

Altaf Begam Vs. Brij Narain

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Court : Allahabad

Decided On : Jan-24-1929

Reported in : AIR1929All281

Appellant : Altaf Begam

Respondent : Brij Narain

Judgement :

1. This is a plaintiff s appeal arising out of a suit for cancellation of a sale-deed dated 2nd September 1921 executed by the plaintiff in favour of the defendant, and in the alternative for a recovery of the amount of the sale consideration. Under a hypothecation bond dated 21st September 1913 the plaintiff's husband had undertaken to pay her a monthly allowance of Rs. 75 and had hypothecated his village Nagphan Risuya valuing the deed at Rs. 10,800. There were certain misunderstandings between the husband and the wife, and it is an admitted fact that she could not for a long time recover her monthly allowance. Eventually she sued her husband for recovery of the arrears and in execution of her decree put the village for sale at auction. It was purchased by Hakim Zakir Husain Khan for a small amount, as the sale was apparently subject to the continuing charge. Thereafter she brought a second suit against her husband and the purchaser and obtained a decree on 28th February 1920 for about Rs. 5,554. This decree also remained unrealized. On 2nd September 1921 she executed the sale-deed in dispute in favour of the contesting defendant Brij Narain.

2. The sale-deed as it stands purported to transfer the decretal amount aforementioned, the amount of her maintenance allowance which had fallen due since the decree and the future amounts which would fall due during the rest of her life with all rights to realize the same. The sale was for Rs. 7,500 which were to be paid in certain fixed instalments. There was a special covenant for forfeiture which we will discuss later on. The plaintiff's case was that she being a pardanashin and uneducated lady did not understand the terms of the deed thoroughly, which were not explained to her; that the defendant and her pairokar colluded with each other and falsely represented to her that only the arrears which had fallen due up to date were being transferred, and that she was never told that her future maintenance allowance for life would also be sold under the deed. She further asserted that there was an express understanding that if the defendant should make any default in the payment of any instalment, he would not be entitled to get back the amount received and the sale-deed would be cancelled, and that accordingly as there were defaults made the sale-deed has become void and that it is invalid in law. These allegations were refuted in the written statement in which it was pleaded that the plaintiff executed the document after fully understanding its terms, that the penal clause was unenforceable and that it was never agreed that the sale itself would be cancelled.

3. The Court below has decided most of the issues against the plaintiff, but upheld her right to claim a forfeiture of Rs. 1,500 and has given her decree for the unpaid balance with interest. The plaintiff has appealed and the defendant has filed cross-objections.

4. The first question to be considered is whether the plaintiff did not understand that her future maintenance allowance was also going to be sold. Connected with this is the further question whether any misrepresentation was made to the plaintiff. The learned Subordinate Judge has disposed of both these points together and has considered that the burden of proving both these matters lay on the plaintiff. He began his findings on issues 1 and 2 with the remark

to prove these issues the plaintiff, besides giving her own statement has examined such and such witnesses.

5. He has then remarked

to my mind the plaintiff has miserably failed to establish either of the two assertions

and has again said that her explanation that her relations and servants failed to explain to her the real nature of the sale was absolutely unbelievable. The learned Subordinate Judge has apparently lost sight of the fact that although the burden of proving any active misrepresentation was on the plaintiff, the onus of satisfying the Court that the deed had been fully explained to and understood by the lady was on the defendant, because the plaintiff is undoubtedly a pardanashin and uneducated lady. In spite of this error in the judgment, we are of opinion that the finding of the Court below that the contents of sale-deed so far as it relates to the transfer of her future maintenance allowance is concerned were fully understood by her. That the document was read over to her is proved by the evidence of the scribe Budh Sen as well as that of the Sub-Registrar Babu Sham Narain. At the time of the registration her husband was present though he declined to identify her. She certainly had some pairokars by her side, and under these circumstances it is inconceivable that the document should have been written, executed and attested, and then registered, without its having been read over to the lady. We believe that the document was read over to her. The reference to the sale of her future rights in the sale-deed does not appear at only one place. It is repeated at no less than three places, and it is made fully clear that the amounts which would become due to her during the rest of her life with all the rights to realise the same were being sold to the vendee. The language of the document where these passages occur is simple and clear, and when they were read to her there is no reason to suppose that she failed to understand their meaning. The Sub-Registrar has expressly stated that he must have explained to the lady the things which were being sold, namely the decree, the arrears which had become due, and the kharch-i-pandan which would be due in future. Although the lady denies this, we are not prepared to take a different view from that which has been taken by the Court below. We must, therefore, find it proved that the lady understood that her future rights were being transferred, and that there was no misunderstanding on her part as regards this point.

6. In this connexion we may dispose of an argument which has been pressed before us very strongly, namely that the decretal amount was over Rs. 5,500 the amount which had since fallen due exceeded Rs. 2,000 and the capitalised value of the future allowance was considerable, and all these items could not have been intended to be sold for Rs. 7,500 only. No doubt prima facie the cash consideration appears to be inadequate, but the plaintiff was hard pressed for money, and ever since the agreement in her favour she had not been able to realize a single pice, and had been driven to sue for arrears twice. Furthermore, the recovery of future allowance might involve further litigation. Having regard to these considerations we are unable to hold that the apparent inadequacy of consideration is sufficient to show that she did not intend to transfer her future allowance.

7. The second point for consideration is whether it was covenanted that on failure of the payment of the instalments fixed in the deed of the sale the deed would stand cancelled. The particular expression which has been the subject of considerable argument before us is mutalaba mobayya ba dastur kaem rahange. The learned Subordinate Judge has himself conceded that no doubt the penal clause 'has been very unhappily and inappropriately worded' and has remarked that the words no doubt literally mean that the 'dues sold would remain intact.' The learned advocate for the plaintiff urges that the meaning of this is that the sale deed would remain cancelled. There are two further circumstances in favour of the plaintiff. The only persons who read over and' explained the document to the lady were the scribe Budh Sen and the Sub-Registrar Babu Sham Narain. Admittedly no one else read it over to her. Budh Sen. when asked in cross-examination to explain the meaning of the disputed phrase said that by that phrase it was meant the dues sold will remain as before 'that is' will not be considered as sold. 'Similarly the Sub-Registrar has said that the words' mutalaba mobayya 'mean the various demands which were sold namely the decretal amount, the amounts which have become payable and the amounts which was to become payable in future. He considered that he put this interpretation on those words at the time of registration which he was putting then. He reiterated his opinion and stated that' mutalaba mobayya 'included to his mind both, that is, the things sold and the consideration for which they were sold. If the language of the document had been clearer or if

the plaintiff had sworn that she understood that the whole deed was to stand cancelled, we would have felt great difficulty in not cancelling this deed.

8. But no express words stating that the sale was to be cancelled are to be found in the document. Either through an omission on the part of her pleader or through her own wilful silence the plaintiff has omitted to state in her deposition that she was made to understand that the sale would stand cancelled if the instalments were not paid. The statements of the scribe and the Sub-Registrar are obviously based partly on their recollection and partly on what they now understand as the meaning of the ambiguous expression. As it is the plaintiff who wishes to 'enforce this forfeiture clause against the defendant, we cannot interpret an ambiguous expression in the way in which she asks us to interpret it, when the language is not absolutely clear and when she herself has failed to depose as to the true meaning which she understood by it. We also find that subsequently to the defaults in payment she went on receiving small sums of money up to June 1923 without asserting any right to cancel the sale. Even if she had any such right she must be deemed to have waived it. We accordingly uphold the view of the Court below, though on different grounds, that there was no covenant directing that the sale itself would stand cancelled if a default were made.

9. The third question is as regards the amount of which the plaintiff can claim forfeiture. This part of the clause also is ambiguously worded. According to the plaintiff the whole amount which would have been paid up to date would be forfeited if any default was made. According to the defendant only Rs. 1,500 which had been paid before the execution were to be forfeited. The difference of interpretation turns on one word hai. If this word had been 'ho' the plaintiff's interpretation would undoubtedly be the right one. If strict regard were not paid to rules of grammar and idiom, hogaihai' may be loosely used for 'hogaiho.' The official translator has interpreted this clause in the way the plaintiff wanted it to be interpreted. He has translated it as follows:

If the vendee shall fail to pay any one of the instalments detailed below at the time fixed, he shall not be entitled to get back any money out of the sale consideration which I the executant shall have received before that time.

10. We also think that if the intention of the parties had been that only the sum of Rs. 1,500 which had been paid at the time of the execution would be forfeited, they would have expressly mentioned this known sum and would not have used an indefinite and vague expression like the one worded above. Such an indefinite expression was more likely to be used when the exact amount which was to be forfeited was not known at the time. On this point the evidence of the scribe, a witness for the defendant, is that the penal clause was that in case of default of payment of instalment the vendee 'could not claim the refund of the paid up consideration from the vendors.' The lady has sworn that it was also said before registration that if Babu Brij Narain should not pay the amounts settled in the time fixed whatever was already paid would be forfeited. But taking the word strictly liberally, the tense used is present perfect tense, which would support the defendant's contention. In such a state of things it is impossible to hold that this ambiguous clause was fully understood by her in the way in which the defendant wants it to be interpreted. We should, therefore, be unable to enforce the deed without accepting the plaintiff's interpretation of it.

11. The argument on behalf of the defendant, that such a forfeiture clause cannot be accepted. The executant was a purdanashin and uneducated lady. If she is made to agree to sell her property on the understanding that a forfeiture-clause will be operative in her favour and it is not explained to her that such a forfeiture was illegal and unenforceable, then if the defendant wishes to stick to the transaction he cannot be allowed to repudiate the forfeiture clause on the strength of which her consent had been obtained. Nor do we think that having regard to the small consideration for which rights of considerable value were being transferred the necessity which the plaintiff felt for timely and regular payment being urged, the terms of such a forfeiture clause were so improper and unreasonable as to demand relief in equity. The last question to consider is whether a transfer of her future right to recover the maintenance allowance was legally transferable. That there has been a considerable divergence of opinion on similar questions admits of no doubt. The counsel for the parties have placed before us a number of rulings, all of which are not reconcilable with each other.

12. So far as this Court is concerned it is now settled that a right to future maintenance cannot be attached and sold in execution of a decree: *Gulab Kunwar v. Bansidhar* [1893] 15 All. 371; *Haridas Acharya v. Baroda Kishori* [1905] 27 Cal. 38 and *Sher Singh v. Sri Ram* [1908] 30 All. 216. Although these cases may suggest the general policy of this legislature, they are not directly in point because they turn on the meaning of the expression 'right to future maintenance' in Section 265, old Civil P.C.

13. The question before us is whether a private alienation of such a right is valid in law. This will depend mainly on the interpretation of Section 6(d), T.P. Act. No case of our High Court which is directly in point has been cited before us. Opinions in the other High Courts are somewhat conflicting. In *Annapurni v. Swami natha* [1911] 31 Mad. 7, a Bench of the Madras High Court thought that a right to recover maintenance was not property within the meaning of Section 6 and expressed the view that although attachment and sale were prohibited, there was no prohibition against private alienation. This case was, however, subsequently overruled by a Full Bench of the same Court in *Subraya v. Krishna* A.I.R. 1924 Mad. 22. The Bench which referred the case to a higher Bench thought that *Annapurni's* case [1911] 31 Mad. 7, was at variance with Section 6. Schwabe, C.J., came to the conclusion that the right to be maintained conferred on a widow under a written document was a purely personal right and therefore clearly alienable. Oldfield, J., differed from the view expressed in *Annapurni's* case [1911] 31 Mad. 7, and also held that the rights conferred by the deed were clearly personal. Coutts-Trotter, J., concurred. This case is also authority for the view that in order to ascertain whether the right was personal or whether the interest was intended to be restricted in its enjoyment to the owner personally one should ascertain the intention of the parties and such intention is to be gathered from the deed and the attending circumstances.

14. Opinion in Calcutta also has not been unanimous; but a most exhaustive judgment of Mookerjee, J., reviewing all the leading previous authorities is to be found in *Tara Sundari Debi v. Saroda Charan* [1910] 12 C.L.J. 146, We propose to quote a passage from the judgment as we agree with the view expressed therein. At p. 153 the learned Judge remarked:

A distinction appears to have been sought, to be drawn between cases in which the maintenance was made a charge upon a definite property or was made payable out of a specific fund and cases in which the grantee of the right of maintenance was not so protected. This distinction, however, in our opinion, does not furnish a true solution of the question, whether the right is assignable or not, because, if the allowance is regularly paid by the person liable, no question of enforcement of a charge upon any interest in immovable property arises; unless a default has been made, and arrears are due, there is no charge to enforce. The answer to the question, therefore, whether the right to receive the maintenance is, assignable or not, ought not to be made dependent upon the circumstance whether, in the event of failure of the grantor or his representative to make regular payments, the grantee is entitled to enforce a charge upon immovable property.

15. At p. 157 the learned Judge examined the circumstances attending the grant of the maintenance allowance in order to ascertain the true intent of the parties, and came to the conclusion that the right from every point of view was essentially a personal one and that there was no room for reasonable doubt that such right was not assignable.

16. We agree with the view expressed in the Full Bench of the Madras High Court and by Mookerjee, J., that the question whether the right to recover future maintenance allowance is alienable or not depends not on whether a charge has been created for the same, but on the true intention of the parties. If the intention was that the right should be restricted in its enjoyment to the owner personally, it cannot be transferred under Section 6(d). Nor can a mere right to sue for the remainder of allowance that may fall due in future be transferred under Clause (e).

17. There being (SIC)no advance by way of loan, the agreement in question does not amount to a mortgage deed. It is an agreement to pay the monthly allowance with a charge on a specific immovable property. Now there is a clear distinction between a mortgage and a charge, the former being a transfer of an interest in immovable property as a security for the loan, whereas the latter is not a transfer, though it is nonetheless a security for the payment of an amount. The right to recover such allowance is not itself, immovable property, and indeed no question

of enforcing the charge arises so long as the amount has not fallen into arrears.

18. In this view of the matter, we must now proceed to examine the true nature of the maintenance allowance. The agreement of 21st September 1913 was executed in anticipation of the marriage of the plaintiff and the sum of Rs. 75 per mensem was fixed in an allowance for her kharch-i-pandan which has been translated inaccurately as pin money. The prospective husband agreed in writing to pay the allowance to the lady for her life and if he failed to pay it the lady was entitled to realize the same. The agreement was held good during the lifetime of the lady and the payment was secured by means of a charge on immovable property. The deed nowhere mentions that the amount could be claimed by the lady's representatives. Of course as the allowance was to subsist during her lifetime only, her heirs could not get it, but there is not even a mention that her transferee can recover it. Nowhere it is mentioned that the right would be alienable. From the very nature of the allowance, which was intended to enable her to meet her daily expenses, it was a personal allowance. All doubt on this point is in our opinion set at rest by the observation of their Lordships of the Privy Council in the leading case of Khwaja Muhammad Khan v. Husaini Begum [1910] 32 All. 410. There too there was an agreement to pay an allowance as kharch-i-pandan charged upon immovable property. At p. 414 their Lordships remarked:

kharch-i-pandan which literally means betel-box expenses is a personal allowance as their Lordships understand, to the wife customary among Mahomedan families of rank, especially in Upper India fixed either before or after the marriage and varying according to the means and position of the parties.... Although there is some analogy between this allowance and the pin money in the English system it appears to stand on a different legal footing arising from difference in social institutions.

19. Although both kharch-i-pandan and pin money were regarded by their Lordships as being amounts for the personal expenses of the wife, there was a difference inasmuch as no obligation to spend the money during coverture attached to the kharch-i-pandan. In case of Harris v. Brown [1901] 28 Cal. 621, which is relied upon by the respondent's counsel the question whether the

maintenance allowance was a personal one restricted in its enjoyment or not was never raised before their Lordships nor discussed.

20. In the present case, it is conceivable that there should have been an intention that the right would be transferable to strangers. At any rate, in the absence of any clear, provision in the deed that it is alienable, we are not prepared to hold that it is so. The mere fact that the payment is secured by a charge on immovable property is by itself, as observed by Mookerjee, J., by no means conclusive. We would therefore hold that the right to recover future allowance as they fall due has not been validly transferred.

21. As it is obvious that the cash consideration offered by the vendee was for the whole contract of transferring her right to maintenance, past and future, and one part of such contract is not enforceable in law, the whole contract on which the transfer is based must fall to the ground. The plaintiff herself claimed the relief to have the transaction set aside. It would also be unfair to the defendant that he should be compelled to pay the whole consideration and yet not get any right to recover the future maintenance allowances. In these circumstances we think it just and equitable that the sale-deed dated 2nd September 1921 should be cancelled and declared to be null and void and the plaintiff given a decree for recovery of the property so transferred on condition of the plaintiff depositing in the Court below within six months from this date the whole of the amounts received by her together with interest at 6 per cent per annum, simple, as set forth in para. 11 of the plaint, after deducting any amount that the defendant shall have received by execution of the decree for past arrears or by a separate suit. As on the disputed points both parties have failed partially we direct that they should bear their own costs in both Courts. The amounts realized by the defendant will be credited to the plaintiff on the dates of such realization and interest to that extent would cease to run from such dates. If the amount is not deposited within the time allowed, the suit will stand dismissed in both Courts.