

APPELLATE CIVIL.

Before Bhide and Din Mohammad JJ.

BUTA RAM (DECEASED) THROUGH HIS REPRESENTATIVES (DEFENDANT) Appellant

versus

SAYYAD MOHAMMAD (PLAINTIFF) Respondent.

Civil Appeal No. 2663 of 1929.

Civil suit—Pleadings—Statement by counsel as to the intention of the parties with respect to the enforcement of a mortgage-deed—whether binding upon the client—Civil Procedure Code, Act V of 1908, section 64, Order XXI, rule 54: Attached property—whether can be sold privately in pursuance of a prior agreement to sell.

Held, that when the question relates not to the interpretation of any document but to the statement made by counsel on behalf of his client, as regards the actual understanding between the parties on a certain point, the question is a pure question of fact and the party concerned is bound by the statement.

Wali Muhammad v. Muhammad Bakhsh (1), *Shankar Das v. Mali* (2), and *Venkata Narasimha Naidu v. Bhashyakarlu Naidu* (3), relied upon.

Held further, that land attached under Order XXI, rule 54 of the Code of Civil Procedure, cannot, after the attachment, be transferred privately, even if there is a prior agreement to sell the same; but it is open to the judgment-debtor to get the attachment removed by paying the decretal money, in order to enable him to fulfil such an agreement.

Gutta Bapineedu v. Gutta Venkayya (4), *Rebula Venkata Reddi v. Mangadu Yellappa Chetty* (5), *Madam Mohan De Sarkar v. Rebati Mohan Poddar* (6) and *Situya v. Mudargaddi Samyar* (7), distinguished.

Tarak Nath Mukherjee v. Sanat Kumar Mukherjee (8), referred to.

(1) (1930) I. L. R. 11 Lah. 199 (P. C.). (5) (1917) 38 I. C. 107.

(2) 1921 A. I. R. (Lah.) 263.

(6) (1916) 34 I. C. 953.

(3) (1902) I. L. R. 25 Mad. 367 (P. C.). (7) 1924 A. I. R. (Mad.) 610.

(4) (1910) 7 I. C. 795.

(8) 1929 A. I. R. (Cal.) 494.

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June 2.

First Appeal from the preliminary decree of Lala Dwarka Parshad, Senior Subordinate Judge, Montgomery, dated 8th August, 1928, declaring that the amount due to the plaintiff is Rs.60,000, and passing a preliminary decree under Order XXXIV, rule 4, Civil Procedure Code.

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M. L. PURI, ACHHRU RAM and SARDARI LAL, for Appellants.

J. N. AGGARWAL, ANANT RAM KHOSLA and S. M. SIKRI, for Respondent.

BHIDE J.—This was a suit for recovery of Rs.60,000 on the basis of a mortgage-deed, by the sale of certain land situate at *Mauza Bahrapur*, or in the alternative for specific performance of the contract on the part of the defendant Buta Ram to sell 2/3rd share in 2,111 *kanals*, 15 marlas of land situated at *Mauza Bohar* as provided for in the deed and also for Rs.21,600 as damages on account of the breach of contract. The learned Judge of the trial Court has granted the first relief to the plaintiff, but disallowed damages for the alleged breach of the contract to sell land, on the ground that the plaintiff was not ready to perform his part in respect of the contract. From this decision the defendant has preferred the present appeal to this Court.

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The material conditions of the mortgage-deed on which the plaintiff's suit was based were as follows:—

“ 1. I (*i.e.* the mortgagor) will remain in possession of the aforesaid mortgaged land, but will not in any way transfer the said land to any other person till payment of the entire aforesaid mortgage money.”

“ 2. I have agreed to sell to the mortgagee in lieu of Rs.60,000 (rupees sixty thousand) 2/3rd eshar

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of the entire land, situate at *Mauza Bohar, Tahsil Pakpattan*, together with all rights, decreed in suit No.24, *Buta Ram, decree-holder v. Gobind Ram and Parshotam Das, judgment-debtors*, for possession by pre-emption of land situate at *Mauza Bohar*, by the Court of the Senior Subordinate Judge, Montgomery, on the 7th April, 1924."

" I will take possession of the land decreed after taking out execution and making payment of the balance of the price. I will then execute and complete a sale-deed in respect of 2/3rd share of the land decreed in lieu of Rs.60,000 (rupees sixty thousand) and will get the same registered in favour of the said *Diwan Sahib*. I will also deliver possession at the spot, and will get mutation of names effected. I will at that time redeem the aforesaid mortgaged land situate at *Bahrampur* that is this mortgage money shall be considered as the sale money of that land."

" If I do not get a sale-deed in respect of 2/3rd share of the land decreed, situate in *Mauza Bohar* registered after having executed and completed it in favour of the abovenamed *Diwan Sahib* within a period of one month and twenty days, or object to delivery of possession or mutation of name being effected, the mortgagee shall be competent to recover from me Rs.60,000 (rupees sixty thousand) mortgage money of the said mortgage on the security of the land mortgaged situate at *Mauza Bahrampur*."

The defendant's case as disclosed in his written statement briefly was that the mortgage with respect to the land at *Bahrampur* was to be enforced only if the defendant failed to sell the land at *Bohar* to the plaintiff, that the defendant had been willing to convey the land to the plaintiff within one month and 20 days

as stipulated in the deed but the plaintiff backed out of the contract on the ground that the land had been attached in execution of a decree against the defendant; that, as a matter of fact, the attachment was legally no bar to the sale of the land to the plaintiff but the attachment was merely used by him as a pretext to evade the purchase of the land and that the real reason for not complying with the terms of the deed in that respect was that the whole transaction had been entered into by the plaintiff merely as a *benamidar* for the benefit of *Malak Zaman Mehdi Khan*, who was then the Deputy Commissioner of the Montgomery District where the land is situated, but the *Malak* had for some reason or other given up his intention of purchasing the land. The defendant further pleaded that the real consideration for the sale was a sum of Rs.32,692 only and the sum of Rs.60,000 was fictitiously shown in the deed as the consideration merely to prevent pre-emptors from coming forward to claim the land.

The plaintiff in his replication denied that he had entered into the transaction merely as a *benamidar* for *Malak Zaman Mehdi Khan* and maintained that Rs.60,000 was the real consideration and had been duly paid to the defendant in the presence of the Sub-Registrar at the time of registration as shown by the endorsement on the deed. He pleaded further that owing to its attachment in execution of a decree the land at Bohar could not be legally sold and that inasmuch as the defendant failed to get the attachment removed or obtain any order of a competent Court for the sale of the land he, *i.e.* the defendant, was not in a position to perform his part of the contract.

Before issues were framed, *Mehta Lek Raj*, counsel for the defendant, made a statement on the

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8th November, 1927, with reference to the question of the sale of the land at Bohar to the effect that in *case of default by either party* the plaintiff was entitled to enforce the mortgage. Counsel for both the parties also admitted that time was the essence of the contract. In view of these statements the only issues framed by the Court were :—

(1) Whether full consideration mentioned in the deed of mortgage was not received. If so how much was received ?

(2) Whether plaintiff is entitled to any compensation by way of damages. If so, how much ?

(3) To what relief is the plaintiff entitled ?

After the evidence of both the parties on the above issues had been recorded, the case was argued and judgment was reserved. The defendant then put in an application on the 2nd July, 1928, for the framing of certain additional issues as to the question whether the plaintiff was entitled to enforce the mortgage even if the defendant had been willing to convey the land at Bohar according to the terms of the deed within the stipulated period. The defendant further expressed his readiness to sell the land even at the time of making the application. The plaintiff opposed this application and pointed out that the defendant's counsel had made a clear statement on the 8th November, 1927, that in case of default by either party, the plaintiff was entitled to enforce the mortgage and that, in view of this statement and his admission that time was the essence of the contract, no further issues arose. As regards the defendant's willingness to sell the land, even at that stage, it was pointed out that the defendant had expressed this willingness for the first time after the close of the

case. It was contended that the defendant could only sell the land within the stipulated time, according to the terms of the contract, time being admittedly of the essence of the contract, and he could not therefore exercise the right after he had used the sum of Rs.60,000 without interest for some three years and also enjoyed the produce of the mortgaged land during that time. The learned Subordinate Judge upheld the plaintiff's objection, rejected the defendant's application, and proceeded to pass a decree in favour of the plaintiff for recovery of Rs.60,000 by the sale of the mortgaged land. The claim for damages was disallowed, as the learned Judge came to the conclusion that the attachment of the land at Bohar in execution of a decree was legally no bar to its sale in pursuance of a prior agreement and that the plaintiff himself was responsible for the breach of the contract of sale in respect of that land.

The main points which require determination in this appeal are:—

(i) Was the learned Subordinate Judge right in rejecting the defendant's application, dated 2nd July, 1928, for the framing of additional issues and, if not whether a trial of these issues is now necessary?

(ii) If the learned Subordinate Judge was right in rejecting the application, whether the consideration of Rs.60,000 was paid in full or whether a sum of Rs.32,692 only was paid as alleged by the defendant.

As regards the first point it is not disputed that the issues framed by the learned Subordinate Judge were correct, if the statement of the defendant's counsel, dated 8th November, 1927, referred to above, is held to be binding on the defendant. It was, how-

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ever, contended that this statement related to a question of the construction of the mortgage-deed and was therefore a question of law and that a counsel's statement on a matter of law is not binding. This contention is not tenable. It is true, and there is ample authority for the proposition that when the question for decision before a Court relates to the construction of a document of title, it is treated as a question of law for the purposes of second appeal, etc., [see *e.g.*, *Wali Muhammad v. Muhammad Bakhsh* (1)]; but here we are concerned not with the interpretation of a document by a Court but with the statement of his case by a counsel on behalf of his client as regards the actual understanding between the parties on a certain point. The question whether the parties intended that the mortgage-deed should or should not be enforced in the case of default of either party was in this aspect purely a question of fact and not a question of law. It was held in *Shankar Das v. Mali* (2) that a finding as to the intention of the executant of a document is a question of fact. The defendant's counsel, when he stated that in the event of default by either party the plaintiff was entitled to enforce the mortgage, was merely stating his client's position as to the real understanding between the parties and not expressing an opinion on a point of law. It was urged that the admission of the counsel was opposed to the pleadings of the defendant. This is not, however, clear. It is true that the defendant pleaded in the *jawab dawa* that the plaintiff's proper remedy was a suit for specific performance. At the same time in reply to clause (e) of para. 5 of the plaint, in which the plaintiff had averred that 'time was an essential

(1) (1930) I. L. R. 11 Lah. 199 (P. C.). (2) 1921 A. I. R. (Lah.) 263.

part of the contract' and that 'if the time fixed for completing the contract for sale expired the plaintiff was entitled to enforce the mortgage-deed and the sale contract became null and void,' the defendant stated that he admitted the correctness of the allegations in that clause with the exception of that relating to the consideration of Rs.60,000. This reply seems to be consistent with the statement of the defendant's counsel, dated the 8th November, 1927, that the plaintiff was entitled to enforce the mortgage-deed in case of default by either party. Nor can the statement be said to be clearly inconsistent with the terms of the mortgage-deed. The mortgage-deed enabled the mortgagor to sell the land at Bohar in lieu of the mortgage money, but it does not say that if the plaintiff failed to take the land he was to be without any remedy and was to lose the sum of Rs.60,000 advanced by him on the basis of the mortgage. It was held by their Lordships of the Privy Council in *Venkata Narasimha Naidu v. Bhashyakarl Naidu* (1) that a Vakil's general power in the conduct of a suit includes the abandonment of an issue, which in his discretion he thinks it inadvisable to press. It would thus appear that the defendant's counsel was well within his rights in the circumstances of the case in making the statement that he did on the 28th November, 1927.

It is noteworthy that the application for additional issues was made at the last stage after arguments had been heard. If the statement in question had been really made by the defendant's counsel through inadvertence, the mistake would have been soon discovered, but no action was taken for some nine

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months while the trial was proceeding. It is also significant that the defendant expressed his readiness to complete the sale of the land at Bohar in the course of this suit, only when the application for the framing of additional issues was made. His original position was that he had been willing to convey the land to the plaintiff during the stipulated period and as the plaintiff had failed to accept it without any legal justification during that period, the plaintiff was no longer entitled to that relief. This fact indicates that this belated application was made only as a result of afterthought, when the weakness of the position taken up by the defendant was realized and not on account of the statement of the defendant's counsel being contrary to his clients' instructions.

On the above finding it is unnecessary to go into the question whether the plaintiff was or was not guilty of a breach of contract, but I may briefly deal with it as it seems to my mind clear that the plaintiff was not to blame in the matter. The fact that the land at Bohar was attached in execution of a decree is not disputed. Now Order 21, rule 54, Civil Procedure Code, expressly prohibits the judgment-debtor from making any private transfer of such property and all other persons from taking any benefit from such transfer after attachment. The defendant could not, therefore, transfer the land nor could the plaintiff accept a conveyance of it, after the attachment, without contravening the provisions of this rule. It was, however, urged that as there was a prior agreement to sell, the land could be transferred in spite of the provisions of this rule. In support of this contention reliance was placed on the provisions of section 64, Civil Procedure Code, as interpreted in

Gutta Bapineedu v. Gutta Venkayya (1), *Rebala Venkata Reddi v. Mangadu* (2), *Madan Mohan De Sarkar v. Rebati Mohan Poddar* (3) and *Sitaya v. Mudargaddi Samyar* (4). But it seems to me that the point is by no means clear. In *Gutta Bapineedu v. Gutta Venkayya* (1) the respondent was not represented. The agreement to sell was accompanied by delivery of possession and the learned Judges based their decision on equitable considerations borrowed from English Law. The decision in *Rebala Venkata Reddi v. Mangadu* (2) was based on similar grounds. The other two cases are really distinguishable, as the alienations therein were not private transfers but were made in pursuance of decrees for specific performance. The decision in *Madan Mohan De Sarkar v. Rebati Mohan Poddar* (3) was commented on and not followed in a later decision of the Calcutta High Court, reported as *Tarak Nath Mukerjee v. Sanat Kumar Mukherjee* (5). In none of these cases the mandatory provisions of Order 21, rule 54, Civil Procedure Code, which prohibit a private transfer during attachment were considered. It is true that a contract for sale may be specifically enforced in certain circumstances even against third parties. But that is not the real question in this case. In the present instance the question for consideration is whether the defendant was in a position to transfer the land privately to the plaintiff during the period stipulated in the deed. In view of the provisions of Order 21, rule 54, Civil Procedure Code, referred to above, this question must, I think, be answered in the negative. It was open to the defendant to get the attachment re-

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(1) (1910) 7 I. C. 795.

(3) (1916) 34 I. C. 953.

(2) (1917) 38 I. C. 107.

(4) 1924 A. I. R. (Mad.) 610.

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moved by paying up the decretal amount, but he did not care to do so. I am, therefore, of opinion that it was the defendant who failed to perform his part of the contract and consequently the plaintiff was clearly entitled to enforce his mortgage.

The next point for decision in this appeal is that of the real consideration for the mortgage. The defendant alleged that he had to pay Rs.32,692 according to the terms of the pre-emption decree and that this was the real consideration paid, although the Sub-Registrar's endorsement on the deed shows that a sum of Rs.60,000 was paid in his presence. In support of this contention it was urged that it was unlikely that the plaintiff would have agreed to pay Rs.60,000 for 2/3rd of the land which had been decreed in favour of the defendant on payment of a sum of Rs.39,840 only. Reliance was also placed on a letter (Ex. C/A) from *Malak Zaman Mehdi Khan* addressed to the present plaintiff which the defendant had managed to secure from him. This letter runs as follows:—

My dear *Diwan Sahib*,

Compliments. With regard to the bargain in respect of the land situate at *Mauza Bohar* with Buta Ram, through you, I have to inform you that I have given up the bargain for some reasons. Please give back the promissory note and mortgage-deed to Buta Ram after receiving your actual amount. I have no mind to purchase the land.

Yours sincerely,

Zaman Mehdi Khan.

It was argued that the sentence 'Please give back the promissory note and mortgage-deed to Buta Ram

after receiving your actual (*asal*) amount ' clearly showed that the actual amount was different to what was stated in the mortgage-deed.

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Malak Zaman Mehdi Khan who was examined as a witness admitted having written the letter C/A but denied that the sale contract had been really entered into by the plaintiff on his behalf. The explanation given by this witness as regards the circumstances in which he wrote the letter is far from convincing and it must be said that this letter as well as the fact that the plaintiff agreed to pay a price far in excess of the price, which the defendant had himself paid for the land, raise a suspicion that the price was perhaps overstated in the deed in order to keep off pre-emptors, as alleged by the plaintiff. But we have on the other hand the Sub-Registrar's clear endorsement on the deed showing that a sum of Rs.60,000 was paid in cash before him. It is not the defendant's case that any part of this sum was refunded. What is alleged by him is that the Sub-Registrar made a false endorsement on the deed to oblige *Malak Zaman Mehdi Khan*, who, as the Deputy Commissioner, was his superior officer. I am not, however, prepared to believe such a serious incriminating allegation against a responsible public servant without cogent and convincing proof. If the defendant has been party to a deed in which a fraudulent recital as to consideration was made to deceive others and he is now unable to prove that fact, he has to thank himself and must take the consequences. Besides he has already used the money received by him in consideration of the mortgage for a period of nearly ten years without any interest and even if the consideration was over-stated in the deed, as he has alleged, he scarcely stands to lose anything by the decree now passed against him.

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On the above findings I would dismiss this appeal with costs.

DIN MOHAMMAD J.—I agree.

P. S.

Appeal dismissed.

APPELLATE CIVIL.

Before Bhide and Din Mohammad JJ.

MUSSAMMAT PURAN DEVI (PLAINTIFF)

Appellant

versus

DILA RAM AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 524 of 1931.

Fraud—Suit for setting aside a decree passed on the basis of an award—on the ground that the decree had been obtained by fraud—whether competent.

Held, that a suit to set aside a decree passed on the basis of an award, on the ground that the award and decree had been obtained by fraud, is competent.

Mehta Kashi Ram v. Dadabhoy (1), Skinner v. Badri Kishen (2), and Teja Singh v. Janmeja Singh (3), distinguished.

Khagendra Nath Mahata v. Pran Nath Roy (4), and Nistarini Dassi v. Nundo Lall Bose (5), relied upon.

First Appeal from the decree of Mirza Abdul Rab, Senior Subordinate Judge, Ludhiana, dated the 3rd December, 1930, dismissing the plaintiff's suit

BADRI DAS and VISHNU DATTA, for Appellant.

J. N. AGGARWAL and J. L. KAPUR, for Respondents.

(1) 124 P. R. 1880.

(3) (1920) 57 I. C. 195.

(2) 98 P. R. 1915.

(4) (1902) I. L. R. 29 Cal. 395 (P. C.).

(5) (1899) I. L. R. 26 Cal. 891.