
(1979) 08 BOM CK 0023

In the Bombay High Court

Case No : Spl. Civil Application No. 160 of 1974

Ganpat and Others

APPELLANT

Vs

Nanaji and Another

RESPONDENT

Date of Decision : 29-08-1979

Acts Referred:

Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 — Section 100(2)
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 91, 92
Transfer of Property Act, 1882 — Section 105, 58

Citation : AIR 1981 Bom 335 : (1980) MhLj 263

Hon'ble Judges : Mohta, J

Bench : Single Bench

Advocate : J.N. Chandurkar, for the Appellant; V.M. Kulkarni, for the Respondent

Judgement

1. Field Survey No. 407/4 measuring 9 acres and 23 gunthas of Malkapur, Tahsil Malkapur, District Buldana, is the bone of contention in the present petition. A registered document dated 20-6-1958 Described ad lease deed is executed by the second, respondent, the father of the first respondent on his behalf as he was then a minor, in favour of the petitioner. About the execution and so also about the terms contained in the document, there is no dispute, as the common case has been that the document correctly represents the terms as agreed upon between the parties. However, the dispute is about what flows from the same and so also from surrounding circumstances which throw light on the relationship between the parties. The petitioners who claimed to be the tenants, contend that from the description as well as receipts (recitals?) of the document itself, it is nothing but a lease; whereas the respondents' case is that it is anything but a lease. The reason for the latter contention is that consideration of Rs. 700/- mentioned in the document is referable to a previous transaction of sale dated 1-2-1958 in respect of this very property, between the parties. ,On the basis of that agreement, it appears, that the respondents had to pay back a sum of Rs. 700/- which they had received as earnest money, and in discharge of that

liability, it is clear that the disputed document came to be executed, as on some grounds the agreement of sale did not materialise. As the whole controversy revolves round interpretation of this document, the translation of which is annexed to the petition, it is necessary to reproduce the same.

"Lease Deed for five crops of Immovable property for Rs. 700/- received in advance, in favour of tappet and Supada, sons of Ragho Dhangar, residing at and Taluq Malkapur, District Buldana by Nana Raoji, minor by guardian father Raoji Sonu Dhangar, resident at Sirsoli Taluq Bhusaval, District East Khandesh in consideration ;--

I had executed in your favour on 1-2-1958, an agreement of sale. I have to pay in respect thereof Rs, 700/- (seven hundred) which I accept without any grievance and accordingly J have received full consideration in respect of which, there is no dispute.

Description of the immovable property:-

Survey No. 407/4, 9 acres and 23 gunthas, land revenue Rs. 20/- entire field with one mango "tree at Kasba Malkapur, Pareana and Taluq Malkapur, District Buldana. The aforesaid Immovable property is of my absolute ownership and in my possession which I have for the aforesaid consideration - given to you for cultivation for five years from 1958-59 to 1962-63 end, and I have placed you in possession thereof. You should maintain the Bandh Warulis as required in proper state of repairs. If you do not do so and some penalty is imposed, you will have to pay the same. You should maintain the trees in proper state and care and without my permission you should not cut them. The land revenue is to be paid by the lessee. The field should be maintained in the very same state as it is at present. The aforesaid Immovable property has not been mortgaged, sold, gifted by me and no document is executed in respect thereof. If so found, and a civil suit is filed as a result of which any obstruction is made with respect to the crop of yourself, I will be responsible in all respects and whatever loss is suffered by you will be made good by the guardian of the executor, personally and from the estate from which it is liable. After five crops are fully taken, the aforesaid land should immediately be placed in my possession. You should not object to delivering possession. This lease deed is binding on the heirs of my estate. Accordingly, the lease deed has been executed. Signed this 20-6-1958 by the hand of K. A. Saokal. Malkapur.

Sd/- Nana Raoji,

Minor by guardian father Raoji Sonu by the hand of self.

Witnesses:

Sampat Dagdu Kawade,

by the hand of self.

Rupchand Bhawani, Malkapur,

by the hand of self."

2. Undisputed position seems to be that after the execution of this document, the petitioners entered into possession of the property " and continue to do so. It is described as a lease deed commencing from a period 1958-59 till the end of 1962-63. Crop statements for all the relevant years as well as the re-cord-of-right Purcha, record the names of the petitioners as cultivator-tenants. The land revenue in respect of the field is also paid by the petitioners. The admitted position is that no attempt till this day was made to challenge these entries. It appears that the agreement of sale dated 1-2-1958 was for a consideration of Rs. 3,800/- and as the party involved was a minor, required permission from -- the Additional District Judge, Khamgaon, was obtained on 25-4-1958. The agreement of sale was cancelled by mutual consent as there was a failure of depositing Rs. 3,800/- in the Court and also a failure to purchase some field from village Sirsoli at the first instant as per one of the terms of the agreement of sale. The petitioners (?) thus became liable to pay back the earnest money of Rs. 700/- which admittedly they had received. In order to discharge completely this liability, the aforesaid document came to be executed.

3. As the petitioners did not deliver possession of the property after the lease period was over, the respondents filed an application u/s 100 (2) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1953 (hereinafter called as "the Act") for a declaration that the petitioners' possession over the property was illegal and that they were not lessees vis-a-vis the said field. The petitioners contended that the agreement was nothing hut a lease and inasmuch as the Act has intervened before the agreement period of lease was over, they have become the protected lessees by virtue of the operation of the Act. Oral evidence was recorded and documents were filed. Though there has been some controversy about the transactions prior to the one dated 20-6-1958, the common case has been that such a lease deed was executed and it records real terms between the parties. The main contention, however, is that the consideration was not paid in cash but it was a past liability arising out of an agreement of sale.

4. In view of this admitted position, it is difficult to appreciate how oral evidence which is contrary to the terms of the agreement could be permitted to be adduced or considered in view of the provisions of Sections 91 and 92 of the Evidence Act. No doubt all the recitals including about consideration of the document being a past liability has to be considered as it is part and parcel of the agreement. It is, therefore, not necessary to travel much beyond the disputed document in order to appreciate the rival contentions of the parties. However, it appears that the Naib Tahsildar recorded a finding that the possession of the petitioners after the Act came into force was in pursuance of the original agreement of sale dated 1-2-1958 and, therefore, they could not acquire the status of a lessee. The Naib Tahsildar has recorded the finding as under :-

"I have no hesitation to come to the conclusion that the possession of the non-applicants Nos. 1 and 2 was not as lessee of N. A. 3 but it was as contract of sale

dated 1-2-1958 and for the realisation of the said- amount of Rs. 700/-which the N. A. 3 had received as per Soudechitti dated 1-2-1958. The primary document Soudechitti dated 1-2-1958 was the main document for writing this Bhadepatta and thus, I hold that the non-applicants Nos. 1 and 2 were in possession of the suit land as per Soudechitti dated 1-2-1958 which is a contract of sale and nothing else."

I have extracted the aforesaid finding of the Naib Tahsildar in order to show the reasoning which had weighed with him in arriving at a conclusion that the petitioners had not acquired the status of a lessee. The Appellate Court confirmed the finding and these two findings were not disturbed by the Maharashtra Revenue Tribunal. On perusal of all the three orders, it appears that the Courts have vacillated between two findings; one is that the possession is under an agreement of sale and the other is that the possession is that of a mortgagee in possession. These are the impugned orders in the present petition at the instance of the tenants.

5. Shri Chandurkar, the learned counsel for the petitioners has contended that the document in question or the transaction between the parties is neither of an agreement of sale nor of a mortgagee. As far as the first point is considered, it is clear that the previous agreement of sale dated 1-2-1958 has been merged in the document dated 20-6-1958 and the respective liabilities or obligations arising out of agreement of sale have been completely discharged by that document and the relationship of prospective vendor and vendee no more subsists. It is nobody's case that after 20-6-1958 the possession of the property remained with the petitioners as prospective purchasers under the agreement of sale and it is, therefore, surprising that the Naib Tahsildar should have decided this case on that consideration. As regards the second point, the argument is that even though one may not go by the caption of the document only, and the surrounding circumstances of the document are perused there is no manner of doubt that this is not a document of mortgage at all. The distinction between "lease" and "mortgage" is too well-known to be stated in details.

6. Mortgage has been defined u/s 58 of the Transfer of Property Act Mere glance at that definition will show that it is essentially a form of security for a debt. This means the debt must subsist. Any document by which debt or liability is discharged cannot therefore be a mortgage. In case, this first essential acid test is applied to the document in question it will be seen that it discharges the liability completely. There is neither a personal covenant to pay nor any provision for redemption nor for sale of the property if debt is not paid. Moreover, the transferee was to remain in possession for a specified limit dehors of the question whether the amount was satisfied or not only because the consideration is not cash but a past liability the transaction cannot be termed as a "mortgage". In case, the term "lease" which is defined by Section 105 of the Transfer of Property Act is perused, it will be found that for creation of lease cash or present consideration is not at all a must.

7. It is nobody's case that the transaction of agreement of sale was not real but was as a matter of fact only a loan transaction. Only because the liability is past and for discharging that liability the lease deed had been executed, the relationship cannot be turned into that of mortgagor or mortgagee. This view is backed by several decided cases on the point i.e. *Abdulbhai v. Kashi* ILR (1887) 11 Bom 46; *Nidhasah v. Murlidhar* ILR (1903) 25 All 115 ; *Konjeti Kotayya Vs. Konjeti Annapurnamma*, and *Jaideo Anaji Upase v. Kisanlal Chandulal Shrivastava* 1979 Mah LJ 438.

8. For testing the present transaction on the touchstone of the various tests laid down, the following telling circumstances will have to be taken into consideration :--

"1. A genuine sale dated 1-2-1958 had taken place between the parties and that permission from the Additional District Judge, Khamgaon, was also obtained for this purpose.

2. The transaction did not fall through because an agreed consideration of Rupees 3.800/- was not deposited in the Court and so also purchase of field from village Sirsoli had not taken place as per the terms of the agreement;

3. The seller had received a sum of Rs, 700/- as earnest money which he was obliged to return to the purchaser and to meet that liability this document dated 20-6-1958 was executed,

4. The document as described as lease deed and completely discharges the liability;

5. Even under the terms of the agreement, the liability does not subsist and there is no recital about the personal covenant to pay back the amount.

6. There is neither liability nor right to repay the so-called debt and the amount could not be recovered even from the property.

7. The property was to be used by the lessee for a period of 5 years and the land revenue was also to be paid by the lessee.

8. In the crop-statements as well as records-of-right entry the name of the lessee has been recorded as being in the cultivating possession and those entries were not even attempted to be challenged.

9. Shri Kulkarni, the learned counsel for the respondents, had also placed reliance on the case of *Jaideo Anaji Upase v. Kisanlal Chandulal Shrivastava* 1979 Mah LJ 438 (cited supra) in support of his contention that not merely the document but also surrounding circumstances have to be seen and that is why I have mentioned them. Thus, even if the surrounding circumstances are examined, and the provisions of Sections 91 and 92 of the Evidence Act are kept in background, it is clear that they lead only to the conclusion about creation of a lease and not a mortgage. It is also submitted that as all the three Courts have concurrently held in favour of the respondents after appreciation of evidence, no

interference in the extraordinary jurisdiction under Article 227 of the Constitution of India is called for.

10. No doubt, if any decision is based on evidence and if a finding of fact is arrived on that basis the High Court in its extraordinary jurisdiction will be reluctant to interfere with the same, unless and until the appreciation of the evidence is demonstrated to be perverse. The present case does not depend upon appreciation of evidence but upon the interpretation of law and construction of the document. I have referred to certain surrounding circumstances also from which conclusion that a lease was created is inevitable. If any question depends upon the construction of document a so also on certain circumstances and "on that basis the lower Courts arrive at an obviously wrong conclusion, it will not only within the jurisdiction of the High Court but it will tie its duty to interfere with those conclusions and misreading: and to set them aside. After hearing both the parties perusing the document and record, in my view, this is a case in which judgments, of all the Courts below have been, vitiated on account of errors apparent on the face of the record, in holding that this was not a case of creation of lease.

11. Thus, the petition is allowed by quashing all the orders passed by the three Courts below. The rule is made absolute but with no order as to costs.

12. Petition allowed,