Pandit Chunchun Jha

Vs

Sheikh Ebadat Ali and Another

Civil Appeal No. 98 of 1953

(B.K. Mukherjea, Vivian Bose, Ghulam Hasan, T.L. Venkatarama Ayyar JJ)

14.04.1954

JUDGMENT

BOSE J. -

This is a plaintiff's appeal in a suit for redemption of what the plaintiff calls a mortgage dated 15th April, 1930. The only question for determination is whether this is a mortgage by conditional sale or a sale out and out with a condition of repurchase. If the former the plaintiff succeeds. If the latter he is out of Court.

The property covered by the disputed deed belonged to one Bijai Tanti who died leaving a widow Mst. Phaguni and two sons Siban Tanti and Chander Tanti. On 25th May, 1922, Siban Tanti alone executed a simple mortgage in favour of the second defendant for Rs. 25. Then on 6th May, 1927, Siban Tanti, Chander Tanti and Mst. Phaguni mortgaged the same property to the first defendant for Rs. 250. This was also a simple mortgage. After this came the transaction in suit dated 15th April, 1930. The same three persons executed the disputed deed. This was in favour of the first defendant. The consideration mentioned in the deed is Rs. 634-10-0 due on the second mortgage and Rs. 65-6-0 taken in cash to enable the executants to meet the expenses of certain commutation proceedings under section 40 of the Bihar Tenancy Act in respect of this very land.

The second defendant sued on his mortgage of 1922 but did not join the subsequent mortgagee, the first defendant. He obtained a decree against the mortgagors alone and executed it in 1940. He himself purchased the property in dispute and took possession on 20th March, 1943. Shortly after, on 19th August, 1943, he sold this land to the plaintiff for Rs. 400.

The plaintiff's title is derived from the second defendant who stepped into the shoes of the mortgagors because of his suit against the mortgagors in 1940. The plaintiff's case is that the transaction of 15th April, 1930, is a mortgage and, as the subsequent mortgagee was not joined as a party to the earlier suit, the plaintiff is entitled to redeem. The first defendant's case is that the transaction of 15th April, 1930, was no a mortgage but an out and out sale with a covenant for repurchase which became infructuous because no attempt was made to act on the covenant within the time specified. The learned trial Judge and the lower appellate Court both held that the document was a mortgage and so decreed the plaintiff's claim. The High Court on second appeal reversed these findings and held it was a sale. Consequently the learned Judges dismissed the plaintiff's suit. The plaintiff appeals here.

The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There

are numerous decision on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain.

The first is that the intention of the parties is the determining factor : see Balkrishen Das v. Legge (27 I.A. 58) . But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine that was intended. As Lord Cranworth said in Alderson v. White (44 E.R. 924 at 928) :

> "The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase..... In every such case the question is, what, upon a fair construction, is the meaning of the instruments ?"

Their Lordships of the Privy Council applied this rule to India in Bhagwan Sahai v. Bhagwan Din (17 I.A. 98 at 102) and in Jhanda Singh v. Wahid-ud-din (43 I.A. 284 at 293).

The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction.

Because of the welter of confusion caused by a multitude of conflicting decisions the Legislature stepped in and amended section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage.

The document with which we are concerned, Exhibit A, is the following terms and our first duty is to construe the language used and see whether it is ambiguous. (We have paragraphed the document for convenience of construction and have omitted unnecessary words).

(1) "Rs. 634 principal with interest under a registered rehan bond" (simple mortgage) "dated the 6th May, 1927, is justly due..... by us the executants. Now we further require Rs. 65-6-0 more to meet costs of the suit under section 40." (Bihar Tenancy Act.)

(2) "and at present there is no other way in view rather it seems impossible and difficult to arrange for the money without selling, the property let out in rehan" (simple mortgage) "under the above mentioned bond."

(3) "Therefore, we the executants..... declare..... that we..... sold and vended the properties detailed below on condition (given below) for a fair and just price of S. 700....."

(4) "That we set off Rs. 634-10-0 against the consideration money" (torn) "payable under the aforesaid bond in favour of the said vendee and received Rs. 65-6-0 in cash from the said vendee. In this way the entire consideration money was realised from the said vendee."

(5) "and we put the said vendee in possession and occupation of the vended property detailed below and made him an absolute proprietor in our places."

(6) "If we, the executants, shall repay the consideration money to the said vendee within two years..... the property vended under this deed of conditional sale attached shall come in exclusive possession and occupation of us, the executants."

(7) "If we do not pay the same, the said vendee shall remain in possession and occupation thereof, generation after generation, and he shall appropriate the produce thereof."

(8) "We, the executants, neither have nor shall have any objection whatsoever in respect of the vended property and the consideration money. Perchance if we do so if shall be deemed null and void in Court."

(9) "and we declare also that the vended property is flawless in every way and that if in future any kind of defect whatsoever be found on account of which the said vendee be dispossessed of a portion or the entire property vended under this deed of conditional sale and will have to pay the loss or damage, in that event we, the executants,

(a) shall be liable to be prosecuted under the criminal procedure, and

(b) we shall pay the entire consideration money together with loss and damage and interest at the rate of Rs. 2 per mensem per hundred rupees from the date of the execution of this deed till the date of realisation from our person and other properties.

(c) and we shall not claim the produce of the vended property for the period of vendee's possession against the said vendee or his heirs and representatives."

(10) "Therefore we, the executants..... have executed this deed of conditional sale so that it may be of use in future."

In our opinion, this language is not free from difficulty and is ambiguous. The deed purports to be a sale and has the outward form of one but at the same time it calls itself a "conditional sale." It has, however, no clause for retransfer and instead says (clause 6) that if the executants pay the money within two years, the property "shall come in exclusive possession and occupation of us, the executants." That is clear about the possession but is silent about the title. In the context we can only take these words to mean that if there is payment within the specified time, then the title will continue to reside in the executants; for what else can a right of exclusive possession import in these circumstances ?

It is relevant to note in passing that this silence about title would be proper in a mortgage, for there the owner's title remains in him all the while and so a reconveyance is unnecessary. But if there is an out and out sale the title could not revert to the original owner without a proper reconveyance. Clause (7) appears to underline this because it couples the transferee's right to remain in possession and occupation and to appropriate the produce "generation after generation" with the non-payment of the money within the time set out. It is true the words of conveyance in the earlier part of the deed (clause 5) would pass an absolute title if they stood alone but the document must be read as a whole and it must also be remembered that it was executed by ignorant rustics and scribed by a man whose knowledge of conveyancing was, on the face of it, rudimentary and defective. The deed lacks the precision of a practised hand and that probably accounts for its ambiguities : that there is ambiguity is patent from what we have said.

The next step is to see whether the document is covered by section 58(c) of the Transfer of Property Act, for, if it is not, then it cannot be a mortgage by conditional sale. The first point there is to see whether there is an "ostensible sale." That means a transaction which takes the outward from of a sale, for the essence of a mortgage by conditional sale is that though in substance it is a mortgage it is couched in the form of a sale with certain conditions attached. The executants clearly purported to sell the property in clause (5) because they say so, therefore, if the transaction is not in substance a mortgage, it is unquestionably a sale : an actual sale and not merely an ostensible one. But if it is a mortgage, then the condition about an "ostensible sale" is fulfilled.

We next turn to the conditions. The ones relevant to the present purpose are contained in clauses (6) and (7). Both are ambiguous, but we have already said that on a fair construction clause (6) means that if the money is paid within the two years then the possession will revert to the executants with the result that the title which is already in them will continue to reside there. The necessary consequence of that is that the ostensible sale becomes void. Similarly, clause (7), though clumsily worded, can only mean that if the money is not paid, then the sale shall become absolute. Those are not the actual words used but, in our opinion, that is a fair construction of their meaning when the document is read as a whole. If that is what they mean, as we hold they do, then the matte falls squarely within the ambit of section 58(c).

Now, as we have already said, once a transaction is embodied in one document and not two and once its terms are covered by section 58(c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion.

There are no express words here which say that this is not a mortgage but there is ambiguity, so we

must probe further. The respondents, who claim that this is a sale and not a mortgage, rely on the following circumstances. They are all culled from the deed itself.

First, they point to clause (5) which says that the transferee has been made the absolute proprietor in place of the executants. Those, they say, are the operative words and point to an out and out transfer of title. Next, they point to clause (2) where the executants say that they have no other means of raising the money they want except by selling the property. The respondents argue that the word "sale" could not have been used inadvertently because it is contrasted with a mortgage in the very same sentence. The word "mortgage" is also used in clause (1), therefore it is clear that when a mortgage is intended the word "mortgage" is used. It must follow that when the word "sale" is used a sale must have been meant. The only weakness in this argument is that when a mortgage is by conditional sale this is the form it has to take, because section 58(c) postulates that there must be an "ostensible sale" and if a sale is ostensible it must necessarily contain all the outward indicia of a real sale. The question we are considering can only arise when the word "sale" is used and, of course, a sale imports a transfer of title. The use of the words "absolute proprietor in our places" carries the matter no further because the essence of every sale is to make the vendee the absolute proprietor of what is sold. The question here is not whether the words purport to make the transferee an absolute proprietor, for of course they must under section 58(c), but whether that is done "ostensibly" and whether conditions of a certain kind are attached.

The learned counsel for the respondents next relied on the fact that clause (3) says that the price paid was a "fair and just" one and that the Courts below have found that the consideration was not inadequate. He also relies on the fact that no interest was charged, that the transferee was placed in possession of the property and was not to account for the usufruct; also on the fact that a short term, namely two years, was fixed for repayment.

But on the other side, there is the very significant fact that Rs. 64-6-0 was borrowed to enable the executants to carry on commutation proceedings under section 40 of the Bihar Tenancy Act (that is, for substitution of a cash rent instead of one in kind) in respect of this very property : (clause 1). It was admitted before us, and the lower Courts so find, that the commutation proceedings related to this very land. The learned High Court Judges discount this by saying that there is no evidence to show that the proceedings, which were started in 1929, continued after the deed. But that is a mistake apparently due to the fact that the copy of the entry in the Rent Schedule, produced before the learned Judges, inadvertently omitted the date. Mr. N. C. Chatterjee produced a certified copy of the revenue record here and that gives the missing date. From that it is clear that the proceedings continued till 18th February, 1931, that is to say, for some ten months after the deed. This, we think, is crucial. Persons who are selling their property would hardly take the trouble to borrow money in order to continue revenue proceedings which could no longer benefit them and could only enure for the good of their transferees.

There is another point in favour of the appellant, and that is that the surrounding circumstances show that there was a relationship of debtor and creditor between the parties existing at the date of the suit transaction. The bulk of the consideration went in satisfaction of the mortgage of 6th May, 1927. In those circumstances, seeing that the deed takes the form of a mortgage by conditional sale under section 58(c) of the Transfer of Property Act, it is legitimate to infer, in the absence of clear indications to the contrary, that the relationship of debtor and creditor was intended to continue.

The point made on behalf of the respondents about the adequacy of the consideration and the absence of interest can be explained. The transferee was to take possession of the property and

would thus get the produce and it is evident to us from the tenor of the document that he was not to be accountable for it. We say this because the indemnity clause (clause 9) says in sub-clause (b) that in the even of the transferee's possession being disturbed the executants would among other things, pay him, in addition to damages, the entire consideration together with interest at 2 per cent. per month from the date of the deed and would not require the transferee to account for the usufruct. It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustics with whom he was dealing and that he would not have agreed to account for the profits : indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt and the value of the property as is ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under section 58(c) of the Transfer of Property Act.

The appeal is allowed. The decree of the High Court is set aside and that of the lower appellate Court is restored except as to costs.

The original owners of the property have lost it. The value of the property was put at over Rs. 10,000 in the special leave petition. The second defendant ousted the original owners by getting a mortgage decree for Rs. 130 in his favour on a mortgage of only Rs. 25 and purchasing it at the auction himself. He is no longer in the picture as he sold it to the plaintiff for Rs. 400. The plaintiff has accordingly obtained property which on his own showing is worth more than Rs. 10,000 for only Rs. 400. The first defendant spent only Rs. 250 plus Rs. 65-6-0 on it : Rs. 315-6-0 and the consideration of the disputed deed is only Rs. 700. It is evident that both asides are speculators. In the circumstances we direct that each party bear its own costs.

Appeal allowed.

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