

(1908) 02 BOM CK 0018
In the Bombay High Court
Case No : Second Appeal No. 355 of 1907

Parag Naran

APPELLANT

Vs

Chodra Chhatia Jakhlo

RESPONDENT

Date of Decision : 10-02-1908

Acts Referred:

Citation : (1908) 10 BOMLR 494

Hon'ble Judges : Knight, J;Chandavarkar, J

Bench : Division Bench

Judgement

Chandavarkar, J.—This was a suit brought by the appellant to recover possession on the strength of a sale-deed alleged to have been executed by the respondent in his favour. In his written statement the respondent denied the execution of the deed. In the Court of first instance there were only two issues raised. The first of them was:-Are the sale-deed and leases of the plaintiff as set up in the plaint proved? The second was :- What relief should be awarded to the plaintiff in respect of the possession and the profits (rent as well as mesne profits), sought?

2. It will be observed from these issues that the question on which the parties went to trial was-whether the sale-deed on which the plaintiff sued to recover possession, and the rent-notes alleged to have been executed by the respondent in consequence of the sale-deed were genuine documents or not? In other words : Whether they had been executed by the respondent ? Evidence having been led upon that issue, the Subordinate Judge found the deed and the notes to be genuine. The respondent appealed. The learned District Judge in the appeal Court raised several issues.

3. The first issue raised by him was: Has the lower Court erred in holding that the defendant executed the sale-deed in respect of the six Survey Numbers in dispute, that it was for consideration and was binding on the defendant ?

4. This issue consisted of two parts-the first being whether the factum of the deed of sale was proved; the second, if it was, whether the deed was without

consideration and bound the defendant?

5. No objection can be taken to the first part because it had formed part of the pleadings in the first Court; but the second part raised a new case for the first time in appeal.

6. A genuine document might or might not be binding upon a party but, if the party who has executed it intends to raise the defence that it is not binding he ought either to raise it in his written statement or get an issue framed on it. Further, if a party denies the execution of a document he cannot, strictly speaking, be allowed to raise the inconsistent defence that the document is not binding upon him (1888) ILR 15 684 (P.C.) (Privy Council) .

7. Here the defence of the respondent was that the deed of sale and the rent-notes were not genuine and it was upon that issue that the parties went to trial. Therefore the sole question was-whether the sale-deed was genuine or not? It was not open to the respondent after that to rely on mis-representation, undue influence or fraud as vitiating the deed. For that if authorities were necessary, it would be sufficient to refer to the judgments in Narayan Ramchandra v. Sakharam Vithaset (1889) P.J. 42, decided by Sir Charles Sargent and Mr. Justice Nanabhai Haridas, where they observe: "The defendant might have pleaded that he executed Exhibit 2 under undue influence, but he has not thought proper to do so and confined himself to denying execution. It was not open to the Court-to make such a defence for him." In support of that they cited the authority of Mahomed Buksh Khan v. Rosseini Bibi. To the same effect is the authority of Shivapa v. Irapa (1889) P.J. 203, where Sargent C.J. and Candy J say:-"Possibly the defendant's signature may have been obtained by fraud or mis-representation; or he may not have received full consideration. But that is not his case as made at the trial which was simply a denial of execution."

8. Now in this case we do not think that it was open to the District Judge in appeal to deal with any case of fraud or mis-representation. The sole question was whether these documents were genuine or not? No doubt it was quite open to the appellate Court in considering the question of the execution of the deed and the rent-notes to deal with the evidence from a certain point of view, that is, in order to determine whether the documents are genuine or not, the Court could legitimately take into consideration the poverty or low intelligence of the respondent or the fact that there was no consideration. And if the District Judge had dealt with the case from that point of view, it would have been impossible for us to upset his finding. But reading his judgment, it is impossible to say that he has done that. The District Judge says:-The question was whether the defendant should have sold all his property at once to the plaintiffs? and he proceeds :-" the Subordinate Judge has not paid any attention to the rulings which lay down the duty of the Court in cases of transactions entered into during poverty and distress. It was his duty to see if advantage had been taken unduly of the distress or necessity of the defendant. " We stop there for the purpose of pointing out that if these observations mean anything, they mean this, that the

defendant did execute the sale-deed, that there was a transaction between the plaintiff and the defendant, that the plaintiff's story was not a mere fiction, but that that transaction was the result of undue advantage taken of the defendant's position by the plaintiff. That reading of the District Judge's view is supported by the remarks which he has made later on in his judgment, where he says: "In the present case the transaction was between a Chodhra, a person belonging to a class occupying the lowest rung on the social ladder, and a shrewd Kunbi who uses printed forms for rent-notes," which means that there was a transaction, and not that there was no transaction altogether as pleaded by the defendant. At the same time we are not quite clear as to what was passing in the District Judge's mind. Under these circumstances, we are unable to accept the finding of the District Judge. The learned pleader for the respondent asks for time to consult his client whether he would elect to amend his written statement and raise the defence based on the ground of fraud and undue influence. As the appellant's pleader does not object we allow the respondent's pleader time as prayed.

9. Feb. 14.-The learned pleader for the respondent now elects to base his client's case upon the ground of fraud and undue influence and mis-representation. We must send the following issue to the lower Court for a finding, after allowing either party to adduce evidence on it.

Was the sale-deed executed by the defendant under circumstances amounting either to fraud, undue influence or misrepresentation?

10. We may add that this election has been allowed to the respondent because the learned pleader for the appellant has fairly conceded that he has no objection to the respondent basing his case upon the ground of fraud, and especially having regard to the fact that in his written statement the defendant stated that there was no consideration for the deed. And there are some circumstances noticed in the judgment of the Court of first instance which, we think, it is necessary to inquire into thoroughly to do justice between the parties.

11. Finding to be returned within three months.

12. The onus of the issue will lie at the outset on the defendant.