(1954) 05 CAL CK 0003

Calcutta High Court

Case No: Appeal from Appellate Decree No. 619 of 1951

Subodh Chandra Mazumdar		APPELLANT
	Vs	
Monorama Ghose		RESPONDENT

Date of Decision: May 3, 1954

Acts Referred:

- Evidence Act, 1872 - Section 92

Citation: (1956) 1 ILR (Cal) 150

Hon'ble Judges: P.N. Mookerjee, J

Bench: Single Bench

Advocate: Atul Chandra Gupta and Haridas Chatterjee, for the Appellant; Apurbadhan Mukherjee and Benoy Krishna Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

P.N. Mukherjee, J.
This appeal arises out of a suit for pecific performance of a contract of re-sale of land. The dispute between the parties has a long history, but, for my present purpose, the relevant facts may be stated as follows:

The suit land originally belonged to the Respondent''s predecessor Bepin Behari Grhose. On July 17, 1940, Bepin sold the suit land to one Asutosh Majumdar, the predecessor-in-interest of Appellants Nos. 1 to 5 for Rs. 1,000. The kobdla or the deed of sale is Ex. A in the present case. On the same date, Ashutosh agreed to reconfey the land to Bepin on receipt of the said sum of Rs. 1,000 within eight years. This agreement was confirmed by a letter (Ex. 1) written by Asutosh himself, as now abundantly proved in this case, to Bepin on September 26, 1940.

2. In 1942, Bepin applied u/s 38 of the Bengal Money-Lenders Act for the statutory taking of accounts, as provided in the said section, giving rise to Miscellaneous Case No. 197 of 942 of the second court of the Munsif at Howrah, upon the allegation inter alia that the above sale and agreement of re-sale of July, 1940, really

represented a mortgage transaction. This application was dismissed by the learned Munsif upon the finding bat the sale and the agreement were two separate and independent transactions and did not and could not in law institute a mortgage. That decision was eventually affirmed by this Court on June 18, 1945. Both Bepin and Ashutosh died huring the pendency of the above proceeding under the Bengal Money-Lenders Act which was during its later stages conducted by and against their respective heirs, namely, the Respondents and the Appellants Nos. 1 to 5.

3. On May 13, 1942, Asutosh had executed a kobala (Ex. A /1) in favour of Dtirga Prosad Ghosh, the predecessor of Appellants Nos. 6 to 8, purporting to convey the suit land to him for Rs. 1,200.

4. On July 2, 1948, the present suit was commenced by Bepin''s heirs for specific performance of the agreement for re-sale. In this suit, the Defendants were the heirs of Asutosh and also the heirs of Diirga Prosad who was the vendee in the kobala of 1942. With regard to this kobala (Ex. A/1), the Plaintiff''s case was that it was collusive and that, in any event, the vendee Durg Prosad took the kobala with full knowledge of Asutosh''s agrement for re-sale in favour of Bepin.

5. The suit was contested by all the Defendants who denied inter alia that there was any agreement for re-sale and pleaded the the letter (Ex. 1) was not genuine. The Plaintiff''s allegation that Durga Prasad''s kobala was collusive was also denied and the latter''s heirs further contended that their predecessor Durg Prosad was a bona fide purchaser for value without notice and they, at any rate, were not bound by the alleged agreement an were not liable to re-convey the suit land.

6. All the defences were negatived by the two courts below an the Plaintiff''s suit was decreed. Hence this second appeal by the Defendant.

7. It is fairly clear from what has been stated above that the issues between the parties mainly involved questions of fact which have been found by the two courts below in favour of the Plaintiffs. Mr. Gupta with his usual fairness conceded that he could not challenge, at least, could not successfully challenge those findings in this second appeal. It seems to me also that the materials before the court, they are quite correct and unassailable and, accordingly, in this appeal I must proceed of the footing that the letter, Ex. 1, is genuine and that Ihirgaprosad''s kobala was collusive and no question of any bona fide purchase for value without notice can arise in connection therewith.

8. On the above basis the only point which was argued by Mr. Gupta was whether there was any enforceable agreement for re-sale between Asutosh and Bepin and his contention was that having regard to Bepin''s own case in the Section 38 proceeding that the sale and the agreement of re-sale of 1940 really represented mortgage transaction which was also, according to Mr. Gupta the Plaintiff''s case in the present plaint, this, suit for specific performance of the alleged agreement of re-sale cannot be decreed. In short, Mr. Gupta submitted that, as, according the

Plaintiffs and their predecessor Bepin, the alleged agreement of re-sale was really no such agreement but was merely part of mortgage transaction, the court cannot make a new contract out of the same and enforce the said agreement as a true and independent agreement for re-sale and decree specific performance on that footing.

9. In the facts of this case I am unable to accept Mr. Gupta'' submission. As I have already sufficiently indicated above, the decision in the Section 38 proceeding was clearly based on the finding that the sale and the agreement for re-sale of 1940 were two separate and independent transactions. Having regard to the wording of Section 38 of the Bengal Money-Lenders Act and the nature and scope of the proceeding thereunder, it is possible, to argue and probably it is quite correct, that when the application was dismissed on the finding that the transaction in question was not a mortgage but was really a sale with an independent agreement for re-sale, that finding would not be res judicata between the parties in subsequent suits or proceedings. But that would not materially help the Appellants. In the Bengal Money-Lenders Act proceeding it was the Appellants'' case and Appellants Nos. 6 to 8 can have no independent say in this matter, particularly when their kdbala (Ex. A/1) is collusive, that the sale and the agreement of re-sale of 1940 were two separate and independent transactions and not parts of any single transaction of mortgage and that allegation was accepted by the court and the Respondent''s application u/s 38 of the Bengal Money-Lenders Act was dismissed on that basis. In these circumstances, it is not open to the Appellants to turn round and plead that there was no separate or independent agreement for re-sale but the agreement, if there was any, was really part of a mortgage transaction represented by the sale and the said agreement (vide the case of Bhaja Choudhury and Ors. v. Chuni Lal Marwari and Anr. (1906) 5 C.L.J. 95.) That is a well recognised branch of the doctrine of election, founded, in the ultimate analysis, on the law of estoppel, and the Appellants must submit to it.

10. It is undeniable that the Appellants took the benefit, indeed, the full benefit, of their earlier representation and, that being so, law will not allow them to go back upon it. It is too late now to question this well established principle.

11. It is also sufficiently clear that the present suit is based upon the decision in the earlier Money-Lenders Act proceeding and, indeed, it "grows out of the judgment" of the same. There, in that earlier proceeding, the Appellants succeeded on their above representation and it is certainly not open to them now to change front and take up an entirely inconsistent plea to defeat the Respondent''s present action (vide Dwijendra Narayan Roy v. Jogesh Chandra De and Ors. (1923) 39 C.L.J. 40, 52.)

12. Against the Respondents, however, there would be no estoppel and no legal bar of any kind whatsoever. Bepin, their prodecessor, no doubt alleged in the proceeding u/s 38 of the Bengal Money-Lenders Act that the sale and the agreement of resale of 1940 were parts of a single mortgage transaction. But that allegation was not accepted and his application was dismissed. The principle of

election or estoppel which underlies the decisions in Bhaja Chavdhuri''s case and Dwijendra Narayan Roy''s case can therefore, have no application as against Bepin or his-successors, namely, the present Respondents. Clearly enough, no question of waiver also arises so as to preclude the Respondents from maintaining their present action. I am also unable to hold that the plaint in the present suit, when properly read, is, in any way, inconsistent with the view that the agreement for resale was a separate and independent transaction. The plaint is no doubt not very happily worded but, if it is fairly read as a whole, it sufficiently discloses that the Plaintiffs want specific performance of the agreement of re-sale as a separate and independent agreement and they are no longer contending, after the Section 38 proceeding, that it is part of a mortgage transaction. Indeed, as I have already held, the present suit really proceeds upon the decision in the said Money-Lenders Act proceeding that the agreement for re-sale is a separate and independent transaction and not part, of any mortgage transaction, represented by it and the deed of sale (Ex. A).

13. On the merits, too, it is fairly clear that the agreement for re-sale of 1940 was a separate and independent transaction. The said agreement and the sale of 1940 may have been contemporaneous and both the sale and the re-sale might have been arranged or agreed upon at one and the same time, but it is quite clear that the said two transactions were separate and independent and an outright sale was intended to be followed by a re-sale or reconveyance. The present case is thus sufficiently similar to and covered by the case of AIR 1949 32 (Privy Council) and no question of any bar u/s 92 of the Indian Evidence Act would also arise.

14. In the above view of the matter I reject the Appellants'' contention and hold that there is nothing in law to prevent the Plaintiff-Respondents from relying upon the disputed transaction as an agreement for re-sale and claiming specific performance thereof on that footing and I hold further that the said agreement is valid and legally enforceable and that the suit has been rightly decreed by the two courts below.

15. Before I conclude I propose to make, and, indeed, I feel tempted to make, some general observations on the oft-quoted amorphous metaphors "blowing hot and cold" and "playing fast "and loose". Attractive as they are, these maxims sometimes tend to Induce somewhat loose conceptions which may affect even judicial decisions. That mischief has to be carefully guarded against. In going through the decided cases one may justly feel that sometimes, the law, purporting to be based on these metaphors, has been too broadly stated, and, if I may say so with respect, their application also has not always been kept within proper limits. Strictly speaking, no formal legal concept is inherent or necessarily implied or involved in the maxims quoted or in the familiar cognate phrases "to approbate and "reprobate", "to affirm and disaffirm". At the most they may broadly be described in legal parlance as "picturesque synonyms" of certain aspects of the law of waiver,

estoppel or acquiescense or of the allied legal doctrines of res judicata and election. That, however, is the limit and their application should not be extended beyond it.

16. To preclude a party from "blowing hot and cold" or "playing "fast and loose" or, to use a more common expression, from "approbating and reprobating" one must establish a case of estoppel, waiver or acquiescense or invoke the well-known principles, underlying res judicata or election. In the application of these maxims it unsafe to go beyond the limits, set by the above principles of law, to which I have just referred. It is not in every case that a man is precluded by law from "blowing hot and cold" or "playing fast and loose" but to prevent him from so doing the bar of the legal principles, referred to above, must be established. Generally speaking also, in the true application of those maxims in the field of law some change of position is contemplated and some sort of estoppel in the broader sense of that term eventually interferes. This follows fairly from the discussion of this subject in one of the well-known treaties in this country, namely, Casperz on Modern Estoppel (T.L.L. 1893), Third Ed. (1909), vide pp. 30, 34, 70, 332-35 and 338-40 and the leading case of Smith v. Baker (1873) 8 C.P. 350, 357and the recent decisions of the Privy Council in the case of (1933) L.R. 60 I.A. 266 (Privy Council) , and of the House of Lords in the case of Lissenden v. C.A.V. Bosch, Ltd. (1940) A.C. 412, 417-18, 420-21, well accord with the views of the learned author. I ought to refer also to the case of Hurrybox Deora v. Johurmull Bhotoria (1929) 33 C.W.N. 711, where, years ago, Rankin, C.J., presiding over a Bench of this Court, correctly anticipated" the law as now laid down by the House of Lords in Lissenden''s case (1940) A.C. 412, 417-18, 420-21.

17. The other leading cases of this Court on this branch of the law, viz., Bhaja Choudhury and Ors. v. Chuni Lal Marwari and Anr. (1906) 5 C.L.J. 95, Girish Chandra Bit and Ors. v. Bepin Behari Khan and Ors. (1917) 27 C.L.J. 535, Bama Charan Chakravartti and Ors. v. Nimai Mondal and Ors. (1921) 35 C.L.J. 58, and Dwijendra Narayan Roy v. Jogesh Chandda De and Ors. (1923) 39 C.L.J. 40, 52 do not, in any way, militate against the view which I have taken above. They are all explainable on the basis of the same. Thul Bhaja Choudhury and Ors. v. Chunilal Marwari and Anr. (1906) 5 C.L.J. 95 and Dwijendra Narayan Roy v. Jogesh Chandra De and Ors. (1923) 39 C.L.J. 40, 52 really involved application of the rule of waiver or election, Girish Chandra Bit and Ors. v. Bepin Behari Khan and Ors. (1917) 27 C.L.J. 535 was clearly a case of res judicata and in Bama Charan Chakravartty and Ors. v. Nimai Mondal and Ors. (1921) 35 C.L.J. 58 the question was one of inconsistent pleading which, in the ultimate analysis, resolved in effect into one of election. None of those cases, therefore, presents any obstacle and in my opinion, when properly read, they disclose sufficient warrant for the limitation which I have sought to impose upon the popular maxims in the matter of their legal adaptation and application. That, however, is of no help to the Appellants here as the present case is well within the approved limit on principle and on authority (vide Dwijendra Narayan Roy v. Jogesh Chandra De and Ors. (1923) 39 C.L.J. 40, 52.).

18. As a result of the foregoing discussion, the point urged in support of this appeal must fail and the appeal ought to be dismissed. It appears, however, that there is a smoll error in the decree made and confirmed, respectively, by the two courts below. That relates to the payment of "execution and "registration costs". It is not very clear what the learned Munsif meant by "cost of execution" namely, whether, by that expression, he referred to the cost of the execution proceeding or the cost of execution of the document. This ambiguity has resulted from the use of the two terms "execution" and "registration" in the phrase "cost of execution and registration". It cannot be disputed that the cost of stamp and registration of the reconvayance must be borne by the vendees, that is, the Plaintiff-Respondents. It is also beyond dispute that if, on account of the Appellants'' default, the document has to be executed by the court, the Plaintiff-Respondents will be entitled to costs of the execution proceedings.

19. I, therefore, direct and make it clear that the cost of stamp and registration in connection with the document of reconveyance will be borne by the Plaintiff-Respondents whether the document is executed by the Appellants or on their default, by the court. If, however, the execution of the document has to be obtained by levying execution in court, the Plaintiff-Respondents will be entitled to the costs of the execution proceedings from the Appellants.

20. Subject to this minor modification, tie decision of the two courts below is affirmed and this appeal is dismissed.

21. The Appellants will pay to the Respondents the costs of this appeal.

22. Leave under Clause 15 of the Letters Patent is asked for and it is refused.