

(1977) 02 KAR CK 0025

Karnataka High Court

Case No: None

Syed Rasool and
Others

APPELLANT

Vs

Mohammad Moulana

RESPONDENT

Date of Decision: Feb. 3, 1977

Acts Referred:

- Evidence Act, 1872 - Section 92

Citation: AIR 1977 Kar 173 : (1977) ILR (Kar) 416 : (1977) 1 KarLJ 181

Hon'ble Judges: E.S. Venkataramiah, J

Bench: Single Bench

Advocate: A.M. Farooq, for the Appellant; K.R.D. Karanth, for the Respondent

Judgement

1. The appellants, who were plaintiffs in O. S. No. 21 of 1968 on the file of the Munsiff, Bidar, instituted the said suit for redemption of a mortgage executed by Saiduddin alias Saidan Saheb on 7-6-1951 for Rs. 2,500/- (O. S.) in favour of the defendant mortgaging a house belonging to him, as his heirs. It would appear that the mortgagor Saiduddin had also executed a sale deed dated 6-11-1952 in favour of the defendant purporting to convey his right, title and interest in the said house. The plaintiffs pleaded in the course of the plaint that the sale-deed in question was a nominal one and the parties to it did not intend that it should be an effective instrument. They, therefore, pleaded that they were entitled to redeem the mortgage dated 7-6-1951 notwithstanding the alleged nominal sale-deed dated 6-11-1952. The defendant contended, among other pleas, that the suit for redemption was not maintainable since the mortgagor had parted with his right, title and interest in the property under the sale-deed dated 6-11-1952.

2. One of the issues framed by the trial court in the suit was "Whether the present suit for redemption of the mortgage dated 7-6-1951 is maintainable without getting the sale-deed dated 6-11-1952 cancelled?" After the issues were framed, the case

was posted for trial. After several adjournments, the trial court posted the case to hear the parties on issue No. 2 extracted above, which was treated as a preliminary issue. After hearing the learned counsel for the parties, the trial court rejected the plaint holding that without a prayer for cancellation of the sale-deed the suit was not maintainable. Aggrieved by the order of the trial court, the plaintiffs filed an appeal in Misc. A. No. 21 of 1972 on the file of the Civil Judge, Bidar. That appeal was also dismissed. Hence, this second appeal.

3. A reading of the plaint shows that the plaintiff's case was that the sale deed executed by Saiduddin was a nominal one and was not intended to be effective by the parties to it. It was not their case that the sale deed was a voidable instrument. In the circumstances, the courts below were in error in holding that it was necessary for the plaintiffs to seek the relief of cancellation of the sale deed. They were further in error in thinking that no oral evidence could be adduced by the plaintiffs to show that the document was a nominal one. When the document in question is a void one, the question of seeking its cancellation would not arise at all. It is only when a document is as voidable one that is valid until it is declared as void, the question of seeking its cancellation would arise. Section 92 of the Indian Evidence Act precludes a party from adducing oral evidence for the purpose of contradicting, varying, adding to, or subtracting from the terms of a contract or grant. In order to attract the provision of S. 92 there should be a contract in existence. When a party pleads that there was no contract at all or that an instrument which had been brought into existence earlier was only a sham one not intended, to be acted upon, it would be open to him to establish by oral evidence that there was no intention on the part of the parties to bring into existence a contract or an effective document. The Courts below while disposing of the case before them, failed to notice the above distinction. The order passed by the trial court rejecting the plaint and the judgment passed by the lower appellate court are, therefore, liable to be set aside. They are, accordingly, set aside. The suit is remitted to the trial court with a direction to dispose it of afresh after recording the evidence to be adduced by the parties. The trial court shall if necessary after hearing the parties re-cast the issues framed in the suit.

4. The institution fee paid on the memorandum of appeal shall be refunded to the appellants. No costs.

5. Appeal allowed.