

Nathoolal Vs. Ganpatprasad

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Court : Madhya Pradesh

Decided On : Sep-09-1957

Reported in : AIR1958MP84

Judge : Hidayatullah, C.J. and ;Choudhari, J.

Acts : Specific Relief Act, 1877 - Sections 25; [Evidence Act, 1872](#) - Sections 115

Appeal No. : Second Appeal No. 115 of 1951

Appellant : Nathoolal

Respondent : Ganpatprasad

Advocate for Def. : M. Adhikari, Adv.

Advocate for Pet/Ap. : P.K. Tare and ;P.S. Pultamkar, Adv.

Disposition : Appeal dismissed

Judgement :

1. This appeal comes before the Division Bench on a reference by one of us (Chief Justice) because it involves an important question of law requiring authoritative decision.

2. The facts of this case are interesting but simple. The plaintiff, who is the respondent in this appeal, has succeeded in getting a decree for specific

performance of an agreement (Ex. P-6) executed by the parties and one Mst. Chhotibai on 4th October 1938. From the terms of that exhibit we gather that Mst. Chhotibai and the present respondent Ganpat Prasad sold to the appellant Nathulal a house which Nathulal agreed to reconvey to them on their paying him Rs. 1,000/- and claiming reconveyance within ten years. It has been found as a fact that Ganpat Prasad tendered Rs. 1,000 to Nathulal within the ten years agreed upon but the latter refused to receive payment from him and hence this suit on 5th October 1948.

3. In the Court of first instance the claim was in the alternative. Ganpat Prasad sought redemption if the document were interpreted as a mortgage and in the alternative claimed to repurchase the house if the document was interpreted as an outright sale coupled with, an option of repurchase to be exercised within 10 years.

The two Courts below have concurred in holding that the document betokened a sale coupled with an option of repurchase, and they have granted specific performance of the condition of repurchase to Ganpat. The case of Nathulal was that Ganpat Prasad was not entitled to claim specific performance because he was not the owner of the property nor the son of Chhotibai, which he pretended to be. That argument has been pressed upon us in this appeal.

4. To begin with, if we were free to decide the case we would have been compelled on the authority of the Supreme Court to hold that the document was a mortgage by conditional sale and not an outright sale coupled with a condition of repurchase. In Ex. P-6 there is nothing to show that a mortgage was expressly excluded, and in view of the presumption which their Lordships of the Supreme Court in *Chunchun Jha v. Ebadat Ali*, (1955) 1 SCR 174: (AIR 1954 SC 345) (A), have said arises in such case, the document would have had to be interpreted as a mortgage.

We considered the application of Order 41, Rule 33 of the Civil Procedure Code to grant to the plaintiff the relief of redemption instead of specific performance, but we restrained ourselves from taking that action in spite of the generality of the powers conferred by the 33rd rule, because neither side was keen to have the

document interpreted as a mortgage.

Nathulal does not care to have it interpreted as a mortgage, because all his pleas with regard to the title of Ganpat Prasad would fail as Ganpat Prasad was a mortgagor named in the document and no mortgagee can deny the title of a mortgagor. Ganpat Prasad, on the other hand, is not keen to have the document interpreted as a mortgage because he has obtained concurrent decrees of the two Courts below holding that he is entitled to a reconveyance, and he never set up in the appellate Court below a case of mortgage, either by way of cross-objection, or otherwise.

We must therefore confine the case to one of repurchase, to which the parties have limited it and which has been accepted in the two Courts below. We do not say that if justice could not have been done otherwise we would not have used the powers conferred upon us by the 33rd rule of Order 41, Civil Procedure Code. In our opinion, the proper course in the Courts below would have been to construe the document as a mortgage and to grant redemption; but in view of what we are saying hereafter we do not see what difference it would really make to the present appellant in any event.

5. The case of Nathulal is that Ganpat Prasad used to describe himself in some documents as the son of Jiwanlal and not as the son of Harkaran Ahir as he has been described in Ex. P-6. There are, however, other documents which show that Ganpat Prasad was also described as the son of Harkaran Ahir. He deposed that he was the son of Chhotibai, and that has been accepted in the Courts below. It amounts to a finding of fact, and therefore we must hold that he was born of Chhotibai.

6. The case of maternity is on a different footing from that of a doubted paternity. If Chhotibai accepted him as a son and the Courts below have given a finding that he is the son of Chhotibai, we do not see how in a second appeal we can reopen the question, because, to say the least, there is some evidence on which that conclusion can be based. We may refer here to Ex. P-7, which is a document of 1919, in which Ganpat is described as the son of Harkaran Ahir and was in fact the sole vendee of a portion of the plot on which this house is constructed. We

must therefore hold that Ganpat Prasad was the son of Harkaran Ahir and therefore the son of Mst. Chhotibai, as has been found.

7. The question raised by Shri Tare for the appellant is that Ganpat Prasad is not entitled to sue for specific performance of the condition of repurchase, because he was the original vendor, who knew that he had no title to the property. He relies upon Section 25 (a) of the Specific Relief Act and says that this circumstance will exclude the case from the operation of Section 23.

Section 25 (a) deals with the case of a vendor who seeks to enforce an agreement of sale against a vendee. It takes away the right from the vendor if at the time of the agreement of sale he knew that he had no title to the property, It does not deal with the vendee for obvious reasons, because no vendor can be asked to sue for specific performance in respect of property of which he knows the vendor is not the real owner.

8. Shri Tare's argument, though advanced with great fairness, was on the footing that the character of Ganpat Prasad as a vendor to begin with cannot be altered when he is enforcing another part of the self-same document. This, in our opinion, does not correctly represent the case. To start with, of course, Ganpat Prasad was a vendor. That part of the agreement was completed by the handing over of the property to Nathulal.

What remained of the original agreement of sale was another condition in which the positions of Ganpat Prasad and Nathulal were reversed. For the purposes of enforcing the option of repurchase Ganpat Prasad was a vendee and Nathulal was the vendor. Section 25 (a) does not in terms therefore apply to Ganpat Prasad, and he is not estopped from taking a conveyance from Nathulal even if he knew at the time of the original agreement that he was not the rightful owner.

However, as has been pointed out by Shri Adhikari who appeared for Ganpat Prasad, that a portion of the property was in fact purchased by Ganpat Prasad in his own name as far back as 1919. There was, therefore, some title in respect of this property on which Ganpat Prasad could rest his case, even if Section 25 (a) did apply to him. We think that Shri Tare's argument must fail for the reasons that

(a) Ganpat Prasad has been found as a fact to be the son of Chhoti-bai and therefore entitled to enforce this agreement after the death of Chhotibai, (b) he himself was a beneficiary under the agreement to reconvey the property, and (c) he was also the purchaser of a part of the property entirely in his own name as far back as 1919.

9. We, therefore, do not see any reason to interfere, but we cannot help saying that if the Supreme Court case had been before the lower Courts a decree for redemption of the mortgage would have been passed. Since the result would in any event be the same, we do not raise that issue under the powers conferred on us by Order 41, Rule 33 of the Civil Procedure Code, because neither side was anxious to press upon us the case of mortgage and because substantial justice in any event can be done by dismissing the present appeal.

10. The appeal fails and is dismissed with costs.

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