

Krishna Bai Vs. Rama Bala

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Court : Mumbai

Decided On : Aug-29-1906

Reported in : (1906)8BOMLR764

Judge : Aston and ;Heaton, JJ.

Appeal No. : Second Appeal No. 71 of 1902

Appellant : Krishna Bai

Respondent : Rama Bala

Judgement :

Aston, J.

1. In this case the lower Court has entirely misconceived the nature of the issue remanded for a finding: having treated it as an issue purely of law, instead of what it was intended to be-an issue of fact. The interlocutory judgment stated, 'the pleaders before us admit that the only dispute with regard to the eastern moiety is, as to whether Exhibit 74, the sale deed by Khando to Daolat Rao is a mortgage transaction or a sale transaction,' and the issue remanded was accordingly, whether Exhibit 74, dated 8th October 1884, represents a mortgage transaction.

2. The lower Court was therefore required to find a question of fact, whether the real transaction between the parties as shown by the evidence, and not as might

appear from Exhibit 74 taken alone, was a mortgage.

3. Mr. Desai for the appellant has contended that, although the direction of this Court has not been carried out and although it is undoubted that the issue remanded was intended to be an issue of fact a finding on that issue is now rendered superfluous in view of the decision in *Datoo v. Ramchandra* (1905) 7 Bom. L.R. 669. But there is a later decision, viz., the case of *Abuji v. Luxman* : (1906)8BOMLR553 to which we must call the attention of the lower Court, as well as to the Privy Council case of *Pertab Chunder Ghose v. Mohendra Purkait* (1889) 16 I.A. 233.

4. Mr. Bakhle has also called our attention to the case of *Navalbai v. Sivubai* : (1906)8BOMLR751 there the interlocutory judgment points out that the only question in the suit was, whether the plaintiff was entitled to show that the transaction was not an out and out sale. In that case there was a document evidencing the transaction in the form of an absolute sale, and the case there was sent back for a determination of the issue, whether the plaintiffs prove any facts which would invalidate the document or entitle them to any decree or order relating thereto. And the learned Chief Justice remarked in that case, ' In dealing with this issue the Court may profitably have regard to the decision of the Privy Council in *Pertap Chunder Ghose v. Mohendranath Purkai* ILR (1889) Cal. 291 where it is said-where one party induces the other to contract on the faith of representations made to him, any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. If such representation had not been made, the tenants might have refused to sign the *Kabulayat*. Further if there is any stipulation in the *Kabulayat* which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the *Kabulayat* is not the real agreement between the parties, and the plaintiff cannot sue upon it;' and the judgment goes on to say ' so in this case, if the plaintiffs were told that the document, which in the form is a sale-deed, would not be enforced as such against them, and on the faith of that representation *Hariba* executed the document, then the sale-deed cannot be upheld as against him or the plaintiffs as a sale-deed.' The attention of the lower Court is also invited to the definition of ' contract' in the Contract Act.

5. The contention in the present case is, that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement.
6. In the case of *Ansa v. Khenchappa* (1905) 8 Bom. L. R. 669 it was also pointed out that in disputes of this nature, the real question that is to be decided is, whether the real agreement between the parties was embodied in the document.
7. Mr. Bakhle has asked us to remand the case for a fresh finding on the issue that was sent down, in order that a finding should be arrived on evidence and not only upon the terms of Exhibit 74.
8. The case must be remanded for that purpose.
9. Mr. Desai has also asked us to remand the case for a finding, whether defendant 3 is a bona fide purchaser for value without notice. But he has candidly admitted that he did not ask for such an issue to be remanded when the case was sent down on the 25th November 1902: and having regard to the terms of the judgment already quoted, it is too late now to remand such an issue.
10. The case to be remanded for a fresh finding on the same issue in the light of the above remarks.
11. Finding to be returned within four weeks.

Heaton, J.

1. I wish to add a few words about what appears to be a very striking difference between the case of *Balkishen Das v. W.F. Legge* ILR (1899) All. 149 : 2 Bom. L.R. 523 and cases of the class, with one of which we have been now dealing. The actual facts in *Balkishen's* case need only to be briefly read from the report to show that they have no similarity with the ordinary dealings between a creditor and debtor in the Deccan. But what should be particularly noticed with regard to *Balkishen Das* case is this, that before the Privy Council both sides, (as appears with great distinctness from the report) argued that the contract and the terms and nature of the contract were to be found in the deeds. That was the view taken by their Lordships in deciding the case. But in the case before us and in many similar

cases that come from rural parts of the Deccan, the contentions of the parties are, on the one side that the terms of the contract are to be found in the document, and on the other hand that they are not. The difference herein disclosed between the Deccan cases and the case dealt with by the Privy Council is very great. When we have cases in which one party alleges that the contract is to be found in the document and the other party alleges that it is not to be so found; I cannot see how we can refer to Balkishen Das' case for enlightenment as to the issues which ought to be raised, and the nature of the evidence which ought to be heard.

2. In the case of *Datto v. Ramchandra* (1905) 7 Bom. L.R. 669 the allegations on behalf of the debtor resolved themselves, as the report of the judgment shows, into the assumption that 'the document was accompanied by a contemporaneous oral agreement or statement of intention which must be inferred' from certain circumstances. But that does not accurately describe the case here. So far as the allegations of the parties go, the creditor asserts an out and out sale : whilst the debtor implies by his assertions that no such thing as a sale, in any form or subject to any modifications or limited by any contemporaneous understanding, was within the contemplation of the parties; at least that is how I understand the matter.

3. The case illustrates the theory of those who believe that many of these apparent sales are mortgages. This theory is not based on the conception of a sale accompanied by a modifying oral agreement or understanding. It rests on the suppositions, that the intention of the parties is simply and solely that the property shall be security for the debt; and that no sale in any form is jointly contemplated. The fact that the document takes the form of a sale-deed, is explained by the assumption (1) of a fraud by the creditor ; or (2) of a convention which the creditor insists shall be observed, and which the debtor dare not repudiate; or (3) of circumstances peculiar to an individual transaction. It may be that the debtor prepares for himself a case specially difficult of proof: but that is not a reason for refusing to allow him to attempt to prove it.

4. For the reasons stated by my learned colleague, taken with those which I have ventured to record, I have no hesitation in arriving at the conclusion that the issue must be again sent down, to be determined as an issue of fact.

