Trimbak Narayan Hardas vs Babulal Motaji And Ors. on 12 April, 1973

Equivalent citations: AIR1973SC1363, (1973)2SCC154, AIR 1973 SUPREME COURT 1363, 1973 2 SCC 154

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Bench: A.N. Ray, D.G. Palekar

JUDGMENT

D.G. Palekar, J.

1. This appeal arises on a certificate granted by the High Court at Bombay from its judgment and decree dated April 17, 1963 in First Appeal No. 847 of 1957.

2. The appellant is one Trim-bak Narayan Hardas, a resident of Amaravati where he lived after his retirement as a District Judge. Respondent No. 2 Krishnaji Mahadeo Jangli is a resident of Poona. He owned some house properties at Poona and at the relevant time had a small business of manufacturing rubber goods. Jangli was a distant relation of Hardas being the son of the sister of the father-in-law of Hardas. Jangli was in financial difficulties and so he borrowed moneys from Hardas. On 11-5-1949 he was paid Rs. 15,000/- by Bank Draft and again on 13-7-1949 another sum of Rs. 15,000/- was paid to him by a Bank Draft. In respect of these loans, Jangli passed a Pronote in favour of Hardas on 12-7-1949. The loans were supposed to be accommodation loans which Jangli had promised to repay as early as possible. On 2-12-1950 he gave a cheque of Rs. 3,000/- to Hardas in part payment but on presentation to the Bank, it was dishonoured. The two met often and Hardas used to remind Jangli about the loan. There was also correspondence between them. Since Jangli was not able to satisfy the loan, Hardas naturally wanted some security for it, especially, as the period of limitation was fast expiring. Sometime in March, 1952 Hardas went to Poona and it seems that some talk as to the property which Hardas would be willing to take as security, took place. In all probability they did not agree as to which of Jangli's Poona properties should be offered as security. So Jangli went to Amaravati on or about 1-4-1952 and it was agreed between them that the matter may be referred to one Chaubal a retired Deputy Collector for his arbitration. Jangli gave the description of his property and on 2-4-1952 the arbitrator recorded the statements of Hardas and Jangli. Chaubal gave his award on 4-4-1952 and on the same day the award was filed in Amaravati court. The award was accepted by Hardas and Jangli and the award decree was drawn up on 7-4-1952. The decree was also registered on 29-5-1952. In accordance with this decree, Jangli was directed to pay Rs. 30000/- with costs and interest within 3 months, in default of which he was liable to execute a sale deed in favour of Hardas of House No. 102 in Mangalwar Peth, Poona City.

The decretal amount was also made a charge on house nos. 108, 109, 110, 111, 44 and 45 in Mangalwar Peth, Poona, belonging to Jangli Jangli failed to pay the decretal amount and so Hardas filed his first petition of execution against Jangli on 30-3-1953 asking for the execution of the sale deed. Later he amended the petition by asking only for the attachment of Jangli's movables. Under that pressure, Jangli handed over possession of house No. 108 to Hardas where after Hardas allowed the execution petition to be disposed of without further action. In the meantime another creditor of Jangli filed an execution petition for the recovery of his decretal amount and in execution of the decree attached the property in the possession of Hardas. Hardas applied to the court for raising the attachment and the attachment was raised on 30-8-1954. Hardas continued to be in possession of house No. 108. Mangalwar Peth.

2A. One Babulal Motaji, respondent No. 1 in the appeal before us, filed the suit out of which the present appeal arises. He filed the suit on 18-11-1954 after giving notice on 2-8-1954. The suit was for the specific! performance of an agreement to sell house nos. 108, 109, 110 and 111 Mangalwar Peth executed by Jangli in favour of Babulal. The agreement is dated February 5, 1952 and is Exhibit 49. The suit was directed against, Jangli and his four minor sons, defendants nos. 1 to 5 respectively. Hardas was also joined as a party being defendant No. 6. The plaintiff alleged Sieged that Jangli had executed an agreement to sell the property to him on behalf of himself and his minor sons for a sum of Rs. 50,000/- out of which Jangli as earnest money had received Rs. 30,000/-. The sale Seed was to be executed within one year. But by agreement between them, endorsed on the document itself, the time was extended for six months in the first instance and then again for one year thereafter. The extended time expired on about the 5th of August, 1954 and since Jangli did not execute the sale deed, the plaintiff gave him notice on 2-8-1954. Before filing the suit the plaintiff obtained extracts of the City Survey records which disclosed that there was a charge on the property of Hardas, defendant No. 6. Plaintiff alleged that Jangli and Hardas had brought about a fraudulent-find collusive award in order to defeat the plaintiff and hence he should be given a decree for specific performance against all. In the alternative, he asked for a decree for the amount of earnest money paid by him with interest thereon against Jangli and his minor sons.

3. Jangli, who was defendant No. 1, filed his written statement on behalf of himself and as the guardian of his minor sons. In this written statement, he admitted practically all the allegations of the plaintiff. On the other hand, he disputed the award in favour of Hardas. After this the plaintiff found that the interests of Jangli and his minor sons were conflicting and, therefore, applied for the representation of the minors by their toot her. The mother contested the suit denying the transaction with the plaintiff or the receipt of the money. She further alleged that there was no legal necessity or benefit to the estate and hence the minor sons were not bound by the agreement. Hardas, defendant No. 6, affirmed his transaction as a genuine one and alleged that the suit was a collusive suit between plaintiff and defendant No. 1 with a view to defeat defendant No. 6. It was suggested that there was really no genuine transaction of an agreement to sell and the document must have come into existence sometime when defendant No. 6 against defendant No. 1 had filed the execution petition. It is necessary to note here that after filing the written statement admitting the plaintiff's claim defendant No. 1 did not take part in the further proceedings. Thus there was a double contest-one between the plaintiff and the minor sons of Jangli; another between the plaintiff and Hardas.

4. The learned trial judge found that the plaintiff had failed to prove either the payment of the ear nest money by the plaintiff to Jangli or the genuineness of the alleged agreement to sell. Similarly he held that the award decree obtained by defendant No. 6 must have been a collusive decree. Since defendant No. 1 had admitted the plaintiff's claim, while dismissing the suit against the rest, the learned Judge passed the following order:

> Defendant No. 1 do pay plaintiff Rs. 25,036/- with costs and future interest at 4 per cent. per annum on Rs. 30,000/- from the date of suit till realisation. A charge of this decree is kept on the Defendant No. 1's share in the suit properties

5. Aggrieved by the decision the plaintiff filed first appeal No. 846 of 1957 in the High Court and defendant No. 6 Hardas filed first appeal No. 847 of 1957. Both the appeals were heard together. The High Court held that the suit against the minor sons had been rightly dismissed. Differing from the findings of the learned Civil Judge the High Court held that the agreement to sell by defendant No. 1 to the plaintiff was a genuine transaction and so also was the award decree. The question of priority having arisen between the plaintiff, on the one hand, and the defendant No. 6, on the other, the High Court pointed out that the plaintiff had a statutory charge for the money and since this charge dated from the execution of the agreement to sell, namely February 5, 1952, it had priority over the charge created by the award decree in favour of defendant No. 6 Hardas. Subject to this declaration the appeals were dismissed. It is from this Order that defendant No. 6 Hardas has come to this Court in appeal.

6. This was essentially a competition between two claims. One was a claim by the plaintiff based upon an alleged agreement to sell property dated February 5, 1952 and the other was under the award decree obtained by defendant No. 6 on 7-4-1952. It is interesting to note that the plaintiff's agreement to purchase bears a date just about the time when negotiations were going on between defendant No. 6 and defendant No. 1 with regard to the security which should be given for the amount of Rs. 30,000/- which defendant No. 1 had admittedly received from defendant No. 6. There can be hardly any doubt at all that defendants No. 1 had received Rs. 30,000/- from defendant No. 6. The payments had been made by Bank Drafts and there is also a promissory note dated 12-7-1949 passed on the eve of receiving the second bank draft of Rs. 15,000/-. The High Court was obviously right in holding that the transaction which terminated in the award decree between defendant No. 1 and defendant No. 6 was a genuine decree. There was no question of any collusion because we find that defendant No. 6 filed an execution application against defendant No. 1 and took out a warrant for the attachment of defendant No. 1's movables. To avoid the ignominy which an actual execution of the warrant would have brought on defendant No. 1, the latter hurried to give possession of house No. 108 in Mangalwar Peth to defendant No. 6 which under the award decree he was bound to sell to defendant No. 6. It is true that defendant No. 1 and defendant No. 6 were related, though distantly, but it cannot be ignored that the matters between them had come to such a head that defendant No. 6 Hardas had come all the way from Amaravati to Poona to take out execution against defendant No. 1 in satisfaction of his decree-Under the pressure of execution he had also obtained possession of one of the houses belonging to defendant No. 1. There was no question thereafter of any cordiality between defendant No. 1 and defendant No. 6. It is suggested on his behalf that the agreement to sell in favour of the plaintiff must have come into existence at

about this time. the sole object of the document being merely to defeat his claims. It must be noted here that defendant no.

6 had to file an application to raise the attachment levied by one other creditor who had been made defendant No. 7 in the suit and actually the attachment was raised at his instance on 30-8-1954. The award decree had directed that defendant No. 1 should sell house premises 108 Mangalwar Peth to defendant No. 6. So after the first petition of execution had been disposed of on 15-6-1953 defendant No. 6 filed a second execution petition on 16-7-1954 and had demanded the execution of the sale deed of the property of which he was now in possession in accordance with the award decree. A point to be noted is that it is at this stage that defendant No. 1 receives a notice from the plaintiff dated 2-8-1954. Learned Counsel for the appellant has asked us to note these particular facts, namely, that this agreement to sell sees the light of the day for the first time when defendant No. 6 was seriously prosecuting his claim against defendant No. 1 filing execution petitions one after the other. We have felt no hesitation in agreeing with the High Court that the transactions between defendant No. 1 and defendant No. 6 were genuine transactions and the award decree was also equally genuine. The trial court has held that if the award decree is held to be not collusive then there is no evidence to show on behalf of the plaintiff that defendant No. 6, who was a resident of Amaravati, had any notice of the alleged agreement to sell. We agree with that finding also.

7. Since defendant No. 1 did not contest the claim of the plaintiff and the plaintiff's claim against the minor sons of defendant No. .1 has also been finally dismissed, it would not have been necessary to examine the genuineness of the alleged agreement to sell (Ext. 49) but for the fact that the High Court has declared that plaintiff gets a prior charge as against defendant No. 6's charge under the award decree. It. is contended on behalf of the appellant (Hardas) that in order to claim a charge on the property under Section 55(6)(b) of the Transfer of Property Act, there must be a genuine transaction of an agreement to sell, and if there is no genuine transaction there could be no statutory charge under that provision. The issue as to whether the transaction was a genuine one or not was before the trial court as well as, in appeal, in the High Court. The trial court held that there was no genuine transaction. The Appellate Court held there was and we have to see which view is correct.

8. In the first place, the document (Ext. 49) makes very strange reading. It says that there were two mortgages, one of Pendse and the other of Ranabhor and the total amount due thereon was about Rs. 15,000/-. The dates of these mortgages are not mentioned. Then it proceeds to say that the vendor had decided to sell the property for Rs. 50,000/- out of which the vendor had received Rupees 30,000/- as earnest money The document reads as if Rs. 30,000/- had been received in cash by the vendor at the time of the execution of the document. One year's time is given for executing the sale deed and then it proceeds to say "we will clear away all debts and liabilities as above described and render the property absolutely free from all encumbrances and execute a sale deed at our cost in your favour or in favour of any other party nominated or assigned by you." In other words, there is no stipulation that out of Rs. 30,000/- that had been received by the vendor he should first pay off the mortgages. Where a vendor is serious about taking a sale deed and knows that property is under mortgage he generally takes upon himself to pay off the mortgages out of the amount payable to the vendor or, in any case, insists that the mortgages may be paid off immediately so that the burden on the property may not increase. Secondly, it sounds rather

extraordinary that where the price is fixed as Rs. 50,000/- the vendee should make a payment of Rs. 30,000/- without any security for his money except this unregistered agreement. The matter becomes more curious when the plaintiff in his evidence says that Jangli was not a friend of his but just an acquaintance and the plaintiff himself was not even a money-lender. Jangli was not able to sell the property within the first year So the time was extended by six months. Even after those six months the sale deed was not passed and then the plaintiff extends the period by one more year and all this time the plaintiff knows that the previous mortgages have not been paid off and his own amount of Rs. 30,000/- does not bear any interest. It is extraordinary that the plaintiff who pays Rs. 30,000/- as earnest money to a mere acquaintance would not even stipulate for interest on that amount if the document was not executed in time, with his eyes open, the plaintiff extends the time for executing the sale deed. He had the balance of Rs. 20,000/- with him at the time and if he was really serious about the transaction he could have himself paid off the mortgages but 'he does not do anything of the kind. On the face of it, therefore, the document does not impress one as being a genuine transaction for sale of property.

9. This was a property in Poona. The plaintiff, had known that there were mortgages on this property. It does not appear that the plaintiff made any enquiries about these mortgages. No doubt he says in his evidence that he had enquired from the mortgagees but these very mortgagees, who were called as his witnesses, did not say that any enquiries had been made with them. Admittedly the plaintiff did not give public notice before purchase in order to see if there are any claims against the property or objections to the sale. According to him, just two or three days before the document, the vendor had approached him and thereupon he decided to purchase the property for Rs. 50,000/-. Asked how he fixed the price at Rs. 50,000/- he said that one contractor Ambekar had told him that the property was worth Rs. 52,000/- or Rs. 53,000/- and so he agreed to pay Rs. 50,000/-. This contractor was not examined and it is admitted that the contractor did not make any written estimate of the value. In his evidence he tried to make out that he had made all necessary enquiries before purchase by asking the mortgagees and consulting a lawyer named Mr. Ban-kar. According to him Mr. Bankar was to make enquiries in the City Survey Office. He admitted that Mr. Bankar did not give any opinion in writing nor was Mr. Bankar examined as a witness. It is hence, clear, that no enquiries were made as to the title of the property. The plaintiff also admits that he could not say how much rent was received from the property. In a place like Poona it is impossible to believe that anybody will offer to buy house premises without making detailed enquiry whether there are any tenants in the premises or not and if there are, what rents are being paid. The notice he had given before filing the suit belies his whole case in the evidence that he had made all enquiries with regard to a clear title. In this notice he had clearly charged defendant No. 1 that the latter had not satisfied him about a marketable title. In the plaint also in two or three places he alleged that defendant No. 1 had not satisfied him with regard to the title to the property. We have no doubt, whatsoever, that the plaintiff had made no enquiries regarding the premises, its occupants, the rents received or the in cumbrances to which they were subject. He did not make enquiries as to the proper price. All this does not speak of a genuine desire to purchase house property in Poona.

10. It does not also appear from the evidence that earnest money amounting to Rs. 30,000/- had been paid against this document. The document itself (Ext. 49) and the plaint speak as if Rs.

30,000/- had been paid at the time of the document. Strangely this amount of Rs. 30,000/- mentioned in the document is just the amount which was payable to Hardas-the appellant, under his Promissory Note and award decree. The plaintiff knew that he had to prove his document not merely against, defendant No. 1 who admitted his claim in his written statement but against the other defendants. The document had been challenged as bogus and, therefore, it was necessary for him to show that it was a genuine document and that he had in fact paid Rs. 30,000/-at the time of the execution of the agreement. In short, he was not taken by surprise and yet when he gave his evidence as to how this amount of Rs. 30,000/- had been paid, he made all sorts of statements, which only show that he was thoroughly unreliable. In the very first para of his evidence he started by saying that on 5-2-1952 when the document was executed he had advanced Rs. 30,000/- to defendant No. 1. He was then asked with regard to his accounts, extracts of which seem to have been produced. That reminded him that he had not paid Rs. 30,000/- at the time of the execution of the document. So during the course of the examination-in-chief itself he said that this Rs. 30,000/- was made up of three items-first item being for Rs. 12,000/- which he said he had paid to defendant No. 1 by cheque in July, 1951 i.e. about 7 or 8 months earlier. The second item consisted of Rs. 4,500/- which he said his father had advanced to defendant No. 1 by cheque and of which the plaintiff had taken the havala and the third item according to him was of Rs. 13,500/-which, he says, he paid in cash at the time of the execution of the document. Asked whether these were money-lending transactions he said that they were not money-lending transactions and that he was not a money-lender and that no interest had been charged. In the first place, if there were three items which made up this Rs. 30,000/-, then the document itself was the proper place where these items would have been shown. All the money had not come from the plaintiff himself. A part of the amount namely Rs. 4,500/-had come from his father, who was separated from him, and the plaintiff had taken the havala to pay him the amount. In other words, while defendant No. 1 was discharged from his liability to pay the plaintiffs father the plaintiff himself was liable to pay that amount to his father. The father is not examined in the case nor do we have any evidence to show that the father had at any time made an advance of Rs. 4,500/-. It is said by the plaintiff that that payment was also made by cheque but neither of the two cheques or their counterfoils have been produced in court. Nothing would have been easier than to show that these various amounts had been paid by cheque. In any case, if there were really three connected transactions like these, not for small amounts, but amounts running into thousands, It is impossible to believe that the document itself will not show how the previous amounts forming part of Rs. 30,000/- had been discharged. In the cross-examination the plaintiff came into further difficulties. Having said that two sums of Rs. 12,000/- and Rs. 4,500/- had been paid by him and his father to defendant No. 1 by cheque-and the cheques were not forthcoming,-he started wriggling out in the cross-examination by saying that the cheques had not been actually issued by him and his father for those amounts but that defendant No. 1 himself had given cheques to them and against the security of those cheques those two items had been paid. The obvious conclusion from that would be that the plaintiff and his father must have encashed the cheques given by defendant No. 1 and reimbursed themselves against the accommodation loans, because the plaintiff is very firm that he had not charged any interest nor was he a money-lender. In that case. there would be no prior debt payable by defendant No. 1 to the plaintiff or his- father, in which case the whole of Rs. 30,000/- must be deemed to have been paid on the date of the agreement itself. If, on the other hand, the plaintiff and his father were not able to encash the two cheques given by defendant No. 1 then some mention of these cheques would have

been made in the agreement itself; secondly if they were not able to encash those cheques, it is difficult to believe that on the date of the execution of the deed the plaintiff would still pay in cash Rs. 13,500/- and all .'those amounts without interest. The whole story appears to be so fantastic that we must say that the plaintiff is not telling the court the truth about the matter and his oral testimony is really of no value.

11. Admittedly he had no evidence about the payment of the money except his books of account. He did not produce his books of account at the hearing because if they had been produced the originals would have been exhibited. He referred to some extracts of accounts which he said he had himself prepared from his account books. There is no evidence that any of the contesting defendants . agreed to these copies of extracts of account going in " evidence. It would appear that even these extracts were not exhibited at the time of the trial but accepted by the learned Judge after the trial was over when, the judgment was written some months later. It does not also appear that these extracts were verified in the office by any ministerial officer of the court, because the usual practice is that when original books of account are produced in court and they are required for daily use, extracts are produced in court, and after their verification with the originals by a ministerial officer of the court the originals are allowed to be taken away, to be produced again at the time of the hearing. The extracts produced in this case do not show that they had been verified with the originals by any ministerial officer of the court. The High Court observed in its judgment that it was more than likely that the plaintiff had produced the books of account in court and for this support was derived from the fact that during the cross-examination no questions have been put to the plaintiff in connection with the entries in the account books. We are afraid this is a wrong approach. If the plaintiff does not produce his original books of account in court and does not give evidence after referring to the entries therein, there is no obligation-in fact it will be wrong-on the part of the learned Counsel for the opposite side to ask questions with regard to the entries in the books of account. It is true that the plaintiff had said that he had produced extracts and that these extracts were true copies of the originals. But counsel for the other side need not take any notice of this statement because that statement does not prove the books of account. If the learned Judge were satisfied with the extracts at the time and had decided to exhibit the same, counsel would have promptly objected to the same being done in the absence of the originals. It must be, therefore, held that the books of account had not been produced in court and the extracts were inadmissible in evidence.

12. The High Court saw this difficulty and asked the plaintiff to produce these books of account for the court's inspection. It further appears that the learned Judges went through the original books of account and straightway relying on them held that the whole of the earnest money must have been received by defendant No. 1. Strong objection is taken by learned Counsel for the appellant to the manner in which an important point has been disposed of. In fact this was letting in fresh evidence without giving the parties an opportunity to cross-examine the witness with regard to the books of account or the truthfulness of the entries. We agree that the High Court was not justified in looking into the books of account which had not been put in as evidence in the trial court. The High Court has suggested that the appellant had a duty to call the books of account for inspection in the trial court. One really does not see the point of this. The plaintiff was proving his case both with regard to the execution of the document and the money he had paid under it. Apart from his own word there

was no other evidence except the evidence of books of account. These books of account ought to have been produced by him to corroborate his own oral evidence. If he does not produce the books of account, the other side was under no obligation to call on the plaintiff to produce them for their inspection. Indeed, if the plaintiff had given intimation that he was going to rely on his books of account and had offered to give inspection of the same to the other side that would have been a different matter. We must, therefore, proceed in this case on the footing that the books of account had not been proved in the trial court and the High Court was not justified in looking into these books and deciding about their correctness without giving an opportunity to the other side to challenge them by the cross-examination of the plaintiff. As we have already shown, the plaintiff's oral evidence is not trustworthy and it is not possible to believe that he had paid Rs. 30,000/-under this document.

13. Plaintiff's claim to have a prior charge over defendant No. 6 arises from the claim that this agreement to sell (Ext. 49) is a genuine document. We have pointed out serious deficiencies in the evidence of the plaintiff which go to show that there must not have been a genuine transaction for sale of property. It appears from the judgment of the High Court that on inspection of the books of account it was possible to discover that these were loan transactions and that actual deductions by way of interest had been made before payment We cannot take notice of what the learned Judges found on going through the account books because they were not evidence. But even otherwise, if that finding is correct, we do not see how the document against which these loans had been made can be described as a genuine document to sell immovable property. We are not concerned to decide whether Ext. 49 embodied a loan transaction. In our opinion, the transaction was not an agreement to sell immovable property; which alone would have attracted" the statutory charge under Section 55(6)(b) of the Transfer of Property Act. And if the plaintiff does not get a charge over the property, it should follow that there is no prior charge against defendant No. 6.

14. The appeal must therefore succeed. The finding of the High Court that the plaintiff is entitled to priority in respect of the charge as against defendant No. 6 is set aside. The decree of the High Court will be modified accordingly. The appellant to get his costs from respondent No. 1 throughout.