

K. Simrathmull

Vs

S. Nanjalingiah Gowder

Civil Appeal No. 8 of 1960

(S. K. Das, M. Hidayatullah, J. C. Shah JJ)

28.02.1962

JUDGMENT

SHAH, J. -

This is an appeal with special leave against the judgment of the High Court of Madras.

On February 18, 1948, S. Nanjalingiah Gowder - hereinafter referred to as the plaintiff - borrowed Rs. 1,500/- from K. Simrathmull - hereinafter called the defendant. On February 19, 1948 the plaintiff executed a sale deed conveying to the defendant certain land at Ootacamund together with a house standing thereon and belonging to him Rs. 700/-. Two other documents were executed on the same day : (1) a deed of reconveyance (Ext. A-1) (counterpart of the sale deed) in favour of the plaintiff which contained the following covenant :

"If you pay the sum of Rs. 1500/- within a period of two years I shall at your cost and your responsibility execute a sale in respect of the under-mentioned land and house. You shall pay the assessment for the house and the municipal tax, you shall if there is any arrears of rent pay the same, prior to the sale, as per the rental deed executed by you and your father. If there is arrears of rent for six months, the aforesaid counterpart deed shall become cancelled."

and (2) a Rent Note by the plaintiff and his father Bora Gowder in favour of the defendant agreeing to pay rent @ Rs. 26/4/- per mensem for occupation of the house and the land.

Rent accruing due was not paid regularly by the plaintiff and his father, and by April 1949 it was in arrears for seven months. The plaintiff sent Rs. 52/8/- by postal money order being rent for two months, on April 20, 1949, but it was not accepted by the defendant. The plaintiff then filed on November 7, 1949 a suit in the Court of the Subordinate Judge, Ootacamund for specific performance of the agreement of reconveyance contained in the deed Ext. A-1. The suit was dismissed, for, in the view of the trial Court, the conditions incorporated in Ext. A-1, had not been strictly complied with, and the agreement stood cancelled. The decree of the trial Court was affirmed in appeal. But in second appeal the High Court of Madras reversed the decree and ordered specific performance.

The sale deed, the deed of reconveyance Ext. A-1 and the Rent Note Ext. B-1 were undoubtedly parts of the same transaction. The plea of the plaintiff that the sale deed Ext. A-1 constituted as transaction of mortgage by conditional sale is inadmissible, because the sale deed and the covenant for reconveyance are contained in separate documents. Indisputably, on the findings of the trial

Court and confirmed by the Appellate Courts, the plaintiff has not complied with the terms of the agreement for reconveyance. The plaintiff, however submitted that the court could relieve him against the forfeiture of his rights in exercise of the courts equitable jurisdiction. The defendant submitted that the covenant for reconveyance was in the nature of a concession granted by the defendant subject to certain conditions and if the conditions were not fulfilled the right could not be enforced. On this question the trial Judge with whom the First Appellate Court agreed held that the court had no jurisdiction to relieve against the extinction of the right to demand reconveyance, because the plaintiff had failed to comply strictly with the conditions of the deed. The High Court held that the equitable jurisdiction of the Court could properly be exercised in favour of the plaintiff so as to relieve him against the extinction of his right.

The plaintiff had sold his property to the defendant. There is now no dispute that though the sale deed was for Rs. 700/-, it was in satisfaction of the loan borrowed on February 18, 1948 for Rs. 1500/- that the sale deed was executed. By the deed Ext. A-1 the defendant gave plaintiff a concession : he agreed to reconvey the house, but the exercise of the right of demanding reconveyance by the plaintiff was subject to two conditions (1) that the right must be exercised within two years, and (2) that the rent payable under Ext. B-1 should not be in arrears for more than six months at any time. When the plaintiff demanded specific performance of the agreement of reconveyance, the first condition was fulfilled but the second was not. It is true that equity relieves against penalties when the intention of the penalty is to secure payment of a sum of money or attainment of some other object, and when the event upon which the penalty is made payable can be adequately compensated by payment of interest or otherwise. Thus relief is granted in equity against the penalty in a money bond, and also against penal sums made payable on breach of bonds, covenants and agreements for payment of money by instalments, or for doing or omitting to do a particular act (see Halsbury's Laws of England III Edition vol. 14 page 620 Art. 1147). The cases in *John H. Kilmer v. British Columbia Orchard Lands Ltd.* (L.R. (1913) A.C. 319.) and *Devendra Prasad Sukul and others v. Surendra Prasad Sukul and Another* ((1935) L.R. 63 I.A. 26.) are illustrations of that principle. But there is a well recognised exception to this rule which is enunciated in Halsbury's Laws of England Vol. 14 III Edition page 622 paragraph 1151, as follows : "Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms." The Federal Court in *Shanmugam Pillai and others v. Annalakshmi Ammal and others* (A.I.R. (1950) P.C. 38.) held by a majority of three to two that where under an agreement an option to a vendor is reserved for repurchasing the property sold by him the opinion is in the nature of a concession or privilege and may be exercised on strict fulfilment of the conditions on the fulfilment of which it is made exercisable. If the original vendor fails to act punctually according to the terms of the contract, the right to repurchase will be lost and cannot be specifically enforced. Refusal to enforce the terms specifically for failure to abide by the conditions does not amount to enforcement of a penalty and the Court has no power to afford relief against the forfeiture arising as a result of breach of such a condition. A majority of the Judges of the Court in that case followed the principle set out in *Davis v. Thomas* ((1930) 39 E.R. 195.). We accept the view of the majority enunciated in *Shanmugam Pillai's* case. The decree passed by the High Court must therefore be set aside and the decree passed by the trial Court restored. But the property in dispute is valuable. Even on the defendant's case it was on the date of the institution of the suit worth Rs. 15000/-. The defendant purchased it only about a year and seven months prior to the date of the institution of the suit for Rs. 1500/-. He appears to have overreached the plaintiff and taken a document of sale conveying the property when a mere loan was intended on the security of

the property. It is unfortunate, having regard to the provision of s. 58(c) of the Transfer of Property Act, that the plaintiff is debarred from proving that the transaction was in the nature of a mortgage. In the circumstances we direct that there will be no order as to costs throughout.

Appeal allowed.

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