Manindra Nath Bose Vs Narendra Krishna Mitra and Another

Court: Calcutta High Court

Date of Decision: Feb. 1, 1954

Acts Referred: Evidence Act, 1872 â€" Section 92
Transfer of Property Act, 1882 â€" Section 58, 59

Citation: (1956) 1 ILR (Cal) 59

Hon'ble Judges: Rama Prosad Mookerjee, J; Paresh Nath Mookerjee, J

Bench: Division Bench

Advocate: A.C. Gupta, Manindra Nath Ghose, Jyotish Chandra Pal and Krishna Prosad Basu, for the Appellant;Pramatha Nath Mitra and Purnendu Sekhar Basu, for the Respondent

Final Decision: Allowed

Judgement

1. This appeal arises out of a suit under S. 36 of the Bengal Money-Lenders Act. The suit has been dismissed by the trial court. Hence this appeal

by the plaintiff.

2. The plaintiff''s case was that on October 7, 1942, he took a loan of Rs.7,000 from the defendant no. 1, Manindra Lal Gupta, on the security of

his Behala Property described in the plaint schedule. It was agreed between the parties that the loan would be repaid in the course of a period of

about two years and the stipulated interest for the said period was Rs.1,150. It was further agreed between the parties that in view of the Bengal

Money-Lenders Act the transaction would be made in the form of a kobala or a deed of sale accompanied by a simultaneous but separate

agreement for resale or reconveyance. Accordingly, the plaintiff duly executed and registered a kobala in favour of defendant no. 1 in respect of his

said Behala property for an ostensible consideration of Rs.8,000, although he really got from the said defendant only Rs.7,000 and that too by way

of a loan on terms, stated above, and the defendant no. 1 simultaneously executed in his turn an unregistered agreement for reconveyance of the

said property in favour of the plaintiff upon the latter''s paying to him the ostensible sum of Rs.9,150 within the said stipulated period of about two

years or within the month or Aswin, 1351 B.S., to be precise. The agreement recited payment and receipt of a sum of Rs.1,000 as earnest money,

which, according to the plaintiff, was deducted from the ostensible consideration of Rs.8,000 of the kobala, the plaintiff actually receiving only

Rs.7,000 on this latter document and that too by way of a loan as aforesaid. Within the stipulated period the plaintiff offered to pay the stipulated

amount of Rs.8,150 but the defendant no. 1 avoided contact and made it impossible for the plaintiff to make the payment and re-deem the

mortgage property. Accordingly, the plaintiff brought the present suit for necessary reliefs under S. 36 of the Bengal Money-Lenders Act.

3. The suit was instituted on December 20, 1944, and during the pendency in the trial court the plaint was amended on February 26, 1946, by

adding as defendant no. 2 as person named Narendra Krishna Mitra to whom, according to the plaintiff, the suit property has been transferred by

defendant no.1.

4. The suit was contested by both the defendants whose main defence was that the transaction in question was not a loan even in substance, and,

accordingly, the suit under S. 36 of the Bengal Money-Lenders Act did not lie. Defendant no. 1''s specific case was that the disputed transaction

was really a sale followed by an agreement of reconveyance and that the ostensible was the real state of things and, the plaintiff not having

performed his part of the said agreement or contract, he had forfeited his claim to enforce the same. The plaintiff''s allegations to the contrary were

denied by this defendant. Defendant No. 2 pleaded ignorance of the agreement for reconveyance and contended, inter alia, that he was a bonafide

purchaser for value without notice. There were also the usual defences of limitation and ""waiver, estoppel and acquiescence"". An objection was

also taken that the court-fee paid was insufficient, but such objection was clearly untenable if the suit, as framed, namely, under S. 36 of the Bengal

Money-Lenders Act, was maintainable.

5. The principal issue between the parties was whether the disputed transaction was a ""loan"" within the meaning of the Bengal Money-Lenders

Act. This was issue no. 2 framed by the trial court. It was clear that if the said issue was answered in the negative, the suit would not be

maintainable and the plaintiff would have no cause of action for the suit, and accordingly, no other question would arise. The learned Subordinate

Judge held against the plaintiff on the above issue no. 2 and that finding inevitably led to a dismissal of the suit.

6. Naturally, therefore, Mr. Gupta, who has argued the appeal on behalf of the plaintiff-appellant, has concentrated his attack on the learned

Subordinate Judge''s finding that the transaction between the parties was not a loan even in substance so as to come within the definition of ""loan

in the Bengal Money-Lenders Act. On this point as to the nature of the disputed transaction, the primary evidence is furnished by the two

documents, namely, the kabala (ex.1) and the agreement (ex.2) for resale or reconveyance. Some oral evidence was also led by the parties, but all

of it, as we shall presently see, would not be relevant or admissible in law.

7. In arriving at his finding that the disputed transaction was not a ""loan"" within the meaning of the Bengal Money-Lenders Act, the learned

Subordinate Judge made two different approaches leading to the same result. In the earlier part of his judgment he expressed the view that ""if the

transaction be a loan then it must be a mortgage by conditional sale""; and further that ""the"" transaction cannot be a loan without being also a

mortgage by ""conditional sale"". As it was clear that in view of the proviso to S. 58 (c) of the Transfer of Property Act the transaction could not be

a mortgage by conditional sale, the ""condition"" or the agreement of repurchase or retransfer being admittedly not ""embodied"" or contained in the

deed of sale but in a separate document, the learned Subordinate Judge held that the disputed transaction was not a mortgage by conditional sale,

and accordingly, in view of his opinion, quoted above, he decided that the transaction was not a loan or, in other words, that ""there was no loan"".

The learned Judge then proceeded to observe that ""as there was no loan at all there remains no scope for"" finding that there was a loan within the

meaning of the ""Bengal Money-Lenders Act of 1940"" and he concluded this part of his judgment as follows: -

Under the Bengal Money-Lenders Act or any other law a transaction which does not create the relationship of creditor and debtor between the

parties cannot be a loan at all and since by reason of the aforesaid proviso to Cl. (e) of S. 58 of the Transfer of Property Act there cannot be any

relationship of creditor and debtor between the parties unless the condition for resale is embodied in the sale deed, the transaction cannot by any

means be deemed to be a loan. I find thus that there was no loan within the meaning of the Bengal Money-Lenders Act or any other law.

8. The above reasoning of the learned Subordinate Judge was subjected to severe criticism by Mr. Gupta. He pointed that, under the definition of

S. 2(12) of the Bengal Money-Lenders Act, ""loan"" includes any transaction which is ""in substance a loan"". This obviously implied, so ran his

argument, that a transaction, which by reason of some technical provision of law could not be regarded as a loan under the general law, might still

be a loan within the meaning of the said special statute if it was ""in substance a loan"". On this question, arising under the Bengal Money-Lenders

Act, the substance, argued Mr. Gupta, must prevail over the form, even though such form was mandatory under some other provisions of law. It

was, accordingly, contended that the technical provisions of requirements of Sec. 58(c) , proviso of the Transfer of Property Act as to the form of

a mortgage by conditional sale would not prevent a transaction from being a loan within the meaning of the Bengal Money-Lenders Act if it was so

in substance"". Mr. Gupta even went further and contended that a transaction which was in substance a mortgage by conditional sale though

wanting in requirements as to form as prescribed in the proviso to sec. 58(c) of the Transfer of Property Act would be not only a ""loan"" under the

Bengal Money-Lenders Act but also a secured loan so as to attract clause (e) of Sec. 36(1) of the said Act, if the other conditions for its

application were satisfied.

9. As at present advised, we are inclined to accept the first part of Mr. Gupta''s argument, though not the second. It seems to us that in view of the

express language of the definition of sec. 2(12) a ""transaction which is in substance a loan"", though not so in form, would be a ""loan"" within the

meaning of that statute and that, accordingly, a ""transaction which is a loan in substance"", though purporting to be in the form of a ale with a

condition of retransfer or repurchase, not complying with the proviso to Sec. 58(c) of the Transfer of Property Act, and thus not being in law a

mortgage by conditional sale, would still be a ""loan"" within the meaning of the Bengal Money-Lenders Act. In that view of the matter, we do not

agree with the learned Subordinate Judge that merely because the disputed transaction is hit by the proviso to Sec. 58(c) of the Transfer of

Property Act, it must be held not be a ""loan"" within the meaning of the Bengal Money-Lenders Act. That, however, would not be of any assistance

to Mr. Gupta''s client unless it be shown further that the disputed transaction ""is in substance a loan"", or, in other words, that it was intended to

create a mortgage and failed in its effect only because of the proviso to Sec. 58(c) of the Transfer of Property Act. We are also of the opinion that

a repurchase, if it does not comply with the requirements of the proviso to Sec. 58(c) of the Transfer of Property Act, namely, as to the ""condition

being contained or ""embodied"" in the sale deed and not in a separate document, cannot be held to be a mortgage by conditional sale and cannot

also in law operate as a mortgage or as a secured loan.

10. On the last question, stated above, Mr. Gupta argued that in view of the proviso to S. 58(c) of the Transfer of Property Act such a transaction

would not in law be a mortgage by conditional sale but it might still well be an anomalous mortgage under S. 58(g) of the Act. It is to be

remembered, however, that to come within the definition or description of an anomalous mortgage, or a mortgage of any type whatsoever, the

transaction must in law be a mortgage. Unless it is first held to be a mortgage the question of its classification under any of the clauses of S. 58 of

the Act does not arise. To constitute a mortgage (where the principal money involved is one hundred rupees or upwards as in the present case) it

must be done by a registered instrument (vide s. 59) except, of course, where it is a mortgage by deposit of title deeds as defined in S. 58(f) which

is not the case here and which cannot be the case in the type of transaction, contemplated above, which at least means that if the transaction is

effected by several instruments all and each of such several instruments must be duly registered under the law. That is the statutory requirement and

it cannot be whittled down or overridden by the rule of substance. Just as the transaction cannot be held to be a mortgage by conditional sale if it

contravenes the proviso to S. 58(c) of the Act, similarly it cannot amount to a mortgage in law if it is hit by S. 59. There is, however, no such

statutory requirement in the matter of a loan and there the rule of substance prevails over form and a transaction which is in form not a loan for

example, a purported sale with an agreement of resale or reconveyance as in the case before us but is so in substance will be held to be a loan and

would certainly come within the definition of ""loan"" as contained in S. 2(12) of the Bengal Money-Lenders Act. We reject, therefore, Mr. Gupta''s

extreme argument that the transaction in the present case was an anomalous mortgage or, for the matter of that, any mortgage at all and we

proceed to consider whether it is a loan in substance so as to come within the definition of :loan"" as contained in the Bengal Money-Lenders Act.

11. The point thus requiring consideration is whether the disputed transaction is a loan in substance. On this point is whether the disputed line of

approach in the judgment of the learned Subordinate Judge the decision of the trial court is against the plaintiff-appellant. The learned Judge has

reached his conclusion on a construction of the two documents - the kabala (ex.1) and the agreement for resale (ex.2) and he has held that the

kabala (ex.1) shows that the agreement (ex.2) was a separate transaction and he has held further that it was ""impossible to construe the ''deed of

agreement as a stipulation for payment with interest'' the amount due from defendant no. 1 under the sale deed (ex.1)"". In his opinion ""the language

of the deed of agreement makes ""such construction impossible"" and his net finding on this part of the case is that -

In view of the clear terms in the two documents it must be held that by the deed of sale (ex. 1) the plaintiff made an out and out sale of the property

to the defendant no. 1 and there was no relationship of lender and borrower between the parties.

12. The learned Subordinate Judge has made no reference to any other evidence or circumstances on the question of the nature of the disputed

transaction possibly because he was not satisfied that the same or any item thereof would be admissible in law for that purpose. The appellant has

invited us to hold that this branch of the discussion of the learned Subordinate Judge suffers from incompleteness and basic misconception and it

cannot be sustained and to that argument we shall now turn our attention.

13. The direct oral evidence (vide P.W.1, P.W.3 and P.W.4) that the said transaction was intended to be a loan or mortgage is clearly

inadmissible under S. 92 of the Indian Evidence Act. It does not come within any of the exceptions to that section and is plainly excluded by the

authority of the leading case (1) ''Balkishen Das and others v. Legge, on the point. The question has to be judged on the documents in the light of

surrounding circumstances, and evidence, if any, in this latter behalf, that is, evidence to show ""how"" or ""in what manner"" the disputed transaction

or the language of the documents"" was related to existing facts, will be clearly admissible [vide the leading case, already cited, namely, Balkishen

v. Legge, and also, (2) Narasingarji Gyanagerji v. Panuganti Parthasaradhi, obviously under exception (6) to S. 92 of the Indian Evidence Act.

14. The documents to be examined are the kabala or the sale deed (ex. 1), on the face of it appears to be an out-and-out sale and the agreement,

(ex.2), also apparently looks like nothing more than a pure agreement for resale or reconveyance. It is to be seen, however, whether this apparent

was the real state of things in the light of considerations, permissible in law, as stated above. For that purpose we shall examine first the relevant

internal evidence, if any, contained in the documents themselves and we shall turn then to the admissible extraneous evidence throwing light on the

point at issue.

15. In the kabala (ex.1) there is apparently nothing which would support the appellant''s contention that the disputed transaction was a loan. The

kabala, on the other hand, appears to contain all the essential terms of a pure deed of sale including the terms as to the delivery of possession to

the transferee and also authorizing him (the transferee) or pay the future rent and taxes and also a covenant of further assurance. It also expressly

entitles the transferee to have his name mutated in the landlord''s sherista and the municipality. It recites delivery of possession to the transferee of

the part of the property which was then in the khas possession of the transferor with a stipulation that the latter would recover khas possession of

the rent of the property at his own cost and make over such possession to the transferee. The internal evidence contained in the kabala is thus fully

consistent with its character of an absolute deed of sale and is apparently inconsistent with its being a loan.

16. It seems to us further that in the ultimate analysis, the agreement for reconveyance (ex. 2) also, considered by itself or taken along with the

kabala (ex. 1) without more, is not of much assistance to the appellant. The agreement (ex. 2) recites that the property has been absolutely sold to

the Respondent no. 1. It recites further payment of an earnest money of Rs.1,000. It fixes a time, namely, end of Aswin 1351 B.S., for the

completion of the purchase and provides that the vendee''s default to complete the purchase within the stipulated time would entail forfeiture of the

earnest money or, at the vendor''s option, specific performance at his (the vendor''s) instance. It also provides for specific performance at the

instance of the vendee if due to the vendor''s default the purchase be not completed within the stipulated period. It then goes on to state that on the

expiry of the month of Aswin, 1351 B.S., the vendee would have no right to keep the ""agreement for sale"" in force.

17. Reading the document (ex. 2) by itself, it seems to us that it was apparent nothing more than an agreement for resale or reconveyance. Mr.

Gupta argued that under the document, the vendor could compel the vendee to make the purchase at any time and there was no time-limit fixed in

the document in that behalf. In this connection to drew our attention to the corresponding term in favour of the vendee and sought to urge that

under it the vendee''s right was of a limited character and he could not, after the expiry of Aswin, 1351 B.S., require the vendor to reconvey the

property to him. We do not, think that any such distinction is borne out by the document. In our opinion, a fair reading of the document amply

shows that a time for performance was fixed and in case of default on the part of either party the other was entitled to enforce specific performance

in accordance with law including also the relevant law of limitation which fixed the same outer limit of time in either case. We cannot, therefore,

accept Mr. Gupta''s argument, noted above. It was also pointed out by Mr. Gupta that although in the document (ex. 2) there was provision for

forfeiture of the earnest money in case of default on the vendee''s part there was no corresponding provision for refund of the same if the contract

was broken by the vendor. We do not, however, think that this is of much significance. In case of breach on the vendor''s part the vendee would

be entitled under the law to a return of the benefit, that is, refund of the earnest money, taken or received by the vendor and the absence of a

specific provision in that behalf in the agreement of contract of sale, resale in the present case would not, in our opinion, affect this right of the

vendee and would thus be of little moment. Mr. Gupta also pointed out that under the document (ex. 2) the stipulated period for getting the

reconveyance was only a little over two years and his submission was that this was rather short or unusual for a contract of resale and was more in

consonance with the transaction being a loan. This submission is not wholly without force but we are unable to hold that the circumstances on

which it is founded is of any overriding importance in the present case. It is not also altogether free from ambiguity. The agreement (ex. 2)

apparently shows that the Respondent no. 1 was no agreeable to a longer period and so the appellant had to be content with that period of a little

over two years. We cannot, therefore, persuade ourselves to accept this submission of Mr. Gupta and hold from the agreement (ex. 2), read by

itself or along with the kabala (ex. 1), that the disputed transaction was a loan. It follows then that the internal evidence furnished by the two

documents (ex. 1 and 2) is of little help to the appellant and the learned Subordinate Judge was right in his reading of the two documents simpliciter

and neither the agreement (ex. 2) by itself nor read in the light of the kabala (ex. 1) without more can possibly lead to a different result.

18. We turn next to the extraneous evidence to which reference is permissible under the law. That, in the present case, obviously consists of

evidence to the show how or ""in what manner"" the disputed transaction or ""the language of the documents"" (exs. 1 and 2) was related to existing

facts, and we proceed now to examine the effect of that evidence.

19. The agreement (ex. 2) recites payment of an earnest money of Rs.1,000. This payment is apparently borne out by the evidence of the appellant

himself when he says: -

I received Rs.8,000 but out of this amount Rs.1,000 in one currency note was taken from me as earnest money on the deed of agreement for

resale"" (vide p. 21, pt. 1 of the Paper Book).

20. The recital and the evidence, however, do not necessarily go against the appellant''s case of a loan of Rs.7,000. The extra payment of

Rs.1,000 might well have been to keep up the show if that was the arrangement between the parties. The learned Subordinate Judge obviously

placed too much reliance on this payment of Rs.8,000 instead of Rs.7,000 to find definitely that the parties intended the kabala and the deed of

agreement to be two separate transactions.

21. The discussion so far made is predominantly in the respondents'' favour but even then it seems to us that no final conclusion ought to be made

against the appellant on this part of the case without full and proper examination of certain other aspects of the matter which we shall now indicate

below.

In the circumstances of this case the true value of the property at the time of the proposed sale on October 7, 1942, and the question of

possession, immediately after that date, appear to us to be of considerable importance and we do not think that they can or ought to be lightly

brushed aside. We feel strongly that without an investigation into those two questions it is hardly proper to express any definite opinion on the real

nature of the disputed transaction. We are supported in this view by the authority of this Court in the case of (3) Shazadi Bibi v. Sheikh Jamal and

others, and plainly also, it well accords with the two decisions of the Judicial Committee, already cited, namely, Balkishen v. Legge, and

Narasingerji Gyanagerji v. Panaganti Parthasaradhi.

22. The kabalas [(exs. 1 (a) and 1 (b)] clearly show that Rs.15,000 was paid for the disputed property in 1939-40. The other kabala (ex E)

shows that it was sold to Respondent no. 2 by Respondent no. 1 for Rs.11,000 in 1944. The circumstances of this sale, however, are apparently

open to some comment and, although they do not throw any apparently open to some comment and, although they do not throw any doubt on the

genuineness of the transfer, it is not quite clear whether the property sold was really worth Rs. 11,000 or more at the date of that sale. In the

kabala (ex. 1), however, the consideration money is stated to be Rs.8,000. On these materials it is at least proper to hold that a case has arisen for

an enquiry as to whether the said figure of Rs.8,000 represented the value of the property or something else, or to put in another way, as to

whether there was any sufficient contrast between the value of the property and the consideration that passed under the kabala (ex. 1) to affect the

ostensible nature of the disputed transaction.

23. On the question of possession too the position is hardly satisfactory. There is no clear evidence on the present record that Respondent no. 1

got possession after the kabala (ex. 1) as recited therein. The evidence that is there of possession since the date of that kabala is extremely meager

and even that is highly conflicting in material particulars. It is true that the kabala (ex. 1) recites that the vendee was given khas possession of a part

of the disputed property. But the important thing to consider is whether the recital was true. Our attention was drawn to the appellant''s evidence in

cross-examination that after the kabala (ex. 1) he made no payment of rents or taxes. From that, however, it does not necessarily follow that the

appellant had no further interest or possession in the disputed property. It seems to us, therefore, that this question of possession also will have to

be properly investigated and for that purpose much fuller evidence will be necessary.

24. We, accordingly, propose to remand the case to the trial court for a consideration of the above two questions of possession and value and for

a final decision of the suit in accordance with law in the light of its ultimate findings on those two questions and other relevant circumstances. We

are not unmindful of the fact that the two questions, to which reference has been made above, were not very clearly raised in the pleadings, which

possibly accounts for the unsatisfactory state of the evidence on the said points. We feel, however, that the justice of the case demands

consideration of those questions and we do not, therefore, hesitate to direct a remand, as proposed above. The parties will be entitled to adduce

further evidence on the points on which the case now goes back to the trial court.

25. We direct further that the re-hearing will be only as between the plaintiff and the defendant No.1. The subsequent transferee-defendant no.2 is

undoubtedly a real purchaser for value, although he may or may not strictly satisfy the rests of a bonafide purchaser without notice. This latter fact,

however, when there is no evidence of any fraud or collusion on his (defendant no.2''s) part, is hardly material so far as he is concerned, in view of

our finding that the disputed transaction cannot in law be a mortgage. That is enough for the purpose of holding that defendant no. 2 (who is

Respondent no. 2 in this Court) will not be affected by the disputed transaction. He will, therefore, be discharged from the suit which will now be

re-heard, with only the plaintiff and defendant no. 1 on the record, in accordance with law and in the light of the directions given above and the

observations, made in this judgment, and the court, if it ultimately finds that the disputed transaction was a ""loan"" within the meaning of the Bengal

Money-Lender Act, will give such relief to the plaintiff as is available to him against defendant no. 1 under S. 36 of the said Act.

The appeal is allowed in part as above but we direct that, in the circumstances of this case, the parties will bear their own costs in all the courts up

till this stage. Further costs will be in the discretion of the learned Subordinate Judge, who will eventually dispose of the suit in pursuance of this

judgment.

Mookerjee, J.

26. I agree.