

(1999) 11 AP CK 0045
In the Andhra Pradesh High Court
Case No : SA No. 309 of 1992

Shaik Abdul Khader and another	Vs	APPELLANT
Vakantham Nagabhushana Rao and others		RESPONDENT

Date of Decision : 24-11-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 41, 53

Citation : (2000) 1 ALD 458 : (2000) 1 AnWR 293

Hon'ble Judges : C.V.N. Sastri, J

Bench : Single Bench

Advocate : Mr. R. Vijayanandan Reddy, for the Appellant; Mr. K. Venkatramana Reddy, for the Respondent

Judgement

1. This is a Second Appeal by the unsuccessful plaintiffs in the suit. The suit was filed for declaration of title and for permanent injunction in respect of the plaint A and B schedule properties. Subsequently, the suit was converted into one for possession also.

2. It is the case of the plaintiffs that the 1st defendant who was the original owner of the suit properties sold the same to his daughter Juleka Bi and her husband Kutubuddin (PW2) under three Registered Sale Deeds dated 22-8-1955, 22-8-1955 and 10-4-1957 marked as Exs.A1 to A3 respectively and that they in turn sold the same to Plaintiffs 1 and 2 under Registered Sale Deed dated 15-2-1974 (Ex.A4). It is the further case of the plaintiffs that the 1st defendant subsequently executed a sham and nominal sale deed dated 8-4-1974 (Ex.B26) covering the suit properties in favour of defendants 2 and 3. As defendants 2 and 3 tried to interfere with the suit properties under the guise of the sale deed obtained by them, the plaintiffs filed the present suit.

3. As regards the plaint B schedule properties, it is the case of the plaintiffs that the said properties originally belonged to one Kulsum Bi and her husband Yatin Saheb. Plaintiff's father was brought up by them. After the death of Yatin Saheb

and Kulsum Bi, plaintiffs father got the B-schedule properties and after his death, plaintiffs got the same by succession.

4. The first defendant filed a Written Statement which was adopted by defendants 2 and 3 contending, inter alia that Exs.A1 to A3 sale deeds were nominally executed by him in favour of his daughter and son-in-law with a view to temporarily screen A-schedule properties from his creditors and that the same were never intended to be acted upon nor were they acted upon and that he alone continued to remain in possession and enjoyment of the properties in his own right. The plaintiffs vendors had no title in the same and they could not, therefore, convey any title to the plaintiffs. So far as the B-schedule properties are concerned, the defendants disputed the title of the plaintiffs for the same and asserted that Kulsum Bi was no other than the sister of the mother of the first defendant and as such the first defendant was entitled to the B-schedule properties as the legal heir of Kulsum Bi.

5. Both the Courts below have dismissed the suit holding concurrently that the sale deeds Exs.A1 to A3 are sham and nominal and that plaintiffs have not established their title to the B-schedule property. They, however, held that the first defendant also has no title to the same.

6. In this Second Appeal, the learned Counsel for the appellants has mainly canvassed the findings recorded by the lower Court with regard to the A-schedule only and did not seriously press the Second Appeal with regard to the B-schedule properties.

7. The learned Counsel for the appellants has argued that the findings recorded by both the Courts below as regards the sham and nominal nature of Exs.A1 to A3 are vitiated by a failure to consider material evidence and also by misreading some of the documents like Exs.A6 and A7. The learned Counsel further contended that in view of Section 53 of Transfer of Property Act, Exs.A1 to A3 are not void but they are only voidable at the instance of the creditors. As between the 1st defendant and his vendees, the transactions are perfectly valid. The learned Counsel further contended that the findings that the first defendant perfected title to the A-schedule properties by adverse possession is erroneous and unsustainable in law. The learned Counsel finally contended that by virtue of Section 41 of the Transfer of Property Act, the first defendant cannot question the sale of the properties by the ostensible owners in favour of the plaintiffs.

8. On the other hand, Sri K.V. Reddy, learned Counsel appearing for the respondents has contended that the concurrent findings of fact recorded by the two Courts below are perfectly valid, just and unexceptionable and there are no valid grounds for interference in the Second Appeal. He further submitted that the argument based on Section 41 of the Transfer of Property Act was not raised in the two Courts below and as such, the same cannot be permitted to be raised for the first time at this stage.

9. The test for determining whether a transaction is sham or nominal was laid

down in the decision of this Court in M. Pullayya v. G. Guravayya 1969 (1) An.WR 209, wherein it is held:

"In order to ascertain whether a transaction is sham or nominal, in addition to the test as to whether any consideration was paid at all, it will also have to be seen what was the motive behind entering into such a transaction. Whether possession of the property alleged to be transferred was given to the transferee as also custody of the deed of transfer."

10. The burden of proving that Exs.A1 to A3 are sham and nominal is certainly on the first defendant. Both the Courts below have examined this question in the correct perspective and on a consideration of the entire oral and documentary evidence on record concurrently found that (1) no consideration was paid under Exs.A1 to A3 (2) that the property was grossly undervalued (3) that even after the execution of Exs.A1 to A3, the first defendant continued to remain in possession and enjoyment of the properties and enjoyed the produce (4) with the income derived from the lands, he discharged his debts (5) he also paid land revenue continuously from 1962 to 1974 as evidenced by Exs.B1 to B18 (6) he also exercised acts of ownership over the property by mortgaging the same thrice under Exs.B21, B23 and B25 and he also sold two items of property covered by Exs.A1 to A3 under Ex.X1 and Ex.B25A which were executed jointly by the first defendant and PW2.

11. For arriving at those findings, the Courts below have relied upon, apart from the evidence of DWs., on the admissions made by PWs.1 to 3. I do not find any valid ground to interfere with the findings recorded by the two Courts below which are essentially findings of fact based on appreciation of evidence.

12. The learned Counsel for the appellants, however, contended that the sale deeds Exs.A1 to A3 contain endorsements to the effect that the sale consideration thereunder was paid in cash before the Sub Registrar at the time of registration of documents and that under Rule 94 of the rules framed under Registration Act, there is a presumption about the truth of the said endorsements and the defendants failed to rebut the said presumption by examining any witnesses who are connected with the said endorsements. However, the said endorsements were not marked as exhibits and none of the witnesses for the plaintiffs has spoken to the same in their evidence. The same were also not referred to in the plaint. The plaintiffs also have not examined either the Sub-Registrar or the identifying witnesses who were present at the time of the registration of the documents. That apart, it was found by the two Courts below that PW3 did not have the means or the capacity to pay the sale consideration. Further, when both sides have adduced evidence, the question of burden of proof and legal presumptions do not assume much importance.

13. It is next contended that in view of Section 53 of Transfer of Property Act, the transactions are not valid but only voidable at the instance of the creditors and inasmuch as no creditor has impeached Exs.A1 to A3, the same are perfectly

valid and binding on the first defendant. It is, however, well settled that Section 53 of Transfer of Property Act has no application to transactions which are sham and nominal. In such cases, the question of avoiding the same does not arise. Section 53 of Transfer of Property Act applies only to real transactions which are fraudulent in nature. But in the instant case, since it is found as a fact that Exs.A1 to A3 were sham and nominal transactions only, I do not find any substance in the said contention of the learned Counsel for the appellant.

14. Finally, coming to the argument based on Section 41 of the Transfer of Property Act. Admittedly, this question was not raised in both the Courts below. In the CMP. Convent v. Subbanna AIR 1948 Mad. 320, it is held that:

"In order to invoke successfully the protection of Section 41 of the Transfer of Property Act, the transferee must establish that (1) the transferor was the ostensible owner of the properties (2) with the consent express or implied of the real owner and (3) that the transferee paid consideration and (4) acted in good faith (5) after taking reasonable care to ascertain that the transferor had power to transfer."

15. The said question is, therefore, a mixed question of fact and law and it is not a pure question of law. As such it cannot be raised for the first time in the Second Appeal.

16. For all the foregoing reasons, I do not find any error of law, much less, substantial error of law warranting interference in the Second Appeal. The Second Appeal, therefore, fails and it is accordingly dismissed, but without costs.