Sisir Kumar Mallik and Others Vs Naran Chandra Mallik and Others

Court: Calcutta High Court

Date of Decision: Aug. 15, 1928

Acts Referred: Evidence Act, 1872 â€" Section 92

Citation: AIR 1929 Cal 548

Hon'ble Judges: Suhrawardy, J; Garlick, J

Bench: Full Bench

Judgement

Garlick, J.
The facts of the case are these. The plaintiff''s grandfather Madu Sudan took Rs. 400 from his relatives Ratneswar Mallik and

Guru Dayal Mallik and executed in their favour a dead of sale of about 24 bighas of land. The deed was executed in the name of their benamdar

Gopi Nath Sarkar. At the same time Gopi Nath executed in favour of Madu Sudan an ekrarnama in which the fact of sale was recited and it was

agreed that if Madu Sudan repaid Rs. 400 at any time the property would be reconveyed to him. In pursuance of this arrangement the purchaser

had possession of the land for nearly sixty years. The document was executed in January 1862. In 1918 the plaintiffs claimed the right to redeem

the property by repaying Rs. 400. The original parties to the transaction were all dead. Six of the descendants of the original purchasers consented

to reconvey their shares of the property to the plaintiffs. Six others refused to do so. Defendants 7 to 12 are those who did execute a deed of

reconveyance. Defendants 1 to 6 are those who refused to do so. The plaintiffs filed this redemption suit on 24th January 1922 which was about a

week before the sixty years period of limitation expired. It was contested by defendants 1 to 6. Both the lower Courts have held that as the two

documents were executed at the same time they must have constituted one transaction and that that transaction was a mortgage by conditional sale.

They have therefore allowed the plaintiffs to redeem by a repayment of the original money that was borrowed. Defendants 1 to 6 have appealed

against that decision. They assert that the transaction was an out and out sale and that the agreement in the ekrar for reconveyance was a purely

personal agreement between Madhu Sudan and the purchasers and was not binding on the purchaser''s heirs. The kobala (Ex. A) taken by itself is

a deed of out and out sale.

2. The ekrarnama also recites that the transaction was an out and out sale transferring to the purchaser absolute rights over the property including

all powers of alienation. But the learned Subordinate Judge says that unless there was an intention to treat the transaction as a mortgage by

conditional sale there was no object in executing the ekrarnama (Ex. 3) at all. He also found circumstantial evidence to show that the transaction

was intended to be a mortgage. He pointed out that in 1901 the sons of Ratneswar and Guru Dayal in a transaction between themselves described

the property in suit as bandaki. He also pointed out that in a cess return filed by the defendants'' predecessors in 1905 this property was omitted.

He mentioned again that the heirs of Ratneswar and Guru Dayal once tried to establish their independent right to this property by a suit for

possession against a third person but they withdrew the suit. He points out again that the heirs of the purchasers have not produced any of their

collection papers to show that the property was treated by them as their own. He comments on the fact that six of the heirs of the purchaser have

recognized the transaction to be a mortgage and have reconveyed their shares in the property. Two other points in the plaintiff''s favour were

mentioned in the judgment of the Munsiff. He pointed out that the stamp of the kobala was paid for by Madhu Sudan and he expressed the opinion

that the price of Rs. 400 for 24 bighas of land must have been inadequate even 60 years ago. But the learned Subordinate Judge does not attach

any importance to these last two points. He says that Madhusudan probably paid for the stamp of the kobala because he was in urgent need of the

money and the stamp on the ekrarnama was paid for by the purchaser. He says that it is impossible to say now whether Rs. 400 was an adequate

price for 24 bighas of land 60 years ago or whether it was not.

3. In this Court the respondents'' advocate has supported the judgment by urging other reasons also why the transaction must have been a

mortgage and not an out and out sale. He argues that Madhusudan was in urgent need of money and took a temporary accommodation from his

relatives and gave the land as security for the loan. As the money was advanced by his relatives no period was fixed for repayment of the loan and

there was no provision for interest nor was there any bargaining over the price. He argues that all the circumstances show that the intention of the

parties was that the property should be given back if the money was repaid.

4. The kobala taken by itself is a deed of out and out sale. It cannot be held to be a mortgage unless there is strong evidence that it was the

intention of the parties that the transaction should be only a mortgage. The property was in the possession of the purchasers for nearly 60 years

and the presumption from long possession is that it was their property. What was both nominally and in effect a sale cannot be lightly set aside after

the death of the contracting parties on an assertion that the land was given as a mere security for the small sum borrowed. One would think that if

24 bighas were given as security for Rs. 400, the mortgagor would have redeemed the mortgage long ago. The learned advocate for the

respondents quotes rulings in which it has been held that the Courts always lean strongly in favour of the persons who claim the right to redeem The

reason for this is historical. In England in the Courts of common law mortgages were not originally recognized at all. It was the Court of Chancery

which compelled the mortgagee who had accepted land as security for a loan to give up the land when the money was repaid. The Courts are

wont to lean in favour of persons who claim the right to redeem because the common law gave them no such right and the Courts of Equity took

upon themselves to protect them But in this case there is no reason why the Court should lean strongly in favour of the plaintiffs who have waited

60 years before asserting their claim. They have not paid any interest for the money.

5. There seems to be no equity in their favour. If the transaction was a mortgage they could have redeemed the property any time within the last 60

years. The fact that they waited until a week before the expiry of 60 years before instituting a suit is a strong reason for suspecting that the

transaction was not a mortgage. During the 60 years the heirs of the purchaser have been enjoying the profits of the property, have been paying the

rent, have received no interest and have had the full right of alienation. They could have sold the property to some one else at any time during these

two generations. We cannot treat the transaction as a mortgage unless there are clear signs of the existence of the relationship of the creditor and

debtor between the parties. I do not find any signs of the existence of the relationship of debtor and creditor except the apparent admission by

certain heirs of the purchaser which are mentioned by the lower appellate Court. An agreement which has not been asserted for 60 years must be

strictly construed. In my opinion the agreement of the learned vakil for the appellants that the agreement in the ekrar for reconveyance was a purely

personal argument between the purchaser and Madhusudan should be accepted. The kobala purports to be an out and out sale and the ekrarnama

taken by itself is a document for which no consideration at all was given. It must, therefore, be strictly construed. It describes the transaction as a

sale which is to bind the heirs of both the parties and then it goes on to say that if Madhusudan repays the money at any time a reconveyance will

be made in his favour. It says nothing about redemption by Madhusudan"s heirs. If the document is strictly construed the right to redeem is

confined to Madhusudan himself. And he is dead. In my opinion there is no reason whatever to disturb a transaction which ostensibly was an out

and out sale and which has had all the effects of a sale for nearly 60 years. For these reasons I would allow the appeal and set aside the decree of

the lower appellate Court with costs.

Suhrawardy, J.

6. I fully agree with the view expressed by my learned brother. I would only add a few words in order to explain the true nature of the transaction

as evidenced by the two documents executed on 14th Magh 1268 B. S. (February 1862). The first is described as a deed of sale. It recites that

on account of the expenses for the Sradh of the mother of the executant the vendor is in need of funds and, therefore, on receipt of Rs. 400 as

purchase money he sells out the lands in suit. Then follows the usual term in a deed of sale that;

the purchaser, his heirs, etc., will be entitled to sell or make a gift of the lands without any objection by the executant or his heirs, etc The purchaser

and his heirs and successors shall enjoy and possess all the lands with all their appertenant rights by either cultivating the same or settling tenants on

the lands.

7. It concludes by saying that on receipt of the consideration of Rs. 400 the kobala is executed in favour of the purchaser. The second document is

headed ekrarnama or a deed of agreement. It is executed by the purchaser in favour of the vendor. It recites that on account of funds for the

Sradh, the vendor has sold to the purchaser the lands and relinquished all right, title and interest in the said property.

I have become entitled to sell the said properties and can enjoy with my sons and grandsons and possess the said properties either by cultivating

the same in khas or by settling tenants on them. In that you or your heirs can never lay claim to it and if you do so that will be void and shall be

refused.

8. This clause is followed by the following clause:

In future if you pay the consideration money at any time I shall on acceptance of the same return to you the kobala and take back the agreement.

Nobody will object to this.

9. Reading the two documents it is clear that the intention of the parties was to effect an absolute sale, the vendee promising to return the property

on receipt of the purchase money and nothing more, i.e., a sale with option of repurchase. It is conceded by the learned advocate for the

respondents that in every case where there is a conveyance and a promise to reconvey, it cannot be presumed that the transaction is not a sale but

is a mortgage. But the learned advocate has pointed out certain circumstances which he says show that the transaction was really a mortgage and

not a sale. (1) That the vendor and the purchaser were near relations and that the vendor was in need of money at the time. I do not see how this

fact goes to support the view that the transaction was a mortgage and not a sale, as it is as much consistent with the transaction being a sale. The

parties were related, one of them was in need of money and the other probably in order to avoid the property going out of the family or to oblige

his relative offered to purchase it.(2) In the ekrarnama there is a condition that on return of the purchase money the purchaser will return the kobala

and take back the agreement. There is no condition that the purchaser should execute a reconveyance which must be necessary if the transaction

was a sale. The absence of this condition does not necessarily signify that the transaction was anything but a sale. The parties might not have been

so well versed in law as to invest the transaction with all legal character. It might also be that it was their idea that the return of the kobala executed

by the vendor to him and the return of the agreement by the vendor to the vendee would constitute a good transfer. (3) It does not appear that

there was any bargain for the price. A deed of sale does not ordinarily show that there was any bargain for the price. We do not know what

happened at that time and there is no finding by any of the Courts below on this point.

10. Reference has been made to several cases which have dealt with the question as to whether a certain transaction was really a mortgage or a

sale. It is not necessary to go into the cases decided by the Indian Courts for we have so many pronouncements of the Judicial Committee on this

question that there can hardly be any difficulty in finding the real nature of a transaction like that in the present case. The earliest case which was

referred to in this connexion is the case of Bhagwan Sahai v. Bhagwan Din [1890] 12 All. 387. It seems to me that this case has the greatest

resemblance with the case before us. The only difference between that case and this is that in Bhagwan Sahai"s case there was a stipulation that if

the money was paid within a period of 10 years from the date of the deed the purchaser would accept it and ""cancel this valid sale;"" and also that

in the agreement it was mentioned that as a matter of favour, grace and indulgence the purchaser should execute a deed on taking back the

purchase money after 10 years. It is argued on behalf of the respondents that the absence of these two points in the present transaction

distinguishes it from the case of Bhagwan Sahai [1890] 12 All. 387. To my mind the distinction is very immaterial. Their Lordships relying upon

certain features of that case which are also present in this case held that it was an out and out sale and not a mortgage. (1) there was no stipulation

that the vendor should have the right to repurchase. (2) The right to repurchase was given on payment of the full amount of the purchase money

and not what should be due at the date of the purchase. Their Lordships followed the English case of Alderson v. White [1858] 2 De. G. J. 105

and quoted with approval the dictum of Lard Chancellor Cranworth laying down the rule which should be followed in construing cases of this

nature:

The rule of law on this subject is one dictated by common sense that prima facie an absolute conveyance containing nothing to show that the

relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely

because the vendor stipulates that he shall have a right to repurchase.

11. The next case is the case of Bal Kishen Das v. Legge [1900] 22 All. 149. In that case there was a deed of sale accompanied by an agreement

by which the purchaser promised to resell the property to the vendor on his paying him a certain amount by a certain date. In the circumstances of

that case their Lordships held that there was sufficient indication that the transaction was really a mortagage and not a sale. The points upon which

the case of Bhagwan Sahai was distinguished in Bal Kishen''s case [1900] 22 All. 149 are pointed out by the Judicial Committee in the ease of

Jhenda Singh v. Whaid-Ud-din AIR 1916 P.C. 49. In that case too there was a deed of sale of immovable property and an agreement to resell.

Their Lordships held that there was nothing in the fact that these documents were simultaneously executed or one after another to indicate that the

transaction was not a sale but a mortgage. Bal Kishen''s case was distinguished on the ground that there the amount to be repaid was not the same

amount for which the property was sold but an amount made up of the purchase money and some subsequent advances, and the fact that the debt

was consolidated showed that it was not a case of out and out sale; and it was further remarked in Jhenda Singh''s case AIR 1916 P.C. 49 that the

case of Bhagwan Sahai resembled the case before their Lordships more than any other case.

12. One of the facts on which the Judicial Committee were led to hold that the transaction was a mortgage in Bal Kishen''s case [1900] 22 All was

that there was a stipulation that if the money for the repurchase was not accepted by the vendee the vendor would be entitled to deposit the money

in Court. In Jhenda Singh''s case A.I.R.1916 P.C. 49 their Lordships held that the mere fact that in the event of the purchaser refusing to accept

the money for repurchase it may be deposited in Court did not necessarily indicate that the transaction was a mortgage. Next we have the case of

Narasingerji Gyanagerji v. Panugenti Parthasaradhi AIR 1924.P.C. 226. In that case it was found that the price for which the property was

purchased was absurdly low, less even than what the property would have realized upon a public Sale and the vendor reserved to himself the sole

right to the minerals and the mineral right including marble in the village and the right to repurchase the said village as per agreement executed on

the same date as the deed of sale." In consideration of these facts and other clauses in the document the Judicial Committee came to the conclusion

that the transaction was mortgage and not a sale. The most important term in that transaction which greatly influenced their Lordships was that the

mineral right was reserved by the vendor. A case of absolute sale would be inconsistent with the reservation of any right above or below the

surface. That case accordingly has no application, to the facts of this case.

13. The learned Subordinate Judge referred to several circumstances and pieces of evidence in support of the view that the transaction was a

mortgage. The circumstances which he points out are that in a certain document the sons of the original purchasers described this property as a

mortgaged property; and that in certain road cess-returns this property was not mentioned as belonging to the family of the purchaser. It has been

repeatedly held by the Judicial Committee that evidence so far as it relates to prove how the language of the document is related to the existing

facts and surrounding circumstances is only admissible. This rule was forcibly stated in Bal Kishen v. Legge [1900] 22 All and also in Maungkyin

v. Ma Shwe La AIR 1917 P.C. 207. But it is argued on the authority of the decision of their Lordships in Baijnath Singh v. Hajee Vally Mahomed

Hajee Abba AIR 1925 P.C. 75 that Section 92, Evidence Act does not fetter the Court''s power to arrive at the true meaning and effect of a

transaction in the light of all the surrounding circumstances. On an examination of that case it will appear that their Lordships did not go back on

what they stated in Bal Kishen''s case and in the Burma case above referred to. They have stuck to the rule that Section 92 does not preclude any

evidence relating to the surrounding circumstances. In the case before their Lordships the transaction extended over a long period and in construing

the document which was executed in 1912 their Lordships took into account certain other documents executed in 1913 as part of the original

transaction. The case before us is very similar to the one that came up for consideration before the Bombay High Court Vaman Trimbak Joshi Vs.

Changi Damodar Shimpi, :. Under similar circumstances the learned Judges held that it was a deed of pure sale.

14. There is one other circumstance in this case which ought to debar the plaintiff from contending that the transaction was not a sale but a

mortgage. The suit was brought just a few days before the completion of 60 years from the date of the transaction. It is impossible at the distant

date to give evidence of facts and surrounding circumstances at the time of the transaction. In Bhagwan Sahai"s case their Lordships remarked:

It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period

of 10 years from 1835 the representatives of the vendors could lie by until the year 1881 and then claim that they had a right which was not barred

by limitation to redeem that which they call a mortgage at any time within the period of 60 years.

15. In Jhenda Singh"s case the suit was brought 44 years after the period within which repurchase could have been effected. Their Lordships

quoted the remark of Lord Cranworth in Alderson v. White [1858] 2 De. G. J. 105.

I think the Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be.

16. It is needless to say that in the present case no evidence cogent or otherwise of the transaction at the time when it took place was given. On all

these considerations I agree that the transaction should be held as an out and out sale and not a mortgage as contended for by the plaintiffs. In this

view it is not necessary to consider whether the right of repurchase was a personal right given to the vendor or it was a right which could be

claimed by his successors. Nor is it necessary to consider if the absence of mention of any time within which the right to repurchase should be

exercised offends against the rule against perpetuity as the present suit is not a suit for specific performance of a contract. I agree that this appeal

should be allowed, the decree of the Courts below set aside and the plaintiff"s suit dismissed with costs in all the Courts.