

APPELLATE CIVIL

Before Mr. Justice Shah.

1956
Jan. 11

GURAPPA NINGAPPA PATNE, APPLICANT PETITIONER (ORIGINAL DEBTOR) v. BASAWANNEPPA APPARAO KILJI, OPPONENT (ORIGINAL CREDITOR).*

Bombay Agricultural Debtors' Relief Act (Bom. Act No. XXVIII of 1947) s. 24—Agreement to sell land whether a Transfer within the meaning of s. 24—Price received against delivery of possession under a written agreement to sell could not be regarded as a debt charged or simple.

Where an application was filed claiming a declaration that an agreement of sale in writing dated September 10, 1942 under which possession of property was conveyed to the vendee in consideration of the payment of price was really in the nature of a mortgage;

Held, that an agreement of sale was not a transfer within the meaning of s. 24 of the Bombay Agricultural Debtors' Relief Act;

Held, also, that the price received against delivery of possession of property under the written agreement to sell could not be regarded as a debt charged or simple.

Held, therefore, that the application was not maintainable under the Bombay Agricultural Debtors' Relief Act.

Jibhoo Harising Rajput v. Ajabsing Fakira Rajput,⁽¹⁾ distinguished.

CIVIL Revision Application against the decision of V. N. Palekar, Esquire, Assistant Judge at Sholapur reversing the order passed by N. J. Chinmulgund, Esquire Civil Judge, Junior Division at Akalkot.

The facts are fully set out in the Judgment.

R. V. Jahagirdar, for the Applicant.

V. V. Albal, for the Opponent.

Shah J.—The petitioner applied to the Debt Adjustment Court at Akalkot for adjustment of his debts and claimed a declaration that an agreement of sale, dated September 10, 1942 under which, Ningappa Patne father of the petitioner received Rs. 600 from the respondent Baswannappa as price of certain property delivered by him was a transaction in the nature of a mortgage and for an order that the property be redeemed after adjustment of his debts under the Bombay Agricultural Debtors Relief Act and for an order for possession. The application was resisted by the respondent Baswannappa. The learned trial Judge held that the transaction evidenced by the agreement, dated September 10, 1942, was intended to be a mortgage and Rs. 268 were at the date of the application due by the petitioner under that mortgage. The learned Judge directed that the petitioner do pay the amount declared to be due in instalments specified in the order and that a charge be retained

* Civil Revision Application No. 1505 of 1954.

1. (1952) 54 Bom. L. R. 971.

for those instalments on the property agreed to be sold. Against that order an appeal was preferred to the District Court at Sholapur. The learned Assistant Judge, who heard the appeal, held that an agreement of sale could not be regarded as a 'transfer' the real nature whereof could be ascertained under s. 24 of the Bombay Agricultural Debtors Relief Act. The learned Judge observed that an agreement of sale does not create interest in immovable property and is not a transfer contemplated by s. 24 of the Bombay Agricultural Debtors Relief Act, and that there being no transfer, the question of ascertaining the real nature of the transfer could not arise. The learned Judge also held that even on the assumption that there was a transfer, the evidence in the case established that it was intended to be an absolute conveyance of the interest of the transferor in the property and was not intended to be a mortgage for securing repayments of the consideration paid. The learned Assistant Judge reversed the order passed by the trial Court and dismissed application No. 166 of 1949 filed by the petitioner. The petitioner has applied to this Court in revision.

The petitioner stated that his father Ningappa executed on September 10, 1942, an agreement to sell for Rs. 600 to one Basawannappa Apparao four strips of lands S. Nos. 109, 88, 89 and 109 situate at Borgaon at Taluka Akalkot which were previously mortgaged under a simple mortgage dated December 4, 1929, for Rs. 400 to Basawannappa. The petitioner by his application for adjustment of debts contended that the agreement to sell was in reality a mortgage and Basawannappa had agreed to return the land in dispute against repayment of Rs. 600. Basawannappa contended that the previous mortgage was satisfied and thereafter possession of the property was delivered to him under an agreement to sell the property executed by Ningappa. He denied that he had agreed to reconvey the property on repayment of the amount of Rs. 600 and contended that the petitioner was not a debtor within the meaning of the Bombay Agricultural Debtors Relief Act and an application under s. 24 could not be maintained for ascertaining the 'real nature' of the agreement to sell.

The learned trial Judge held that the petitioner was a debtor within the meaning of the Bombay Agricultural Debtors Act and that the agreement, dated September 10, 1942, was in the nature of a mortgage. Against that order an appeal was preferred to the District Court at Sholapur being appeal No. 257 of 1950. In that appeal the proceedings were remanded to the trial Court for a fresh trial and disposal according to law. The learned appellate Judge observed that the petitioner was a debtor and also an agricultural labourer. The learned Judge was however of the view that it was doubtful whether a mere agreement to sell can be regarded as a transfer of land within

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the meaning of s. 24 (1) of the Bombay Agricultural Debtors Relief Act. Objection was also raised about the proper presentation of the application in Court and that, according to the learned appellate Judge, had not been properly dealt with by the Court of first instance and it was necessary to adjudicate upon that question. Upon remand the case was reheard by the trial Court and the original order was reaffirmed. Again an appeal was preferred by Baswannappa being appeal No. 217 of 1952, and in that appeal, as I have already observed, the learned appellate Judge held that the transaction was not a transfer of which the real nature could be ascertained under s. 24 (1) of the Bombay Agricultural Debtors Relief Act, and even if it could be ascertained, it could not be regarded as a mortgage.

In this Revision Application, filed by the debtor, Mr. R. V. Jahagirdar, raised two contentions. He contended that the appellate Judge was in error in proceeding to decide a question which had been finally decided in appeal No. 257 of 1950 wherein an order for remand was made. He also contended that in any event where there is an agreement to sell property and consideration is received, if the property is put in possession of the prospective purchaser, the purchaser acquires a charge upon the property and the amount paid to the vendor as price must be regarded merely as a debt which is liable to be adjusted under the Bombay Agricultural Debtors Relief Act proceedings. In my view, there is no substance in either of the contentions raised. In appeal No. 257 of 1950 there was no adjudication by the appellate Court that the agreement to sell should be regarded as a mortgage. The learned Judge, who heard the appeal, held that *ex facie* a mere agreement to sell could not be regarded as a transfer of land within the meaning of s. 24 (1) of the Bombay Agricultural Debtors Relief Act. He pointed out that an agreement to sell immoveable property did not create any interest in or charge upon the property and s. 24 did not therefore apply to such an agreement of sale. The learned Judge decided that the petitioner was a debtor within the meaning of the Bombay Agricultural Debtors Relief Act and was entitled to the benefit of the Act, but he set aside the order of the trial Court because he felt that there had been no proper trial of the plea relating to proper presentation of the petition. It is impossible to accept the contention of Mr. Jahagirdar that the learned Assistant Judge had decided in appeal No. 257 of 1950 that the agreement to sell was in the nature of a mortgage.

Now, a mere agreement to sell does not create any interest in or charge upon immoveable property. Section 24 of the Bombay Agricultural Debtors Relief Act enables a Court to declare that a transfer of land by a person whose debts are being adjusted or by any other person through whom he

inherited it was a transfer in the nature of a mortgage, if the Court is satisfied that the circumstances connected with the transfer showed it to be in the nature of a mortgage. Before the jurisdiction of the Court can be exercised it must be established that there was a transfer of land. If an agreement of sale does not create any interest in land, evidently there can be no transfer of land by a mere agreement of sale of land. It is difficult then to appreciate how the Debt Adjustment Court can exercise jurisdiction under s. 24 to declare an agreement of sale accompanied by delivery of possession of property in anticipation of execution of a deed of sale as a transfer of land. The learned appellate Judge, was in my judgment right in holding that s. 24 has no application to a mere agreement of sale even if it was accompanied by delivery of possession of the property agreed to be sold. The learned appellate Judge, as I have stated, has come to the conclusion on appreciation of evidence that even if the transaction was regarded as a transfer of land, it was having regard to the circumstances connected with the transfer, not in the nature of a mortgage. That conclusion is binding upon this Court in revision. But Mr. Jahagirdar has sought to raise a contention which was not urged in the Court below. Mr. Jahagirdar submits that the father of the petitioner who had received Rs. 600 remained liable to repay that amount to the respondent Baswannappa and there being no proper conveyance of the land in favour of the respondent, the father of the petitioner continued to be the owner of the land. The legal effect of the arrangement whereby the land was agreed to be sold, and possession of the property was delivered against payment of the price, was, according to Mr. Jahagirdar, that Baswannappa remained in possession of the property without title with a charge for the price paid by him and that the price paid became a debt due and charged upon the property and liable to be adjusted in these debt adjustment proceedings. In my view, this argument cannot be accepted. When the amount of Rs. 600 was paid to the father of the petitioner in the year 1942, it was not meant to be a loan. It is true that the sale deed not having been executed the father of the petitioner may have been under a liability to refund the amount which was received by him if the contract of sale was abandoned or terminated by Baswannappa. But no claim was made at any stage to terminate the contract and the respondent Baswannappa remained in possession of the property as if he was the owner. The petitioner could not in the circumstances claim possession of the property relying upon his title in view of the doctrine of part performance. 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

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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 proceeding in the Debt Adjustment Court for obtaining possession of property contrary to s. 53A of the Transfer of Property Act which enables the person put in possession to raise the plea of part performance.

Reliance was placed by Mr. Jahagirdar in support of his contention upon a judgment of this Court, *Jibhoo Harising Rajput v. Ajabsing Fakira Rajput*,⁽²⁾ and it was contended that the principle of that case applies to this case. In *Jibhoo's* case, there had been a sale of property by giving *vardi* to the village officers accompanied by delivery of possession of land. That in certain circumstances by giving a Rajinama under s. 74 of the Bombay Land Revenue Code and executing a Kabulayat in favour of the State, interest in land may be effectively transferred is undisputed. It is not clear from the facts reported whether the Rajinamas (which were of the years 1938 and 1940) were in favour of the State. The Court held in that case that there was no sale, and the "invalid transaction" effected by giving a *vardi* to the village officer and handing over possession according to the prevailing practice in the district of West Khandesh could not be regarded as a transfer within the meaning of s. 24 (1) of the Bombay Agricultural Debtors Relief Act. The Court held that there being no transfer s. 24 (1) did not apply. Mr. Justice Rajadhyaksha, who delivered the judgment of the Court, observed that the words "Notwithstanding anything to the contrary contained in any law, custom or contract" in s. 24 (2) of the Bombay Agricultural Debtors Relief Act

"did not have the effect of enabling the Court to examine transactions which are in their inception invalid. The transaction must be valid in its inception. The precise nature of the transaction can then be examined by the Debt Adjustment Court. There must be transfer of an interest in the property under the transaction in question, and it is then that the debtor can come to the Court and say that the transfer was in the nature of a mortgage.....Therefore, unless a transaction has *ex facie* resulted in the transfer of some interest in the property, a debtor cannot come to the Debt Adjustment Court under s. 24 and ask it to determine that the transaction is in the nature of a mortgage, and that only a mortgagee's interest has passed." (p. 976).

It is evident that the Court held in that case that only if there is a transfer of property initially it is open to the Court to examine the real nature of that transfer under s. 24 (1) of the Bombay Agricultural Debtors Relief Act, and the Court has no jurisdiction under s. 24 (1) of the Act to examine the nature of a transaction which did not amount to a transfer. Mr. Jahagirdar invited my attention to certain observations

made in the course of the judgment and contended that even if there is a mere agreement to sell immoveable property and consideration has been paid, the consideration must be regarded as charged upon the property and the liability can be adjusted in debt adjustment proceedings. No such plea appears to have been raised in this case, in the Courts below, and if the petitioner is permitted to raise at this stage this new plea, it may necessitate evidence to be taken on several questions which have not been investigated. For instance, the Court may have to consider whether the contract of sale has been broken and if broken who has committed a breach thereof and whether the transferor is liable to refund the price. Questions relating to the applicability of the doctrine of part performance and their bearing on the provisions of the Bombay Agricultural Debtors Relief Act will arise. Again in *Jibhao's* case the Court only decided that the liability to refund the price received under an 'invalid transfer' may be regarded as a debt liable to be adjusted. The Court proceeded to decide the case on the view, having regard to the facts of that case, that the liability to refund the price did exist. In this case, possession of the property having been delivered in pursuance of a contract of sale, and the other requisite ingredients for the application of the doctrine of part performance having *prima facie* been satisfied, I do not think that the observations in *Jibhao's* case made in the context of an accepted liability to refund the price received for an 'invalid sale' can be requisitioned to defeat the plea of part performance. It is pertinent to note that in *Jibhao's* case there was an oral *vardi* given to the village officer and the village officer effected mutations according to the practice prevalent in the district. There was no contract to transfer immoveable property by writing signed, from which the terms necessary to constitute the transfer could be ascertained with reasonable certainty, and the Court did not, and with respect rightly, consider any plea of part performance.

In my view, the principle of *Jibhao's* case cannot apply to the facts of this case. In my judgment, by the agreement to sell, dated September 10, 1942, there was no transfer of property, and the price received against delivery of possession of property under a written agreement to sell could not be regarded as a debt charged or simple.

The rule is, therefore, discharged with costs.

Rule discharged.

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