(1927) 07 BOM CK 0024

Bombay High Court

Case No: Second Appeal No''s. 64 and 65 of 1925

Dada Vaku Nikam		APPELLANT
	Vs	
Bahiru Hingu Nikam		RESPONDENT

Date of Decision: July 20, 1927

Acts Referred:

- Dekkhan Agriculturists Relief Act, 1879 - Section 10A
- Transfer of Property Act, 1882 - Section 54

Citation: AIR 1927 Bom 627 : (1927) 29 BOMLR 1419

Hon'ble Judges: Crump, J; Amberson Marten, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Crump, J.

These two appeals are brought from the decisions of the lower Courts in two suits for redemption. In the first suit, No. 381 of 1923, the plaintiff sought to redeem 33 gunthas of land in Revision Survey No. 242. In the second suit, No 382 of 1923, he sought for redemption of the whole of Revision Survey No. 95. The decision of the Court of first instance was that the plaintiff was entitled to redeem both these properties, but as the amount, on taking the accounts under the Dekkhan Agriculturists'' Relief Act, had been fully paid off, he could redeem without further payment. The District Judge in appeal took a different view. He held that by virtue of an arrangement made in the year 1910 the plaintiff was not entitled to redeem.

2. The nature of the transactions between the parties has been fully set out by the learned District Judge. It appears (putting the matter briefly) that there was in 1896 a document which both the Courts have found to be a mortgage, though it is expressed to be a sale-deed, by which the mortgagor mortgaged to the mortgagee a part of Revision Survey No. 242 and a part of Revision Survey No. 252. Following upon that, there was in the year 1900 a further mortgage between the same parties,

whereby the mortgagor mortgaged Revision Survey No. 223 and Revision Survey No. 95. At the date of the arrangement of 1910, as found by the lower appellate Court, the mortgagor was in possession of these four properties. On May 25, 1910, a document was executed which is in terms a sale-deed whereby the mortgagor purports to convey to the mortgagee a portion of Survey No. 223 and a portion of Survey No. 252. On the face of the documents the position would be that the mortgagee thus became the full owner of Survey Nos. 223 and 252, while the remaining properties which are the subject of the present suits for redemption remained as security for the mortgage debt.

3. The learned District Judge held that though that was the apparent nature of these documents, there was an arrangement between the parties whereby the mortgages as regards the properties now sought to be redeemed must be taken to have been settled. He arrived at that conclusion from a consideration of the evidence in the case and from the change in the position of the parties after the date of that transaction. He points out that after that date the mortgagee entered into possession, and the mortgagor relinquished the possession which he had as regards the properties now in dispute. From that he deduced, as also from the oral evidence in the case, the arrangement which he has held proved.

4. We have been invited to consider whether it was open to the learned District Judge to come to the conclusions so stated. Some argument has been advanced based upon Section 10A of the Dekkhan Agriculturists'' Relief Act. Now as 1 understand the scope of Section 10A it is this, that while ordinarily oral evidence would be excluded by a written document by virtue of Section 92 of the Indian Evidence Act or of any law for the time being in force, yet in cases Where the Dekkhan Agriculturists'' Relief Act applies, that bar ceases to operate, and the Court can make inquiries the bar of statutory prohibition no longer existing. Therefore, whether apart from the Act the District Judge could go behind the documents or not, having regard to Section 10A it was certainly open to him to inquire into the real nature of the transactions between the parties, and to hold that as regards the sale-deed of 1910 there was an understanding that as a part of the transaction the mortgages with which we are now dealing should be extinguished.

5. The scope of Section 10A has been considered by this Court in Gopal Parshottam Vs. Morar Punja, , and it has there been held that the words "any other law for the time being in force" must be read as ejusdem generis with the preceding words which refer to Section 92 of the Indian Evidence Act, and that therefore that section cannot be invoked in opposition to the provisions of the Indian Registration Act, which make the registration of a document compulsory. But, however that may be, it is unnecessary to consider that aspect of the matter, All that is sought to be done in the present case is to inquire into the real nature of the transactions and to decide the suit in accordance with such determination. It is unnecessary to hold that a 10A of the Dekkhan Agriculturists'' Belief Act which is in the nature of adjective law

was intended to override the substantive, provisions of the Indian Registration Act and the Transfer of Property Act.

6. And that brings me to the second point which has been urged in this case. It is said that it is not possible for the equity of redemption which in this case must be taken to bo worth more than Rs. 100 to be transferred from the mortgagor to the mortgagee save by a registered document, and Section 54 of the Transfer of Property Act is invoked for that proposition. Though the inquiry made by the District Judge may disclose the existence of an oral agreement to convey the equity of redemption, yet it is argued that the oral agreement is ineffectual for such purpose having regard to the provisions of the section cited. But the answer to that will, I think, be found in the decisions of this Court and notably in the decision of Sandu v. Bhikchand (1922) 25 Bom. L.R. 381. That was a case which on. the facts was very close to the present case, and at p. 385 the learned Chief Justice (then Marten J.) remarks as follows:-

But there is an alternative way of putting the defendant''s case. In AIR 1914 27 (Privy Council) it has been held by the Privy Council that in effect the English doctrine of part performance as explained in Maddison v. Alderson (1883) 8 App. Cas. 467 applies in India as being a principle of natural justice, viz., to prevent the success of fraud in land transactions. No doubt in Mahomed Musa v. Aghore Kumar the documents in question were before the date when the Transfer of Property Act came into operation. But their Lordships were fully aware of that fact (see page 6) and yet in no way qualified the principle which are there laid down. Further, in Bombay that decision has been followed in Hiralal Ramnarayan Vs. Shankar Hirachand, by Sir Norman Macleod and Mr Justice Shah in a case arising in 1916 long after the Act Game into operation in this Presidency. No doubt to establish the application of that principle, it must) be shown that the respective parties have so changed their respective positions that the change can only be referable to the contract alleged.

7. Now, it appears to me that those observations apply precisely to the facts found here by the learned District Judge. And the view which the learned Chief Justice took in that case was concurred in by Mr. Justice Fawcett, who also based his decision upon the judgment of their Lordships of the Privy Council in the case of Mahomed Musa v. Aghore Kumar Ganguli(1). Here, in pursuance of the oral agreement which the District Judge has found, there has been an actual exchange of land in 1910 and the parties so far as it can be seen have remained in possession ever since that date without any question being raised. And thus there is scope here also for the application of the doctrine of part performance, and therefore the bar which is sought to be placed in the way of the defendants u/s 54 of the Transfer of Property Act is in reality removed.

8. Our attention is invited to a Full Bench decision of the Madras High Court in Ramanathan v. Ranganathan(2) But as to that decision it is sufficient to say that

there was so much difference of opinion that its authority is much weakened, and in face of the decision of our own Court we are not disposed to take the view which prevailed in the Madras case.

9. Therefore, it appears to us that the learned District Judge was right in holding that the plaintiff could no longer redeem, and therefore his suit for redemption must be dismissed. These two appeals must be dismissed with costs.