(1934) 10 BOM CK 0007

Bombay High Court

Case No: Second Appeal No. 1050 of 1930

Chand Ahmedalli		APPELLANT
	Vs	
Ravji Tanaji Mali		RESPONDENT

Date of Decision: Oct. 5, 1934

Citation: (1935) 37 BOMLR 246

Hon'ble Judges: Sen, J; Murphy, J

Bench: Division Bench

Judgement

Sen, J.

This is an appeal against the appellate decree of the District Judge of Nasik setting aside the decree of the Joint Subordinate Judge at Malegaon in Regular Civil Suit No. 14 of 1928.

2. The plaintiff''s case is that he purchased fifteen lands from one Kurban Alii In 1898 and the remaining two from Tanaji, the father of defendants Nos. 1 and 2, in 1915, that these lands were taken on lease by Tanaji, who passed a rent-note in 1924, agreeing thereby to vacate them nine months later, and that out of the seventeen lands nine were still in the possession of the defendants ; he, therefore, sued the defendants to recover possession of those nine lands. The case for the defendants was that the lands were originally their ancestral property, that they were ostensibly sold first to Kurban Alii and then to the plaintiff, that the transactions were really in the nature of mortgages, that the rent-notes were passed for sums which represented the interest due on the latter mortgage, and that in 1925 there was a settlement whereby the defendants were allowed to remain as the owners of one-half of the lands in question and the plaintiff took possession of the remaining half. The learned Subordinate Judge held against the defendants on the material issues and decreed the plaintiff''s claim. On appeal, the learned District Judge set aside the order of the lower Court on the ground that the defendants had made out that there had been a settlement as alleged by them, though they had failed to prove that the plaintiff had obtained lands merely as a mortgagee.

3. In this case the only two material points raised by the defendants are that the transactions evidenced by exhibits 47 and 48, the sale-deeds of the years 1898 and 1915, were in the nature of mortgages, and, secondly, that there was a settlement between the parties, as alleged, in 1925.

4. On the first question both the Courts have held that the plea that these transactions were in the nature of mortgages had not been proved, the learned Subordinate Judge having found that the defendants'' evidence regarding the transaction under exhibit 48 is unsatisfactory and that as to the other transaction it is not open to them to prove that it was a mortgage, the Dekkhan Agriculturists'' Relief Act having been applied to the district after the date of the latter. We agree with these findings, and we do not think it necessary to give this point any further consideration.

5. As regards the second point, the defendants'' case was that the arrangement was that one-half of the lands should remain with the defendants and the other half with the plaintiff, so that nothing more remained due from the defendants and that the plaintiff was to pass a deed of re-conveyance with respect to the lands that remained with them. No such document of re-conveyance was passed, nor is there any document, which would have to be registered, embodying the terms of the alleged arrangement. It seems to us that we need not go into the evidence on this point which is merely oral, for whether such evidence, if admitted, amounted to proof or not, we are bound in this case by the decision in the case of Khan Bahadur Mian Pir Bux Vs. Sardar Mahomed Tahar, .. In that case the plaintiff was the registered proprietor of half a plot, and prima facie he was entitled to its possession. The defendant whom he sought to eject did not put forward any title to possession ; he merely pleaded that the plaintiff had agreed to sell him the half plot, and that he was in fact in possession of it. The defence is thus similar to the defence in the present case, namely, that the plaintiff had agreed to reconvey half the lands in question. The part of the decision which, in our opinion, is applicable to this case is as under.

The result is that, under the law applicable to the present case, an averment of the existence of a contract of sale, whether with or without an averment of possession following upon the contract, is not a relevant defence to an action of ejectment in India. If the contract is still enforceable the defendant may found upon it to have the action stayed, and by suing for specific performance obtain a title which will protect him from ejectment. But if it is no longer enforceable, its part performance will not avail him to any effect.

6. Following this ruling we must hold that the case set up by the defendants-will not avail them and that they cannot be allowed to prove it.

7. That being our view, and there being sufficient evidence of the plaintiff''s title to the lands in suit and evidence that rent-notes in respect of them were passed by the

defendants, we are of opinion that the learned Subordinate Judge is correct in his findings that the plaintiff is the owner of the suit lands and that he is entitled to evict the defendants.

8. We, accordingly, reverse the decree of the learned District Judge and restore that of the original Court, with costs on the respondents throughout.