

Hari Charan Pal Vs. Siddheswar Pal

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Court : Kolkata

Decided On : Jul-30-1976

Reported in : AIR1977Cal26,81CWN78

Judge : Salil Kumar Datta, J.

Acts : Bengal Money-lenders Act, 1940 - Section 37 and 37A; ;Bengal Money-lenders (Amendment) Act, 1965

Appeal No. : A.F.A.D. No. 933 of 1972

Appellant : Hari Charan Pal

Respondent : Siddheswar Pal

Advocate for Def. : Amerendra Mohan Mitra and ;Bijitendra Mohan Mitra, Adv.

Advocate for Pet/Ap. : Sudhis Das Gupta and ;Hari Charan Pal, Adv.

Disposition : Appeal dismissed

Judgement :

Salil Kumar Datta, J.

1. This is an appeal against a judgment of affirmance. The plaintiff instituted the connected suit on July 5, 1969 under Section 36 of the Bengal Money-lenders Act, 1940 read with Section 37-A and Section 38. The claim was for a decree

reopening the transaction effected by the sale deed of February 5, 1951 and the agreement of even date treating it as a mortgage by conditional sale and also for reopening the rent decree passed against him in S. C. Suit No. 34 of 1951 as also the decree for ejectment in Title Suit No. 252 of 1960 and for other ancillary and incidental reliefs.

2. The plaintiff appellant's case is that he obtained from the defendant a loan of Rs. 300/- by mortgaging his bastu land measuring 2 1/2 bighas of C. S. Plot 1607, Mouja Balagarh within Hooghly-Chin-surah Municipality. To avoid the provisions of the said Act, at the instance of the defendant respondent, the plaintiff executed a sale deed in favour of the defendant in respect of the said property on February 5, 1951. On the same date an agreement of sale was entered into between the parties whereby the defendant agreed to reconvey the property on payment of the said sum of Rs. 300/- by instalments by Maffh 1362 B. S. The plaintiff who remained in possession of the property, was to pay Rs. 10/- per month as interest though it was described in the agreement as rent thereof. The property was very valuable worth Rs. 15,000/- even at the time of the loan and Rs. 90,000/- at the time of the institution of the suit. The plaintiff was forced to execute the documents aforesaid under pressure of circumstances according to the proposal of the defendant.

3. In view of the law in force at the time, the plaintiff was advised to file Title Suit No. 96 of 1959 for specific performance of the said contract against the defendant stating that though the transaction was a loan transaction it was shown as a sale to avoid rigour of the Money Lender's Act. The suit was dismissed as the amount was not paid within the time agreed upon and the said decree was ultimately affirmed by this Court.

4. The defendant filed S. C. Suit No. 34 of 1959 for rent for the suit property and the suit was decreed. Thereafter the defendant also filed Title Suit No. 252 of 1960 for ejectment of the plaintiff from the suit property which was decreed and the decree was ultimately confirmed by this Court as it now appears. The decree was put into execution but the plaintiff had always been in possession of the property although false reports as to possession had been submitted to the executing

Court.

5. In view of the change of law in respect of the provisions of the Bengal Money-lenders Act by the Amendment Act of 1965, the plaintiff became entitled to establish in a Court of law the true nature of the transaction which remedy was not available to him under the existing law. The plaintiff accordingly instituted the present suit alleging that the transaction was a loan secured by the mortgage by conditional sale. Accordingly, it was prayed, the transaction as also the decrees obtained by the defendant should be reopened and a decree for accounts be passed in the circumstances as the plaintiff had already paid to the defendant double of the principal amount secured.

5-A. The suit was contested by the defendant who filed a written statement denying all allegations made by the plaintiff. It was said that the transaction was a sale with a covenant for reconveyance under certain conditions. The plaintiff's attempt to enforce the agreement of reconveyance failed for his own default and the decrees impugned were passed in accordance with law and could not be reopened. The defendant was in possession of the suit property except in respect of three rooms in forcible possession of the plaintiff against which the defendant had prayed for police help and report of Nazir about possession was correct and true. The impugned decrees, it was contended, could not in law be reopened.

6. The learned Munsif on a trial on evidence dismissed the suit and the decree was affirmed in appeal; the appellate decree is now the subject-matter of appeal before us.

7. The Bengal Money-lenders Act, 1940 was amended by the Bengal Moneylenders (Amendment) Act, 1965 with effect from October 15, 1965. By that amendment, inter alia a new Section 37-A was inserted after Section 37 providing a saving as to mortgage by conditional sale. In modification of the proviso to Sub-section (c) of Section 58 of the Transfer of Property Act, 1882 it is provided that where a mortgager ostensibly sells the mortgage property on any of the conditions of the said Sub-section, the transaction notwithstanding anything contained to the contrary therein shall always be deemed to be a mortgage by conditional sale. Further by insertion of Sub-section (b) of Section 40 of the Act, it has been

provided that evidence adduced by the borrower of any agreement or statement varying the terms of any document creating or witnessing a loan shall be admitted.

8. The appellant's case is that prior to the promulgation of the said Act, it was not possible for him to assert the true nature of the transaction which was a mortgage by conditional sale but was recorded in two separate documents, one the ostensible sale deed which was registered while the other was the unregistered deed of an agreement for reconveyance of the same date. The present suit was instituted on July 5, 1969 well within the period of limitation for a suit for redemption for reopening the transaction. The appellant's further case is that the suit for redemption of the mortgage by conditional sale, which was the true nature of the transaction, could only be instituted when the change of law took place by the Amendment Act of 1965. The Courts below erred in holding that the transaction was an out and out sale.

9. In *Manindra v. Narendra*, ILR (1956) 1 Cal 59, a Division Bench was considering the true nature of a transaction of an out and out sale coupled with an agreement for repurchase entered into by two separate documents of October 7, 1942 between two persons. The Court noticed that a sale and an unregistered agreement for repurchase will not be a mortgage by conditional sale under the Transfer of Property Act. Even so, in the Bengal Money-lenders Act, it was noticed, Section 2(12) includes transactions which are loans in substance though not in form. In construing transactions under or for the purpose of special statute, substance will prevail over form. Thus though a transaction may not amount to mortgage, yet it may well come within the definition of loan under Section 2(12) of the Act if, in substance it is a loan. Section 92 of the Evidence Act makes evidence as to intention of a document contrary to its express language inadmissible but proviso (b) lets in evidence to show in what manner the disputed transaction or the language of the document was related to existing facts. Accordingly, extraneous evidence as to the true value of the property as also possession of the property and dealings, or in other words, the conduct of the parties in relation to the transaction, are relevant and admissible under proviso (6) to Section 92 of the Evidence Act to establish that the transaction in substance was a loan.

10. It may be possible that in the attending circumstances particularly in regard to the value of the property and the possession thereof, the transaction may be considered to be a loan in substance and, after the amendment, secured by a mortgage of conditional sale. But an insurmountable difficulty has been created by the appellant's earlier Title Suit No. 96 of 1959 for specific performance of the agreement of repurchase. If the transaction was a loan, as contended, there was no impediment on the plaintiff at the time to establish that the transaction in substance was a loan in view of the judgment we have referred to above. By the institution of the suit for specific performance of the agreement for purchase, the appellant brought his doom on himself beyond reparation. The Court's decision was that though the appellant was otherwise entitled to repurchase the property which was sold to the respondent subject to purchase as pleaded by the appellant, the claim could not be enforced as the amount due was not repaid within the stipulated period.

11. Mr. Das Gupta appearing for the appellant contended that the relief as prayed for in the connected suit was not available to the appellant at the time he instituted the suit for specific performance. It may be that the right to reopen an ostensible sale as a mortgage by a conditional sale was available only after the promulgation of the Act. But in establishing a mortgage, it also must be established that there was a loan and without establishing the loan, the transaction of mortgage by conditional sale is not conceivable in law.

12. The question now is whether the appellant was entitled in law to institute the present suit for reopening the transaction which was obviously on the basis of a loan secured by mortgage by conditional sale, as contended. The suit for specific performance proceeded on the basis that the transaction was not a loan but was an out-and-out sale. This finding cannot but operate as a *res judicata* on a future litigation amongst the parties and the question of the transaction being a loan could not further be reagitated by the appellant in view of the position taken by him in the earlier suit.

13. Mr. Das Gupta further contended that the appellant in this suit was litigating under a different title viz. as mortgagee and accordingly, no question of the bar of

res judicata arises. This argument would be plausible if the Court was to consider the position only in the context of Small Cause Court Suits for rent and eviction suit only all instituted by the respondent, particularly when the suit for redemption was not barred by time. Unfortunately, these suits followed, as we have seen the dismissal of the suit for specific performance when the appellant in fact gave up his case that the transaction was a loan and, on the contrary, accepted the position that the transaction was an out-and-out sale. Accordingly, there is no escape from the conclusion that the present suit is barred in law by the principles of res judicata as the appellant's case as a debtor was no longer available to him.

14. The appellant in his earlier suit in respect of the same property did not base his claim for the reliefs that the transaction was in substance a loan even though there was no legal impediment in respect thereof. It is to be held accordingly that in obvious absence of any leave of Court he was not in a position to claim later on on the basis of the same transaction being a loan which had been the basis of his claim in the subsequent proceeding under Section 36 of the Act. This bar of Order 2, Rule 2 (3) seems also insurmountable.

15. For all these reasons, the appeal fails and is dismissed. There will be no order for costs in the circumstances.

16. Leave under Clause 15 of the Letters Patent is prayed for and granted.

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