Sandu Valji Vs Bhikchand Surajmal

Court: Bombay High Court

Date of Decision: Nov. 20, 1922

Acts Referred: Registration Act, 1908 â€" Section 17
Transfer of Property Act, 1882 â€" Section 54

Citation: AIR 1923 Bom 473 : (1923) 25 BOMLR 381 : 75 Ind. Cas. 118

Hon'ble Judges: Marten, J; Fawcett, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Marten, J.
The point on the appeal is whether the plaintiff-appellants are entitled to treat Survey No. 76 as still subject to the mortgage of

January 24, 1906. The respondents contend that as the result of a contract arrived at in 1908 it was agreed that they should acquire the equity of

redemption in Survey No. 76 but should re-convey the other property originally comprised in the mortgage, viz., Survey No. 894.

2. The controversy has mainly turned on the document of March 23, 1908, Exhibit No 34, which is alleged to evidence this agreement. The

appellants contend that it is inadmissible in evidence for want of registration, and alternatively, that, on the true construction of it, it only amounted

to putting the defendants in possession of one of the plots whereas up to that date they had not obtained possession of either plot.

3. As to its admissibility in evidence, one main question is whether the document amounts to a transfer of the equity of redemption, or whether on

its true construction it only amounts to a contract to transfer the equity. The Full Bench decision in Bapu v. Kashinath (1916) 19 Bom. L.R. 100

establishes that in this Court a contract for sale which is capable of specific performance may be set up in answer to a claim for possession by a

vendor. And Venkatesh v. Mallappa (1921) 24 Bom. L.R. 242 shows that where a purchaser has obtained possession, it is immaterial that more

than three years have elapsed since the date for completion of the original contract. Further, the Indian Registration Act itself draws a clear

distinction between what I will f call conveyances, which require registration, and mere agreements which do not. Broadly speaking, this may be

described J as the difference between Sub-section (1)(b) and Sub-section (2)(v) of Section 17 of the Indian Registration Act. Accordingly it was

decided by Sir Charles Sargent and Mr. Justice Telang in Shridhar Ballal Kelkar v. Chintaman Sadashiv Mehendale ILR (1893) 18 Bom. 396 that

an agreement to sell an equity of redemption need not be registered.

4. To understand the document of 1908 one must appreciate what was the then position under the two documents of January 24, 1906, Exhibits

28 and 32. The first of these documents purported to be a sale-deed by the plaintiff to the defendants for Rs. 1,200. The other document

purported to be an agreement by which the plaintiff was to pay the defendant Rs. 125 per annum for ten years, and on such repayment the

defendant was to execute a deed of re-sale, and in default of payment the annual installments were to carry interest, and if the plaintiff failed to pay

off the money he should not have any right left in the property. In my opinion the lower Courts have rightly arrived at the conclusion that these two

documents taken together constitute a mortgage and not a sale.

5. Turning next to the document of March 1908 (Exhibit 34), I am of opinion that on its true construction the parties intended that the mortgagee

was to take Survey No. 76 free from redemption, and that the mortgagor was to take Survey No 394 free from the mortgage debt. In effect,

therefore, in my opinion, the agreement was that the mortgagor was to sell Survey No, 76 to the defendant for the amount of the mortgage debt.

6. It will be seen, therefore, that a reconveyance or deed of resale was necessary as regards Survey No. 394. Accordingly Exhibit 34 provided as

follows :-""You (the mortgagee) have agreed to effect the re-sale of that at my convenience by a regular registered deed."" But as regards Survey

No. 76 the parties seem to have thought, that it would be sufficient to leave the original deed of sale, Exhibit No. 28, standing, and merely to

cancel the contemporaneous document, Exhibit No. 32. Accordingly Exhibit 34 provides that ""Survey No. 76 from out of the properties involved

in that mortgage by way of sale has been given this day to you in lien of the debt of your shop and has been given into your possession this

day...and the possession of Survey No. 76 has accordingly been given to you this day. And the survey number has accordingly been transferred to

your ownership itself the field of Survey No. 76 is given to you for cultivation and has been given into your possession,...the said Survey Number

shall be treated as sold on the basis of that kararnama and an endorsement has been made in the said kararnama and is cancelled and has been

given into your possession.

7. Now it is common ground that no endorsement has been made on the kararnama, Exhibit 32, nor has it been cancelled formally. On the whole I

am of opinion that this document, Exhibit 34, did not amount to an actual transfer of the equity of redemption, but only amounted to an agreement

to transfer, or alternatively, an agreement to cancel Exhibit 32, and that consequently Exhibit 34 is admissible in evidence as an agreement and can

be relied on by the defendants accordingly. The case of Vani v. Bani (1895) ILR 20 Bom. 553 is, I think, clearly distinguishable, as there the

Court construed the particular document before it as creating a charge in the nature of a mortgage. It was not therefore a document which merely

created a right to demand another document, Accordingly, on this point, I disagree with the lower appellate Court, and I agree with the conclusion

which 1 understand the learned trial Judge to have arrived at at p. 10, lines 20-32 of his judgment, viz., that the document itself did not purport to

be the sale-deed, but created a right to get formal sale-deeds if necessary.

8. 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 principles 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 came into operation in this

Presidency.

9. 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, A mere payment of purchase money, for instance, is insufficient (see Halsbury, Vol.

XXV, pp. 294-295). In the present case I think the defendants satisfy that test. Since 1908 they have been in exclusive possession of Survey

No.76 : they have paid the assessment: no accounts have ever been demanded by the plaintiffs, nor have the plaintiffs made any payments. On the

other band the plaintiffs have been in exclusive possession of Survey No. 394 and no demand for payment has been made on them. This is exactly

in accordance with the views I have expressed as to the intention of the parties under Exhibit 84. But it seems to me a complete variation of the

original agreement Exhibit 32 of 1906 under which the plaintiffs were to pay Rs. 125 every year for ten years, and under which, as we know, the

mortgagors remained in possession till 1908 of both plots of land. Further, the suit was not brought till 1919 and this length of time strengthens the

inference that otherwise I would be prepared to draw.

10. The plaintiffs relied on Kurri Veerareddi v. Kurri Bapireddi ILR (1906) Mad. 336 and Ramanathan v. Ranganathan ILR (1917) Mad. 1134

but the decision in Salamat-Uz-zamin Begam v. Masha Allah Khan ILR (1917) All. 187 is to the contrary effect, and under the circumstances I

would prefer to adopt what appears to me to be the true effect of Mahomed Musa v. Aghore Kumar followed as it is in this Court by Hiralal v.

Shankar, Accordingly, if necessary, I think that the defendants are also entitled to succeed upon this alternative ground.

11. In my opinion, therefore, the result arrived at by the lower Courts was correct, and this appeal must be dismissed with costs.

Fawcett, J.

12. The document, Exhibit 34, recites that Survey No. 76 has not only been given into the possession of the defendant mortgagee, but also that its

ownership has been transferred to him. It also says that Survey No. 76 is to be treated as sold, and the kararnama, Exhibit 32, is cancelled to that

extent. In view of these provisions I do not think the document can be treated as falling under Clause (v) of Sub-section (2) of Section 17 of the

Indian Registration Act 1908. Even if the document is taken to contemplate a further document cancelling Exhibit 32 to the extent mentioned, this

makes no difference: see Vani v. Bani.I.L.R. (1895) 20 Bom. 553.

13. The teat is whether the document does not itself by its express terms create a certain interest in Immovable property, but expressly

contemplates the creation of that interest by a subsequent instrument : cf. Birdwood J.''s remarks in Chunilal Panalal v. Bomanji Mancherji Modi

ILR (1883) 7 Bom 310 a decision approved in Shridhar Ballal Kelkar v. Chintaman Sadashiv Mehendale ILR (1893) 18 Bom. 396. Otherwise

proper effect is not given to the words ""not itself creating, declaring, assigning, limiting or extinguishing any right,"" &c. and ""merely creating a right

to obtain"" etc. in Section 17(2)(v). Here it seems to me the parties clearly intended Exhibit 34 to be the main document evidencing the sale of the

equity of redemption, and the endorsement on Exhibit 32 as a subsidiary affair. In my opinion it goes beyond ""merely creating a right to obtain

another document"" to effect the Bale, and itself purports to create or declare a transfer of ownership. I regret, therefore, I do not agree with my

learned brother''s view that the document can be treated as a mere agreement for sale.

14. Accordingly, I think the lower appellate Court was right in holding that the document required registration, and is, therefore, inadmissible in

evidence for the purpose of affecting the Survey Number in question u/s 49 of the Indian Registration Act. It can no doubt be looked at for a

collateral purpose; but that must be one other than that of creating or extinguishing a right to the land : see Bai Gulabbai Vs. Shri Datgarji

Mohangarji, . I think this excludes looking at it even for the purpose of evidence as to the nature of defendant''s possession, which he obtained

under the arrangement of 1908 : cf. Muthukaruppan v. Muthu ILR (1914) Mad. 1158.

15. But the mere fact that the lower Court wrongly looked at the document does not necessitate a reversal of its decision: Section 167, Indian

Evidence Act. There was other clear evidence of a new arrangement in 1908, which has been considered by both the lower Courts who hold that

it establishes the arrangement asserted by defendant as against that asserted by plaintiffs. The evidence seems sufficient to justify their conclusion,

and no sufficient ground has been shown for our taking a different view of the facts in second appeal.

16. But it is contended that in law this arrangement is invalid, because it involves a sale of plaintiffs'' equity of redemption which (as it is worth more

than Rs. 100) can only be effected by a registered instrument u/s 54 of the Transfer of Property Act and Section 17 of the Indian Registration Act.

17. The answer to this is suggested in the lower Court''s judgment which refers to the two cases of Mahomed Musa Vs. Aghore Kumar Ganguli, .

and Nilkanth Bhimaji Sinde Vs. Hanmant Eknath Sinde, . In the former case an equity of redemption was held to be extinguished, because, even if

a regular conveyance was necessary, or if some other formal defect had occurred, the acts of the parties had been such as to supply all defects, on

the equitable doctrine of performance or part-performance of an agreement. In this case, on the findings of the lower Court, the agreement to

make defendant complete owner of Survey No. 76 and to cancel the mortgage of 1906, had been acted on by the parties for some eleven years

prior to the suit; and if the equitable principle in question can be properly applied to this case it gives a clear answer to plaintiffs'' contention.

18. No doubt the Madras High Court has held that this principle has no operation in the case of a sale governed by Section 54 of the Transfer of

Property Act : see Kurri Veerareddi v. Kurri Bipireddi ILR (1906) Mad. 336 and Ramanathan v. Ranganathan ILR (1917) Mad. 1134. The latter

decision was not, however, unanimous, Wallis C.J. and Abdur Rahim J. dissenting. It has also been dissented from by the Allahabad High Court

(Salamat-uz-zamin Begam v. Masha Allah Khan ILR (1917) All. 187 where the equitable principle of part performance was applied to the case of

a transfer falling u/s 64, Transfer of Property Act. In this Court the Madras view was taken in Lalchand v. Lakshman ILR (1904) 28 Bom. 466

but this has been virtually overruled by the Full Bench case of Bapu Apaji v. Kashinath Sadoba ILR (1916) 41 Bom. 438 : 19 Bom. L.R. 100

where Section 54 of the Transfer of Property Act is considered, and it is held that, in spite of its provisions, a defendant in possession under an

agreement of sale but without a registered conveyance can resist an action in ejectment by the plaintiff, who agreed to sell him the land and put him

in possession. In the argument the Privy Council case of Mahomed Musa v. Aghore Kumar was referred to.

19. I think it is clear that this ruling, which is binding on us, governs the present case : and personally I have the less hesitation in following it, in that

the judgment in that case is based on Indian statutory provisions, which (it is held) qualify Section 54 of the Transfer of Property Act. If that is so,

the equitable principle in question is one recognised by the Legislature : and the view taken by their Lordships in Mahomed Musa v. Aghore

Kumar Ganguli ILR (1914) Cal. 801 and Venkayamma Rao v. Appa Rao ILR (1916) Mad. 509 that the law in India w not inconsistent with this

equitable principle, is shown to be justified. The case of Maung Shwe Goh v. Maung Inn ILR (1916) Cal. 542. does not affect this, for that only

concerned the English rule that a contract for sale of real property makes the purchaser the owner in equity of the estate, which is clearly opposed

to the express provisions of Section 54 regarding a contract for sale.

20. I was at first inclined to think that Bapu Apaji v. Kashinath Sadoba ILR (1916) 1 Bom. 438 : 19 Bom. L.R. 100 would not apply to this case,

as it was not a suit for possession but merely for an account. On further consideration I think the same principle applies, for in both cases a liability

to account for profits arises, and defendant is entitled to show that he is not so liable : cf. the passage from Story"s Equity Jurisprudence cited in

Bapu Apaji v. Kashinath Sadoba ILR (1916) 1 Bom. 438 : 19 Bom. L.R. 100 And both Mithiram Bhat v. Somanatha Naickar ILR (1901) Mad.

397 and Mahomed Musa v. Aghore Kumar Ganguli ILR (1914) Cal. 801 : 17 Bom. L.R. 420 where the principle in question was held applicable,

were suits for redemption of a mortgage and not for possession.

21. I also think that the fact that defendants'' right to a decree for specific performance may now be barred, is immaterial. In Mithiram Bhat v.

Somanatha Naickar ILR (1901) Mad. 397 the defendant''s claim was similarly barred, as pointed out in Ramanathan v. Ranganathan ILR (1917)

Mad. 1134. And a similar view has also been taken in Venkatesh v. Mallappa. (1921) 24 Bom. L.R. 242.

22. The provisions of Section 92, proviso (4), Indian Evidence Act, were also relied on; but it is not a mere case of setting up an oral agreement in

modification of a registered instrument, and in Mahomed Musa v. Aghore Kumar Ganguli ILR (1914) Cal. 801 : 17 Bom. L.R. 420 was similar

contention was unsuccessful (see at pp. 811 and 812).

23. I agree, therefore, that the appeal should be dismissed with costs.