rent payable by him and the rent of the other two rooms in the occupation of defendant's relations toward the principle and interest payable by the plaintiff. The plaintiff further pleaded that certain open space covered by the said ostensible sale deed would be used by the defendant for the purpose of the poultry business to be run by the defendant. The defendant prepared two drafts, one for the kobala (sale) and the other for an agreement for reconveyance. He showed them to the plaintiff and took the draft agreement for reconveyance. The draft sale deed was left with the plaintiff for being engrossed, executed and registered on February 28, 1968. The arrangement was that on that day the defendant would also attend the registration office with the agreement duly prepared and both the parties would register their documents on the same day. The plaintiff got the sale deed registered but the defendant, contrary to his assurance, did not turn up at the registration office but assured the plaintiff that he would execute the deed as agreed. Ultimately, the defendant went back on his words and tried to take the possession of the suit property. It was alleged by the plaintiff that the property covered under the ostensible document of sale was worth about Rs. 50,000 and the possession thereof always remained with the plaintiff. It was submitted by the plaintiff that the transaction was in substance one of loan. The defendant denied the material averments in the plaint and pleaded that the shops rooms were constructed by him at the request of the plaintiff and the costs of construction incurred by him were agreed to be treated as a loan given by him to the plaintiff to be adjusted against the future rent. According to the defendant, the suit properly comprised mainly of a tank and was sold and conveyed to him by the plaintiff by a deed of out and out sale for a sum of Rs. 9000 and the possession of the same was delivered to the defendant. The defendant totally denied that there was any question of executing any agreement for reconveyance.

6. Both the parties led evidence before the trial court and the trial court on consideration of the evidence came to the conclusion that the shop rooms referred to in the previous paragraph were constructed by the defendant, that he was realising rents from the tenants of the shop rooms, that certain construction which was made on the suit land was made by the defendant on his own account and that the suit transaction was not a loan transaction but was a transaction of a clear sale. The trial court also held that after the sale deed was executed the possession of the suit property was with the defendant. The trial court dismissed the suit of the plaintiff.

7. Being aggrieved, the plaintiff preferred an appeal to the Calcutta High Court being O.S. Appeal No. 27 of 1973. At the hearing of the appeal, the contention urged by the counsel of the plaintiff was that on the material on record the trial court ought to have held that the transaction in substance was a loan transaction and not a sale. The case urged on behalf of the plaintiff in the High Court was that the defendant, who had agreed to execute a deed of reconveyance, had refused to do so with the ulterior motive of grabbing the property purported to be sold at a nominal price. The contention of the plaintiff was that the disputed sale deed (Ex. 'Y') was merely an ostensible sale but really the transaction was one of loan. According to the plaintiff, in 1961, he had constructed five shop rooms and let out two of them to the defendant in 1968. The defendant approached the plaintiff for some residential accommodation on the ground that his ancestral house at Bhowanipore was going to be sold. The plaintiff pleaded dearth of funds whereupon the defendant had suggested that he was agreeable to advance the necessary amount required for construction as a loan. The case of the plaintiff further was that merely as a gesture of goodwill, it was his desire to secure the loan by creating security on the suit property and the purported deed of sale was executed, in these circumstances, on the agreement that the defendant would at the same time execute an agreement of reconveyance. The defendant, on the other hand, claimed that in 1961 he had spent Rs. 6000 to build certain shop rooms on the plaintiff's land and he became a tenant in respect of two of these

shops. The agreement, according to the defendant was that this amount of Rs. 6000 was to be adjusted against the future rents of the said two shop rooms. The amount remained unpaid till 1968 when the plaintiff sold the property in suit to the defendant for Rs. 9000. It may be clarified at this stage that the property conveyed under the purported sale deed is only the land described therein and the construction thereon and not the entire land of the plaintiff. There was no dispute between the parties that the defendant had given a loan of Rs. 9000 to the plaintiff. The possession of the suit property was claimed by both the parties. The Division Bench of the High Court while disposing of the appeal considered the entire evidence on record in order to find out whether the case of the plaintiff was established by him. On examination of the evidence, the High Court came to the conclusion that the story put forward by the plaintiff was not exceptional and the court preferred to believe the case of the defendant. The court pointed that it was clear that the plaintiff was a man having considerable properties and could be expected to have worldly wisdom. In these circumstances, it was not possible to believe that if the transaction was really one of loan and the document of sale was to be executed voluntarily or even otherwise by the plaintiff merely to create security in the land and on the footing that on the same day the defendant would execute an agreement for reconveyance, it was not possible to believe that the plaintiff would have executed and got registered the deed of sale on February 28, 1968 although the defendant failed to execute the agreement of reconveyance or even to turn up at the office of the Registrar. The High Court observed as follows :

After carefully considering the entire evidence we have no doubt that the plaintiff executed the disputed conveyance, Ex. 'Y' which was meant to be a deed of out and out sale and it was not a transaction of mortgage with an agreement for reconveyance.

In view of these conclusions, the appeal of the plaintiff was dismissed with costs by the High Court.

8. Mr. Lal Narain Sinha, learned counsel for the plaintiff submitted before us that although the document in question, namely, the purported sale deed, on the face of it, effected a complete transfer of ownership in the suit property of consideration, in view of the provisions of the Bengal Money-lenders Act, 1940, the court was bound to consider the surrounding circumstances in which the document was executed in order to find out whether the transaction in the course of which the said document was executed, was really one of loan. It was submitted by him that, notwithstanding the provisions of Section 92 of the Evidence Act, the court was bound to examine the surrounding circumstances to find out the true nature of the transaction. He drew our attention to the definition of the term "loan" contained in sub-section (12) of Section 2 of the aforesaid Act. A perusal of that definition shows that any transaction which is in substance a loan except transactions of any of the categories set out in clauses (a) to (i) of that sub-section is included within the meaning of the term "loan" of that purposes of the said Act. In our view, there is no need to consider this question at all because both the courts below have, in fact, proceeded on the footing that notwithstanding the clear terms of the said document, they were bound to examine the evidence relating to the surrounding circumstances to find out the true nature of the transaction in question. It is only after full consideration of such evidence that the trial court as well as the High Court came to the conclusion that the transaction was one of an out and out sale as appeared on the face of the document. Mr. Sinha Next urged before us that we should ourselves reconsider the entire evidence in detail and ascertain whether we agree with the conclusions of facts arrived at by the courts below. We are of the view that in an appeal by special leave granted under Article 136 of the Constitution we are not called upon to indulge in any such task. There are concurrent findings of facts of the courts below on the question of the true nature of the transaction and hence there is no need to enter into a

detailed scrutiny of evidence to see whether these findings are justified. We shall, however, refer briefly to the main factors in the evidence on which Mr. Sinha seeks to rely.

9. It was submitted by Mr. Sinha that one of the main indications which would show whether the transaction in question was one of loan and the document of sale was executed by way of security or that the transaction was an out and out sale of the property is whether the consideration appearing in the document appears to be too low. If the consideration is too low, it would indicate that the transaction could not have been one of sale. If the consideration is fair or reasonable, it would indicate that the transaction was one of sale. The other indication of a sale would be that the possession after the transaction would pass to the vendee and not be retained with the vendor in the absence of special circumstances. As far as the valuation of the property is concerned, the trial court after considering the evidence of instances led before it came to a definite conclusion that, at the time when the document of sale was admittedly executed, it could not be said that the valuation of the property at Rs. 9000 was too low. As against this, all that Mr. Sinha could point out was that the plaintiff in his evidence has stated that the valuation of the property must be more than Rs. 50,000. In our view, statement of this kind is unworthy of any reliance, particularly when instances are available including the instances of sale by the plaintiff himself. The other piece of evidence on which Mr. Sinha wanted to rely was the evidence of Gora Chand Ghosh, who is an advocate. He merely stated that in his opinion no one would sell property like the one in suit at a sum of Rs. 9000. In the first place, Gora Chand Ghosh was a nephew of the plaintiff and hence his evidence must be taken with a certain degree of caution. In the second place, he did not qualify as an expert on valuation of immovable property so that an opinion of this kind given by him could be of any evidentiary value showing the correct valuation. In the absence of such qualification a general opinion of this type is worthless, and all the more so as there is a concrete evidence of sale instances which has been relied upon by the learned trial judge. The point that the property was worth much more than Rs. 9000 does not appear to have been seriously argued before the Division Bench of the High Court at all because no such argument has been considered at all by the Bench and there is no statement in the grounds of appeal, specifically recording that such an argument was advanced in the High Court but the Division Bench failed to deal with it. In our view, the conclusions of the trial court in this regard are perfectly justified.

10. As far as question of possession is concerned, both the courts below have considered the evidence in this connection and have come to the conclusion that after the execution of the sale deed it is the defendant who has been in possession of the property. We do not find anything faulty in the manner in which the courts below have appreciated the evidence and in view of this, we are not inclined to interfere with their findings in this regard.

11. In the result, there is no merit in the appeal and it is dismissed with costs.

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