

Askaran Vs. Madan Lal

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Court : Rajasthan

Decided On : Jul-04-1994

Reported in : AIR1995Raj130

Judge : Milap Chandra Jain, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : S.B.C.M.A. No. 137 of 1992

Appellant : Askaran

Respondent : Madan Lal

Advocate for Def. : R.R. Chacha, Adv.

Advocate for Pet/Ap. : K.C. Samdariya, Adv.

Disposition : Appeal dismissed

Judgement :

Milap Chandra Jain, J.

1. This appeal has been filed against the order of the learned District Judge, Bikaner dated March 25, 1992 by which he has dismissed the plaintiff-appellant's application moved under Order 39, Rules 1 and 2 and Section 151, C.P.C. for

ad interim injunction, seeking stay of the execution of the decree passed in suit No. 95/87 against him on 10-9-87.

2. On May 18, 1991, the plaintiff-appellant has filed a suit for declaration and redemption against the defendant-respondent in the Court of the District Judge, Bikaner with the averments in short, as follows: He was in need of some money. He approached the defendant to lend it. He told him (plaintiff) that he had to mortgage his house but a sale-deed and a rent-note have to be executed for it in his favour instead of a mortgage-deed. Accordingly, he executed a sale-deed showing sale consideration of Rs. 10,000/- and rent-note showing monthly rent @ Rs. 150/-. The defendant also executed a document agreeing to resell the house within a year. Out of the sale consideration of Rs. 10,000/-, Rupees 5,000/- only were paid in cash and remaining amount was adjusted towards old debts outstanding against him. All the expenses required in executing the aforesaid two documents were borne by him. Mutation has not been effected in favour of the defendant in the government and municipal records in respect of the suit property. He tendered to the defendant money several times with a request to reconvey his house but the defendant always avoided on one pretext or the other and lastly refused to execute a sale-deed in his favour. On the contrary, he filed a suit for ejectment against him (plaintiff). In his written-statement filed in the ejectment suit, he averred all these facts. The suit was decreed against him on 10-9-87. Execution application has been moved. Along with the plaint, an application for temporary injunction was moved. It was seriously opposed by the defendant-respondent. In his reply, the defendant has averred that it is absolutely incorrect that the plaintiff mortgaged his house, in fact he had sold his house for Rs. 10,000/- and rent-note was executed by him agreeing to pay rent @ Rs. 150/- per month for the house. Issue of title was framed and it was decided against him. After hearing the learned counsel for the parties, the learned District Judge, Bikaner dismissed the application by his order under challenge.

3. It has been contended by the learned counsel for the plaintiff-appellant that the learned District Judge has seriously erred in dismissing the application for temporary injunction and holding that the plaintiff has failed to establish a prima facie case and balance of convenience in his favour. He also contended that the

learned District Judge did not take into consideration the following important and material facts and circumstances :

(1) The alleged sale consideration was Rs. 10.000/- and the agreement for resale was also for the same consideration.

(2) Stamps for the execution of the sale-deed and agreement for resale were purchased the same day.

(3) That the agreed rate of interest was 18% p.a. and rent-note was executed showing monthly rent to be Rs 150/- per month.

(4) Electricity and water connections in respect of the disputed property remained in the name of the plaintiff-appellant,

(5) Agreement for re-sale has a reference for the return of the original rukka, sale-deed and patta.

(6) All the expenses incurred in executing the alleged sale-deed, rent-note and agreement for re-sale were borne by the plaintiff-appellant.

(7) The plaintiff-appellant has spent a huge amount in the suit property and the defendant-respondent never raised any objection.

He further contended that all these aforesaid facts and circumstances leave no manner of doubt that the suit property was in fact mortgaged and was not sold. He relied upon Smt. Indra Kaur v. Sheolal Kapoor, AIR 1988 SC 1074.

4. The learned counsel for the defendant-respondent duly supported the impugned order. He contended that in view of the mandatory provisions of the proviso of clause (c) of Section 58, Transfer of Property Act the disputed transaction could not be treated as a mortgage as there is absolutely no indication in the sale-deed about the mortgage and two documents, even according to the plaintiff, have been executed on different dates. He lastly contended that in the suit for rent and ejectment filed against the plaintiff-appellant, a specific issue was framed about the title of the suit property and it was decided against the plaintiff-appellant. He relied upon Chunchun Jha v. Ibadat Ali, AIR 1954 SC 345 : (1954 All LJ 546),

Bhaskar Vaman Joshi v. Sri Narain Ram Vilas, AIR 1960 SC 301 and Tamboli Ramanlal Motilal v. Chanchi Chinuulal Kishanlal, AIR 1992 SC 1236 : 1992 AIR SCW 1170.

5. In reply to the aforesaid contention of the learned counsel for the defendant-respondent, the learned counsel for the plaintiff-appellant contended that in the order of this Court dated 4-4-91 dismissing the second appeal of the plaintiff-appellant Askaran it has been observed that in a suit for rent and ejectment question of title is irrelevant and in such a suit the plaintiff is only required to prove the existence of the relationship of landlord and tenant in between the parties.

6. There is no substance in this appeal. It is stated in para No. 16 of the plaint that on September 5, 1968 sale-deed and rent-note were executed by the plaintiff in favour of the defendant and on October 10, 1968 the defendant executed an agreement for re-sale in favour of the plaintiff. It is thus the admitted case of the plaintiff himself that two documents were executed on two different dates. Proviso of clause (c) of Section 58, Transfer of Property Act runs as under :

'Provided that no such transaction shall be deemed to be mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.'

7. It has been observed in *Chunchun Jha v. Ibadat Ali*, AIR 1954 SC 345 : (1954 All LJ 546) at page 347 para 8, as follows :

'Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say the mere fact that there is only one document does not necessarily mean that ' it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant.

The legislature has made a clear but classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage.'

8. It has been observed in *Bahadur v. Motiram*, AIR 1972 Rajasthan 250 at para 6, as follows:

'In *K. Simrathmull v. Nanjlingiah Gowder*, AIR 1963 SC 1182, it has been held by the Supreme Court that proviso to Section 58(c) makes it clear that the transaction cannot be a mortgage if the sale and agreement to repurchase had been embodied in separate documents. Consequently, the contention raised on behalf of the appellant that the transaction between him and the defendants was a mortgage by conditional sale cannot be accepted.'

9. Admittedly, the suit for specific performance on the basis of the agreement for re-sale had not been filed. It may be mentioned here that a photostate copy of the agreement for sale, paper No. C.6/4-6, has been filed. It has been observed in *Bahadur v. Motiram*, AIR 1972 Rajasthan 250 at page 252 para 8, as follows:

'On the other hand, there seems to be a plethora of authorities taking the view that the doctrine that time may not be of the essence of a contract, which arises on the construction of contracts of sale, should not be applied to contracts for the re-sale of property conveyed, and that the right to repurchase must be exercised according to the strict terms of the contract. This was the view taken in *Samarapuri v. Sutharsana*, AIR 1919 Mad 544.'

10. Admittedly, the defendant-respondent Madanlal has obtained a decree for the recovery of arrears of meanse profits and ejectment against the plaintiff-appellant Askaran and Askaran's second appeal had summarily been dismissed by this Court on April 4, 1994. It has been observed in the order of this Court:

'The suit was for recovery of arrears of rent and ejectment. It is well settled law that in such a suit question of title is irrelevant. Reference of AIR 1976 SC 2335 and Pal Singh v. Surendra Singh, 1989 (1) SCC 344 (sic) may be made here. The plaintiff is only required to prove the existence of relationship of landlord and tenant in between the parties. He has not to prove his title to the property.'

11. It was, therefore, not necessary to frame an issue on the title of the suit property and to decide it. It has been held in Mohanlal v. Durga Prasad, 1969 RLW 159, that matter cannot be said to be heard and finally decided within the meaning of Section 11, C.P.C. when the finding on it was not at all necessary for the decision of the case.

12. The Learned District Judge has rightly observed that the plaintiff has failed to establish a prima facie case in his favour, balance of convenience is in favour of the defendant and he would also suffer irreparable injury if he is not allowed to execute his decree for the recovery of arrears of rent and ejectment of the plaintiff-appellant.

13. Accordingly, the appeal is dismissed with costs. Any observation made in this appeal will not prejudice the case of either party during the trial of the suit.