
(1968) 03 GUJ CK 0001
In the Gujarat High Court
Case No : Second Appeal No. 483 of 1961

Jatashanker Fulchand Mehta and Others	APPELLANT
Vs	
Mavji Trikam and Another	RESPONDENT

Date of Decision : 14-03-1968

Acts Referred:

Evidence Act, 1872 — Section 91, 92, 93, 94, 99

Citation : AIR 1969 Guj 169 : (1969) GLR 600

Hon'ble Judges : Thakore, J; Mehta, J

Bench : Division Bench

Advocate : C.H. Doshi, for the Appellant; Served, for the Respondent

Final Decision : Allowed

Judgement

Mehta, J.—Thfs appeal raises an important question which is referred to the Division Bench by our learned brother Sheth, J. as to the correctness of the ratio of the decision of Shah J. in Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker, , that when a possessory mortgage and a lease back to the mortgagor formed part of the same transaction, the lease being a mere device to secure interest, is not legally enforceable and that it does not create any relationship of landlord and tenant.

2. The short facts which have given rise to this appeal are as under :--

3. The plaintiffs are the heirs of the deceased Jatashanker Fulchand while the defendants are the heirs of one Mavji-Trikam. The said Mavji Trikam had executed a registered mortgage deed. Ex. 10, for Rs. 2250/- in favour of the said Jatashankar Fulchand and by a contemporaneous document of a registered rent note at Ex. 5 of the same date possession was sought to be delivered to the tenant. The rent which was payable was arrived at on the basis of the interest at the rate of 6 1/2 annas per cent per annum, which came to Rs. 9-2-3 per month. The said Mavji Trikam thereafter did not pay any rent either to Jatashankar or to his heirs. The plaintiffs served a notice to the defendant No. 1 Valji on 26-10-57

as per Ex. 13 requiring him to execute a fresh document of mortgage as old mortgage deed was about to be barred by limitation, to which defendant Valji gave no reply. Thereafter the plaintiffs gave a notice to the defendants on 4-2-1958 as per Ex. 12 claiming Rs. 1270-7-0 from the defendants to which also no reply was given. Finally plaintiff Pramodrai served a notice, Ex. 9 on 4-10-58 terminating tenancy and asking the defendants to hand over possession of the suit premises on or before 11-11-58. As the said notice of defendant No. 1 was returned with an endorsement of "not known" and defendant No. 2 refused to accept the notice on 9-10-58, the said notice was affixed on the said premises in the presence of Harilal Mohanlal. The plaintiffs, therefore filed the present suit on 4-12-58 for eviction of all the defendants and for six years' rent in arrears amounting to Rs. 658.12 P. along, with mesne profits and notice charges. The defendants contended that their father had executed a registered mortgage deed and as the rent note and the mortgage deed formed a single transaction, the rent note was only a device to secure interest. The defendants, therefore, denied any relationship of landlord and tenant between the said Jatashankar and Mavjibhai and they alleged that no amount was paid by Mavjibhai to Jatashankar by way of rent. They contended that the possession all along remained with them and that the plaintiffs were not entitled to evict them or get the amount claimed by them in the suit. The learned trial Judge following the aforesaid decision of Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker, held that the document Ex. 5 did not create any relationship of landlord and tenant as it was a mere device to secure interest and, therefore, the plaintiffs' suit must fail. The learned trial Judge also held that even by way of interest no amount could be decreed as the plaintiffs' suit was time barred at the date of the suit. The trial Court, therefore, dismissed the plaintiffs' suit. In appeal the learned District Judge has confirmed the said order following the aforesaid decision of Shah J. in Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker, . The learned District Judge also held that the claim of interest could not be decreed as it was time barred. The learned District Judge has not gone into other questions and has merely mentioned that from the notice correspondence it appeared that there was some dispute as to the dues and that the defendants had given a notice on 1-2-59 at Ex. 14 claiming accounts. The appeal was, therefore, dismissed. The original plaintiffs have filed the present second appeal in this Court. The matter came up for hearing before my learned brother Sheth J. on 10-1-68 and as he felt that the aforesaid decision prima facie required reconsideration he has referred this question to the Division Bench and that is how the matter has come up before us. At the hearing Mr. Doshi raised three points:--

(1) That the two deeds. Exs. 10 and 5. were totally independent transactions and both the lower Courts erred in considering extraneous evidence of surrounding circumstances in holding that they constituted a single transaction in plain violation of Section 92 of Indian Evidence Act.

(2) That in any event the aforesaid Bombay decision in AIR 1958 Bom 8 was erroneous and, therefore, the lower Courts erred in considering evidence as to

the intention to contradict the plain terms of the two deeds in question without following the provisions of Section 92 of the Evidence Act

(3) That as the defendants were admittedly tenants in arrears, the decree for arrears of rent and mesne profits ought to have been passed in favour of the plaintiffs.

4. The essential question in this appeal is the question of the construction of the two documents Exs. 10, the registered mortgage which is a possessory mortgage and the contemporaneous document viz. registered rent note Ex. 5 dated 11-6-44. The question will have to be resolved by recourse to Sections 91 and 92 of the Indian Evidence Act, 1872. hereinafter referred to as "the Act". Both these sections are based on the best evidence rule. u/s 91 of the Act when the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract grant or other disposition of property, or of such matter, except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the Act. The original documents would conclusively prove the contents. Section 92 is only supplementary to Section 91 and it in terms excludes oral evidence as between the parties or their representatives for the purpose of contradicting, varying, adding to, or subtracting from, the terms of the document which are proved u/s 91 by the document itself. Section 92. however, contains six provisos which permit oral evidence in certain cases. In so far as the present case is concerned, proviso (1) would have been relevant if any fact was sought to be proved which would invalidate any document, by reason of fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, and want of failure of consideration or mistake in fact or law. In the present case, however, there is no pleading or proof of any such Invalidating circumstances, proviso (2) also would not be applicable as it is not the contention of any party that the document was silent on any matter. The last proviso (6) which is material enacts that any fact may be proved which shows in what manner the language of a document is related to existing facts. The scope of this proviso is illustrated by Sections 93 and 94 which show that where there is ambiguity, evidence regarding intention may be led to clear that ambiguity or when the sense of the word is not clear except in those limited cases which are provided in the provisos the bar of Section 92 would be absolute in so far as the parties or the representatives in interest are concerned and they cannot be permitted to lead any oral evidence as to the intention of the parties for the purpose of contradicting, varying, adding to or subtracting from the terms, Unless the case falls in any of the provisos to Section 92, the parties and their representatives would be bound by this salutary rule in Section 92 and the document would be conclusive as regards its contents. The obvious exception is the case of stranger, as specifically provided in Section 99 to whom Section 92 would not apply. Besides the prohibition is only as regards the different terms being sought to be established but there is no

prohibition from proving that the transaction is different than what it purports to be. The oral evidence as regards intention would, therefore, always be admissible to prove the real nature of the transaction. In case of inconsistency or repugnancy between various clauses the document would have to be interpreted as one whole and attempt would have to be made to reconcile various clauses and it is only the last resort if harmonious reconciliation is not possible that earlier provision would be given effect to so as to override the later provision. In *Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and Others*, , their Lordships pointed out that it is well settled that no evidence is admissible on a question of construction of a contract or grant, which must be based solely on the terms of the document, there being no suggestion before their Lordships that there was any dispute as to how the contents of the document were related to existing facts. (Vide *Balkishen Das v. Legge* (1899) 27 Ind App. 58 and *Maung Kyin v. Ma Shwe La* 44 Ind App 236 : (AIR 1917 PC 207 their Lordships stated that it was a settled rule of interpretation that If there be admissible two constructions of a document, one of which would give effect to all the clauses therein, while the other would render one or more of them nugatory, it was the former that should be adopted on the principle expressed in the maxim "ut res magis valeat quam pereat." At page 30 their Lordships observed if in fact there was a conflict between the earlier clause and the later clauses and it was not possible to give effect to all of them, then the rule of construction was well established that it was the earlier clause that must override the later clauses and not vice versa, relying upon the rule stated by Lord Wrenbury in *Forces v. Git* AIR 1921 PC 209 . These principles of construction of documents are applied by their Lordships of the Supreme Court in *Commissioner of Income Tax v. Motors and General Stores (P) Ltd.* AIR 1968 SC 200. their Lordships observed that the doctrine that in revenue cases the "substance of the matter" might be regarded as distinguished from the strict legal position was erroneous. In the absence of any suggestion of bad faith or fraud the true principle was that the taxing statute had to be applied in accordance with the legal rights of the parties to the transaction. When the transaction was embodied in a document the liability to tax depended upon the meaning and content of the language used in accordance with the ordinary rules of construction. At page 205 their Lordships observed that a transaction which, on its true construction, was of a kind that would escape tax, was not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax. It is therefore, clear that the question of construction of all these two documents must be approached on the settled principles of construction which are merely incorporated in these relevant sections of the Evidence Act. If there is no inconsistency and if the language of the document is not ambiguous or obscure and the case does not fall in any of the six provisos of Section 92, the document would have solely to be construed on its own terms. Of course, if the document falls in two parts, both the parts would have to be read as a whole and all the clauses of the document must be given effect to. It is only as a last resort, when the provisions are destructive, repugnant or inconsistent and no harmonious construction is possible that the

earlier constructions would be allowed to prevail by resort to the aforesaid principles of construction, which question however does not arise in the present case as we are of the view that there is no inconsistency whatever between the two documents in question.

5. As regards the first contention of Mr. Doshi, the question raised by him as regards the construction of the two documents in question is as to whether they are to be looked upon as two independent transactions or as a single transaction. This is not a question where the consideration of intention would be ruled out by Section 92. What is argued is not to change the terms of the transaction. The real question being what is the true nature of the transaction in question: the same would have to be found out by looking at the contents of the document, the surrounding circumstances and by resorting even to the oral evidence of the parties, which would throw light on the true intention of the parties as to the true nature of this transaction. This position is well settled in ILR (1899) All 149 their Lordships of the Privy Council pointed out that oral evidence of the intention was not admissible for the purpose of construing deeds or ascertaining intention of the parties. By Section 92 of the Indian Evidence Act no evidence of any oral agreement or statement could be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos to Section 92, The case before their Lordships was not falling within any of the provisos. Their Lordships, therefore held that the case must be decided on a consideration of contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts. To find out the true nature of the transaction whether it was a mortgage or sale, in *Hanifunnissa v. Faijunissa* ILR (1911) All 340 (PC), their Lordships of the Privy Council observed that the decision of the High Court could not be sustained as it had held that Section 92 of the Evidence Act precluded the parties from giving oral evidence to show that the deed of sale was in reality intended to be a deed of gift. These decisions, therefore, clearly establish that all the surrounding circumstances can be looked into for determining the real nature of the transaction. In order to find out whether the two documents constitute a single transaction or two independent transactions extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts, Shah J. in the aforesaid decision. *Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker*, , was, therefore, right in construing the two similar contemporaneous documents in that case as constituting a single transaction. Shah J. relied upon the fact that both the documents were contemporaneous viz., of the possessory mortgage as well as rent note evidencing lease back to the mortgagor. Another circumstance which was material was that the rent stipulated was equivalent to the interest on the mortgage sum. Shah J. had in that decision relied upon the earlier decision of the Division Bench in *Bhaichand Kirparam v. Rancbhoddas Manchharam* AIR 1921

Bom 285 where the Division Bench had in similar circumstances held that the rent reserved being equivalent to the interest on the mortgage sum it was an important circumstance to prove that it was merely a device for securing payment of interest, In that decision, decree for rent had been obtained and the mortgage property had been sold in execution of the money decree and for invoking the bar under Order 34, Rule 14 the Division Bench had held that such a claim of rent was a claim under the mortgage. Therefore, so far as the construction of the two documents in question at Exs. 10 and 5 is concerned, both the lower Courts were right in following the decision of Shah J, that there can be no doubt in the present case that both these contemporaneous documents constitute a single transaction. In order to find out the true nature of the transaction there was no bar of Section 92 of the Evidence Act in looking to the surrounding circumstances as such extrinsic evidence was only to find out the true nature of transaction and the bar of Section 92 applied only when it was sought to be proved that the terms of the transaction were different and not that the transaction itself was different than what it purported to be. Therefore, the first contention of Mr. Doshi must fail and the finding of both the Courts was correct that Exs. 10 and 5 constitute a single transaction.

6. The second contention raised by Mr. Doshi, however, goes to the root. Even after holding that both the documents of the possessory mortgage and the lease back to the mortgagor would constitute a single transaction, the question still remains to be considered as to whether both these parts of the same transaction evidenced by these two documents can be given effect to. That question can be resolved only on the application of the rule of harmonious construction by considering whether there is any inconsistency between these two parts of the same transaction. The mortgage deed, Ex. 10, itself gives liberty to the mortgagee in possession to create a lease in favour of anybody and there would have been ordinarily no bar to create such a lease even in exercise of his right of prudent management under the Transfer of Property Act. The document of lease back at Ex. 5 is only a document intended to create the relationship of tenant and landlord as well. Even though actual physical possession may have remained all along with the mortgagee, execution of these two documents would create two different relationships with different legal consequences and both these documents can be given effect to at the same time. There is no inconsistency whatsoever between these two transactions. Under the first transaction a mortgage with possession is created giving power to the mortgagee to create a lease in favour of anybody, and in the second transaction the mortgagee creates a lease transferring possession to the mortgagor in consideration of the agreed rent which was to be equivalent to the interest itself. There could also be, no doubt, that in such contemporaneous transactions the mortgagee's intention is obviously to secure himself as regards the Interest The Intention of the parties is, however totally immaterial in this connection. If the transaction creates legal rights and is duly arrived at by law, it must be given effect to so long as it is not barred by any law nor vitiated by any invalidating circumstances. In such cases

merely because the Court thinks that in substance the transaction is a device, it would not be open to the Court to ignore the true legal position and seek to vary the terms of these two solemn documents deliberately arrived at between the two parties who are sui juris. When there is no inconsistency, there can also be no question that the earlier part of the transaction viz. the mortgage would prevail over the subsequent part viz. the lease, because both the parts could be given effect to. As no invalidating circumstance is pleaded and the language of the document is also clear and unambiguous, there would be no scope to resort to any of the provisos to Section 92. Therefore, the bar of Section 92 would remain absolute and it would not be open to the Court to hold that even though the mortgage is a mortgage with possession, in the circumstances of the case it had become a simple mortgage, as the possession all along actually remained with the mortgagor even though it was the effect of the two different documents forming part of the same transaction. Similarly, the lease also must be given effect to and the provision cannot be ignored by resorting to any assumed intention of the parties, whose evidence is wholly inadmissible by reason of Section 92 of the Evidence Act. Therefore, on first principles the decision of Shah J. ignores the plain provision of Section 92 of the Evidence Act. which is based on the well-known canons of construction of documents, that the document must be interpreted on its own terms, and the oral evidence as to intention ought to have been excluded as no proviso to Section 92 was applicable.

7. Even apart from the first principles, the question is concluded even by abundant authority. In *Saiyad Abdullakhan v. Saiyad Basarat Hussain*. (1913) 40 Ind App 31 (PC), their Lordships of the Privy Council had to consider the effect of the usufructuary mortgage with a lease back. At p. 36 their Lordships agreed with the High Court in thinking that such a usufructuary mortgage and the lease back formed part of one and the same transaction, as both were practically contemporaneous documents and the rent was stipulated at the amount equivalent to the interest itself. Their Lordships, however, observed, "but there is no inconsistency between the two instruments nor would there have been any inconsistency if the mortgage itself did contain a provision for granting lease on the terms upon which the lease was actually grant-ed." This decision furnishes a complete answer to the question raised before us. Such a possessory mortgage and the lease back even though they formed part of one and the same transaction, they are not inconsistent and therefore, there is no question of one prevailing over the other. In fact, as pointed out by their Lordships, there would be no inconsistency even if the very mortgage itself contained provision for granting such lease back to the mortgagor in which event it could never have been contended that the relationship of landlord and tenant was not created. In (1933) 1 ITR 219 (Privy Council) . their Lordships of the Privy Council again considered the identical question. In that case the Judicial Commissioner took into account the fact that the lease back was of the same date as the mortgage with possession. It was for the same term at rent which represented yearly interest on the mortgage amount and the possession had all along remained with

the mortgagor. The Judicial Commissioner had also considered that there had been other similar transactions between the parties. In these circumstances such possessory mortgage was construed as a simple mortgage by the Judicial Commissioner. At p. 180 their Lordships held that they were unable to accept the view of the Judicial Commissioner as to the true nature of the transaction evidenced by the two documents in question. It was not suggested that there was anything in the Act which would invalidate a possessory mortgage accompanied by a lease back to the mortgagor. Nor did their Lordships think that there was anything in itself suspicious about such an arrangement. The mortgagee might well have preferred to leave the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the lease were not adhered to. Their Lordships further pointed out that assuming that to have been one of the conditions upon which the mortgage was agreed to, the mere absence of a formal handing over of the land to the mortgagee, and a handing back by him to the mortgagor, in the character of lessee, was of little significance. The reality of the transaction was supported by the mutation in the Government records. Section 92 of the Evidence Act forbade the admission or consideration of evidence as to the intention of the parties, or to contradict the express terms of the document. See ILR (1899) All 149 (PC) and their Lordships thought that no presumption could legitimately be drawn from the fact that there had been previous transactions between the parties of a similar character. The ratio of these two decisions has been accepted by various High Courts in the country. In *Abdul Khadir v. Subramanya Pattar*, AIR 1940 Mad 946, the case related to a usufructuary mortgage and lease back to mortgagor. There also it was found that the mortgage and the lease back formed part of the same transaction. The Court in that case decreed the claim and it made no distinction whether it was rent or interest. However, at a subsequent stage the mortgagee sought scaling down of the amount under the Madras Agriculturists Relief Act. The real controversy arose because the mortgagee called it rent under the lease while the mortgagor called it interest under the mortgage on the ground that except the form in substance the transaction provided such payment of rent in lieu of interest alone. When the matter reached the High Court, the Division Bench consisting of Wads-worth and Patanjali Shastri JJ. categorically observed that though the mortgage and the lease back could and must in a case of such kind be taken to form part of the same transaction, effect must be given to each according to its terms and the Court could not by reading the two together, spell out a transaction totally different in character and incidents. In *Trustees of Motidas Beragi Sadhu Ratlam Trust Board and Others Vs. Ramjatan Ramprasad Sonar and Others*, the Division Bench consisting of Newaskar and Tare JJ. followed all these decisions. Newaskar J. speaking for the Division Bench held that where a deed of possessory mortgage also provided for a lease back to the mortgagor on a monthly rent corresponding to the monthly interest on the mortgage debt, and a rent note was executed giving effect to the lease, effect must be given to each deed according to its terms and the Court could not by reading the two together spell out a transaction totally different in character.

Their being component parts of the same transaction did not mean that the two deeds were inconsistent with each other. Nor were the circumstances that rent was liable to be appropriated towards interest, interest like rent was payable every month, inconsistent with the transaction being a lease. Therefore, in a suit for eviction by the mortgagee based on the rent note which was executed as a sequel to the mortgage deed, it was not open to the mortgagor to plead that he was not in fact a tenant. At page 269 their Lordships distinguished the other line of cases in *Umeshwar Prasad Sinha Vs. Dwarika Prasad, . Baijnath Prasad and Others Vs. Jang Bahadur Singh and Another, and Ramnarain Pasi Vs. Sukhi Tiwary*, and the decision of Shah J. In *Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker*, who had followed those Patna decisions. Newaskar J. had in that case pointed out that the reasoning of the Patna High Court regarding the two deeds being parts of the same transaction was sufficiently met by the observations of the Privy Council in those two cases which we have referred and also in AIR 1940 Mad 946 and in view of those decisions these Patna decisions as well as aforesaid decision of Shah J. did not appear sound to the learned Judge as they had taken no notice of the aforesaid Privy Council decisions which would be clearly binding authorities: We are in complete agreement with the said observations of Newaskar J. and we also hold that Shah J. had fallen into an error in proceeding on an assumption that when the two transactions of possessory mortgage and lease back formed same transaction, it would always be a device and the lease would no longer remain legally enforceable. Shah J. failed to consider that this legal position would arise, only if there was any inconsistency between a possessory mortgage and a lease back, in which event earlier clause might prevail over the subsequent clause, as no reconciliation would be possible and both the clauses could not be given effect to on a harmonious construction of both the parts of the same transaction. Similarly, where a party pleads any of the invalidating circumstances or the transaction is hit by any law. the lease might be unenforceable. In all other cases, however, there would be no room for application of any of the provisos to Section 92 and the bar would remain absolute and it would not be open to the Court to construe these two documents except on their own terms, on any such assumption of the supposed intention of the parties, which consideration is wholly ruled out by Section 92 for the purpose of varying the terms of the two documents. Possessory mortgage cannot be turned into a simple mortgage without possession and the lease also cannot be made ineffective. Therefore, we cannot look to the substance by ignoring the true legal position which had been created by the transaction legally entered between the parties, who had deliberately arrived at said two agreements with intention to create legal relations and had duly acted upon the same.

8. In that view of the matter we accept the second contention of Mr. Doshi. We, therefore, hold that the decision of Shah J. in *Harilal Bhagwanji Vs. Shastri Hemshanker Umiyashanker*, is correct in so far as it construed the two deeds as forming a single transaction. It is, however, incorrect insofar as it holds that the

rent note being a mere device to secure interest, the lease was not legally enforceable and that it did not create any relationship of a landlord and a tenant.

9. Mr. Doshi, however, argued that in view of our decision on this main question, the decree of eviction must follow as of course, as there was no dispute that the rent had remained in arrears. On this question both the lower Courts have not applied their mind. The appellate Court has commented this aspect by stating that from the notice correspondence it appeared that there was a dispute as regards dues. In fact the plaintiffs themselves in their notice, dated 4th February 1958 at Ex. 12, had claimed only an amount of Rs. 1217-7-0 and the defendants, in their reply at Ex. 14 dated 1-2-59, were claiming accounts. The lower Court has also not gone into other questions as well, as to the validity of the notice and as to whether the defendants were entitled to any protection from eviction, as by the time the Saurashtra Rent Control Act had admittedly come into force in Vankaner area. Therefore, in any event, the matter must go back to the lower appellate Court to dispose of all these remaining questions.

10. In the result this appeal is allowed. The decree of the lower appellate Court is set aside. The matter shall go back to the lower appellate Court for disposing of the appeal in accordance with law on all the remaining questions in the light of the aforesaid observations. Appeal accordingly allowed with costs.