

(1957) 12 BOM CK 0017

In the Bombay High Court

Case No : Civil Revision Application No. 855 of 1956

Rangabai Krishna Badgujar

APPELLANT

Vs

Shankar Hari Mali

RESPONDENT

Date of Decision : 06-12-1957

Acts Referred:

Transfer of Property Act, 1882 — Section 22, 24, 32, 53A

Citation : (1958) 60 BOMLR 425

Hon'ble Judges : M.C. Chagla, C.J

Bench : Single Bench

Judgement

M.C. Chagla, C.J.—A rather interesting point arises on this civil revisional application. The opponent applied to the Bombay Agriculture Debtors Relief Court to have his debts adjusted, and the two statutory issues that he was a debtor and that the total amount of debts due from him on the date of the application was not more than Rs. 15,000 were found in his favour. He challenged two oral sales effected in favour of creditor No. 1 and creditor No. 3. The date of both the oral sales was March 16, 1934. Now, the case of the debtor was that these sales were only ostensible sales and that the transactions were in the nature of mortgage. In view of the decision in Jibhaoo Harisingh Rajput Vs. Ajab Singh Fakira Rajput, , it is now settled that an oral sale is a nullity, but the consideration constitutes a charge upon the property, and the Court in that case held that in respect of the consideration, the debtor was indebted to the vendor and, therefore, that debt could be adjusted. The debtor wanted to avail himself of the principle underlying this decision, but the two creditors put forward two agreements of sale, one dated September 21, 1931, and the other dated September 29, 1931, and they contended that in pursuance of these two agreements, they had gone into possession of the property and that they were entitled to protect their possession by reason of the provisions of Section 53A of the Transfer of Property Act. The trial Court held that the creditors were protected u/s 53A of the Transfer of Property Act, that the purchase money had not become repayable to the vendee and there was neither any liability nor any

debt which could be adjusted under the Act. There was an appeal from this judgment to the learned Assistant Judge at Jalgaon and he came to the conclusion that the doctrine of part performance did not apply to the facts of this case, and he held that the amount mentioned in the two agreements for sale should be adjusted, and remanded the matter back to the trial Court. It is against this decision that the two creditors have now come in revision.

2. Mr. Kotwal very fairly conceded that it was difficult to support the decision of the Assistant Judge when he took the view that Section 53A had no application and, therefore, this matter must be argued on the basis that Section 53A applies, that there has been part performance and that the two creditors are entitled to protection under the provisions of that section. But Mr. Kotwal put forward a different argument in support of his client. His contention was that both the agreements for sale mentioned as consideration past indebtedness and admittedly there were earlier mortgages executed between the parties, and Mr. Kotwal says that u/s 22 of the Act, I should ignore the consideration mentioned in these two agreements and ask the Court to determine what was the actual indebtedness under the mortgages ; and when that indebtedness has been ascertained, that could be made a charge on the property, and if the debt is satisfied, the property could be conveyed to the debtor. It is also urged that : u/s 32(2)(v), an order for delivery of possession of any property can be made notwithstanding any law or contract to the contrary. It is urged with some force that the whole object of the Act would be defeated if a creditor were to take from his debtor an agreement of sale, mention as consideration the amount of the debts as settled and thereby prevent the Court from ascertaining what is the amount actually due by the debtor to the creditor notwithstanding what is mentioned in the agreement itself. It is further said that once a debtor has been held to be a debtor and also the amount of his debts do not exceed Rs. 15,000, the whole matter is at large and the debtor is entitled to have an investigation into the affairs of every creditor of his.

3. Now, it is clear that a sale which has been effected between a debtor and a creditor and which cannot be challenged as merely ostensible and being really in the nature of a mortgage cannot be opened up at the instance of the debtor. If a property of a debtor has been sold to the creditor for a certain amount, even though that amount may represent past indebtedness, the only right that the debtor has is to challenge that sale u/s 24 and to have it proved that it is really a mortgage. In that case, the accounts of the indebtedness would be taken and the debtor would be given a chance to redeem the debt. But if the Court were to hold that the sale is genuine, then under the Bombay Agricultural Debtors Relief Act, it is not open to the Court to go behind the sale and determine whether the consideration was proper or whether the debtor actually owed to the creditor the amount mentioned in the sale-deed. I am not suggesting that a sale cannot be challenged in law, but the proper forum for challenging the sale would not be the Courts set up under the Bombay Agricultural Debtors Relief Act, but the ordinary civil Court. Now, with regard to the oral sale, the position, as already pointed

out, has been clarified by Jibhaoo's case. That sale could not be challenged as a mortgage, because an oral sale is not a sale at all in the eye of the law and it is a nullity. But the view taken by the Court in Jihhaoo Harking v. Ajabsing was that inasmuch as the property was in the possession of the purchaser, the vendor had a charge for the purchase price on this property and the purchaser was indebted to the vendor in respect of the purchase price. We are now dealing with a third class of case for which, except for certain observations of Mr. Justice Shah to which I shall presently refer, there is no direct authority and that is the case of part performance u/s 53A. Now, Section 53A is intended to protect the possession of the person who can avail himself of that doctrine. In a sense he is in the same position as a person who has acquired title by a proper conveyance or document of sale and the law overlooks the defect in his title and gives to him the same protection which it would have given to a person enjoying proper legal title. Therefore, when you analyse the case, the object of the debtor in this case is to deprive the creditors of the possession of the property which is protected by Section 53A of the Act. In a sense the position is similar to a case of a debtor who claims possession of the property against the vendee under a proper document of sale. As I have already pointed out, it is not open to the debtor in the latter case to obtain possession unless he succeeds in satisfying the Court u/s 24 that the sale is ostensible and really it is a mortgage. The question is whether also in the former case the position is the same and whether the debtor can be permitted to deprive the creditor of his possession when the transaction between them is not a mortgage and when the creditor is in possession under the provisions of Section 53A.

4. Now, Mr. Kotwal has two answers to give. He says u/s 22 there is a specific provision that notwithstanding any contract purporting to close previous dealings and create a new obligation, the Court shall inquire into the history and merits of the case; and Mr. Kotwal says that an agreement for sale is a contract which purports to close the previous dealings between the parties and creates a new obligation. I am not at all satisfied whether the agreement of sale is a contract of the nature suggested by this particular provision of Section 22. But even assuming it was, Section 22 is merely procedural. The marginal note "mode of taking accounts" correctly represents the extent and nature of that Section. Therefore, before accounts can be taken u/s 22, we must find some provision in the Act which would fix the liability upon the creditor to render accounts. Mr. Kotwal is really putting the cart before the horse. He wants to take accounts from the creditor in order to ascertain the liability, whereas in law the liability to account must first be ascertained, and then in taking the accounts, the Court must look to the provisions of Section 22 and follow the procedure laid down in that section. Now, I think it is clear that before accounts can be taken, there must be a debt due by the debtor and that there must be a relationship of debtor and creditor between the parties. In the case of an ostensible sale, as soon as the Court holds that it is a mortgage, that relationship is brought into existence, because whatever the debt due under the mortgage, the mortgage is redeemable

and the Court determines the debt and allows the debtor to redeem the mortgage. In the case of an oral sale, the debtor who has received the purchase price is bound to return the purchase price if the sale is a nullity, and till that purchase price is returned, the vendee has a charge on the property in respect of that purchase price. Therefore, in that case also, the debt is established and there is a relationship of debtor and creditor between the parties.

5. Now, turning to this case, the first question that I have to consider is whether there is any debt due by the debtor which can be adjusted. The debtor came to Court with a clear case that he was liable to return the purchase price as the sale was an oral sale and no title passed. That case could not be pursued in view of Jibhaoo's case. Then an attempt was made by the debtor to establish that, following that decision, there was a charge and he was liable, even in that view, to refund the purchase price and, therefore, he was a debtor. But when now the case rests not upon oral sale but upon agreement of sale, the position is entirely different. When the vendee has, taken possession pursuant to the provisions of the agreement for sale, can it be said that the vendor is indebted to the purchaser in any amount? The possession of the vendee being protected, the vendor cannot get back that possession and, therefore, there is no question of the return of the purchase price or the purchase price being a charge upon the property. As I said before, the position is identical with that of a proper sale-deed being executed and, therefore, we have a case here where at the date of the application, no debt was due by the debtor to these two creditors and there was no relationship of debtor and creditors between them. It is significant to note that in Jibhaoo Harising v. Ajabsing, the decision of the Court actually rested on the fact that there was a debt which the debtor was bound to pay. At page 982 of the judgment, we have the following observations:

“We think, therefore, that the learned District Judge came to a right conclusion in holding that the creditor had a charge on the property intended to be sold, and of which he was in possession. That being so, there is clearly a debt which the debtor was bound to pay. The charge created in favour of the creditor was in respect of that debt. That being the case, the transaction can properly fall within the purview of a Debt Adjustment Court, and the learned District Judge was, in our opinion, right in holding that the Debt Adjustment Court had jurisdiction over the matter in dispute.

Applying this ratio to our case, there is no debt which the debtor was bound to pay and which debt could be properly adjusted by the Debt Adjustment Court.

6. Now, Mr. Kotwal has strongly relied on Clause (v) of Sub-section (2) of Section 32 which provides that "the Court may pass an order for the delivery of possession of any property notwithstanding any law or contract to the contrary", and Mr. Kotwal says that whatever Section 53A may provide, brush it aside, give it a go-by and give the possession to the debtor if he is prepared to pay the debt which is finally adjusted. Now, in my opinion, that is not the correct reading of Section 32(2)(v). Section 32(2)(v) comes into force at the stage of the making of

an award. It is only if there is a debt due by the debtor to the creditor which can be adjusted by the Court that the Court can pass an award u/s 32, and it is only when the Court is passing an award u/s 32 that Mr. Kotwal is right that the Court can ignore the provision of any law and give possession to the debtor. But if the very foundation is lacking, if there is no debt and no debtor and creditor, then the question of applying Section 32 does not arise. I receive considerable support in the view that I have taken in the observations of Mr. Justice Shah in *Gurappa Ningappa Patne Vs. Basawanappa Apparao Kilje*, . the learned Judge says:

In any event a claim for possession of property which is delivered in pursuance of a contract to sell is not within the competence of the Bombay Agricultural Debtors Relief Court even if the opponent has acquired no title by the contract. In my judgment, under the guise of an application for adjustment of debts the debtor is seeking to institute proceedings in the Debt Adjustment Court for obtaining possession of property contrary to Section 53A of the Transfer of Property Act which enables the person put in possession to raise the plea of part performance.

These observations in all their force apply to the facts of this case.

7. The result is the judgment of the learned Assistant Judge will be set aside ; the judgment of the trial Court will be restored. Rule absolute with Costs.