Bhoju Mandal

Vs

Debnath Bhagat

Civil Appeal No. 204 of 1960

(Syed Jafar Imam, K. Subba Rao, J. R. Mudholkar JJ)

14.11.1962

JUDGMENT

SUBBA RAO, J. –

The only question in this appeal is whether the suit document is a mortgage by conditional sale or a sale with a condition of repurchase.

The facts that gave rise to this appeal may be briefly stated : On February 2, 1924, the appellants 1 & 2, their father late Matooki Mandal and their uncle late Lila Mandal executed a deed purporting to convey a property of the extent of 12.6 acres in favour of respondents 1 & 2 for a consideration of Rs. 2,800/- and put them in possession of the same. In 1950 the appellants instituted title suit No. 73 of 1950 in the Court of the Munsif, 1st Court, Bhagalpur, Bihar for redemption on the ground that the said document was a mortgage by conditional sale. The contesting defendants i.e., respondents 1 & 2 pleaded that the said document was not a mortgage but an out and out sale and therefore the suit for redemption was not maintainable. The Munsif and on appeal the Subordinate Judge, Bhagalpur, accepted the contention of the appellant and decreed the suit but on second appeal the High Court held that the document was a sale and on that finding the appeal was allowed and the suit was dismissed with costs throughout. The appellants by Special leave preferred the present appeal against the decree and judgment of the High Court.

The only question in this appeal is whether the said document is a mortgage or sale. As the question turns upon the construction of the provisions of the sale deed, it would be convenient to read the document as the High Court did omitting the unnecessary words :-

> "1. We, the executants, executed a registered Sudbharna bond, dated 1-3-1923, in favour of Deonath Bhagat and Raghunath Bhagat and received the entire consideration money.
>
> 2. We, the executants, are badly in need of some money in cash for repayment of debt of Sumeri Kapri and are in great need of some more money in cash for meeting the expenses of cultivation, purchasing bullocks and also for meeting the household expenses and repayment of petty debts to creditors.
>
> 3. We, the executants, cannot arrange the aforesaid money in cash without selling some property.
>
> 4. Deonath Bhagat and Raghunath Bhagat aforesaid have not up till now entered into

possession of the Sudbharna property and they are making a demand for the money and it is absolutely necessary to repay the money to the said creditors.

5. Hence on negotiation for sale of the some property with the said Bhagats by way of conditional sale the said Bhagats agreed to purchase our property and to pay money in cash for repayment of the debts of Sumeri Kapri and for meeting other expenses.

6. Hence we, the executants, have sold and vended 12.6 acres of Nakdi jot land for Rs. 2,800/- to Deonath Bhagat and Raghunath Bhagat.

7. We declare that in the month of Baisakh 1334 Fasli we shall on repayment of the said amount in full and in one lump sum to the said Bhagats, take back the vended property from the said Bhagats and that in case of failure of repayment of the consideration money of this deed of sale in full within the stipulated time, this deed of sale will remain in force and we the executants, or our heirs, shall not be competent to demand the return of the vended property.

8. Out of the consideration money of this sale deed Rs. 1,600/- due to the said Bhagats under the bond dated 1-3-1923 was paid up in full and on receipt of the remaining consideration money the dues of Sumeri Kapri amounting to Rs. 500/- was paid up and with the balance of Rs. 700/- we met the above expenses.

9. We, the executants, put the said vendees in possession of the vended property and authorise them to remain in possession thereof and appropriate the produce thereof in such manner as they like and the payment of the rent of the vended land from 1332 fasli remained the concern of the said vendees.

10. If due to a defect in the title the said vendees are dispossessed of the vended property or any portion thereof, we shall be liable to refund the consideration money of the sale deed with interest at the rate of Rs. 3/2/- per hundred rupees per month.

11. Whatever rights and interests the said vendees had under the bond dated 1-3-1923 remained intact under the sale deed.

12. Hence we have put into writing these few words by way of a deed of absolute sale conditional sale, so that it may be of use when required."

There is a clear legal distinction between the two concepts - a mortgage by conditional sale and a sale with a condition of repurchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of re-purchase. The question to which category a document belongs presents a real difficulty which can only be solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. Decided cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. Let us therefore look at the terms of the document extracted above.

The learned counsel for the appellants relied upon the following circumstances :-

1. The consideration of the document went mainly in the discharge of a registered sudbharna bond dated March 1, 1923, given in favour of the respondents 1 & 2. It indicates that relationship of creditor and debtor was continued under the document.

2. There are no words of conveyance in the document.

3. There are no words of re-conveyance after the stipulated date.

4. There is a term that if there was a defect in the title and the vendees were dispossessed the executants would be liable to the refund of the consideration with interest with a charge on the property covered by the document.

The term creating a charge on the property transferred it is said indicates that the executants continued to be the owners of the land despite the document.

5. The executants took upon themselves the liability of the entire rent for 1331 fasli though the document was executed in the Magh of 1331 fasli. The fact that the executants continued to be liable to pay for a period after the execution of the sale deed, it is suggested indicates that the document was not an out and out sale but one in which the appellants continued to have an interest in the land.

6. In the execution portion of the document it is described as 'tamashuk sarti kebala' and the appellants' counsel says that the said expression means mortgage any conditional sale.

If there was any ambiguity in the rest of the document the argument proceeds that the parties clearly expressed their intention by so describing the nature of the document.

It is not accurate to say that the suit document was executed only to discharge the mortgage bond dated March 1, 1923. The document itself narrates that the executants were badly in need of money not only for repaying the debt under the said bond but also for repaying the debts of one Sumeri Kapri and for meeting the expenses in connection with cultivation, purchase of bullocks and household. It is, therefore, not a document executed in renewal of an earlier mortgage bond but was brought into existence to meet the pressing demands on the appellants. It is also not correct that the document does not contain words of conveyance or re-conveyance. The document says in express terms that the property 'was sold and vended', which are certainly words of conveyance, and that after the prescribed period and after the amount was paid the appellants would 'take back the vended property' from the respondents' which are again words of reconveyance. Though the words of 'conveyance' and 'reconveyance' are not expressed in phraseology found in documents prepared by trained draftsmen, they are expressed in words usually adopted by village document writers. The taking over of the liability to pay the rent by the executants for a short period subsequent to the execution of the document may be due to the fact that the rent had become due before the execution of the document or for some other circumstance which is not clear from the document. This is at best a neutral circumstance. The fact that in case of any defect in title the vendees were dispossessed, the consideration amount with interest was charged on the property is nothing more than an indication of the intention to keep alive the mortgage's rights under the earlier document. The said clause only makes explicit what the respondents would be entitled to in law. The translation of the words 'tamashuk sarti kebala' as mortgage by conditional sale does not appear to be correct. The learned Subordinate Judge observes that if those words were literally translated, they

would mean 'a bond by way of conditional sale'. If that was the meaning the said expression would be consistent both with a mortgage by conditional sale as well as a sale with a right of re-purchase. In law Lexicon, P. Ramanatha Iyer gives the following meanings to the word 'kebala'; 'Any deed of conveyance or transfer of right or property, any contract of bargain or sale, a bond, a bill sale, title-deeds, and the like'. Even accepting the widest meaning given to that word, the expression can only mean a bond or a contract by way of conditional sale. So translated the expression is consistent with a mortgage, as well as with a sale and therefore that is a neutral circumstance. On the other hand the executant describes the transaction as a sale and respondents as vendees. The amount paid is described as consideration for the sale. Usual covenant of title is given and there is a provision of re-conveyance in case of payment of the prescribed amount within the time agreed upon. No doubt these recitals would be found in a document which purports to be an ostensible sale and they do not in themselves are decisive of the question raised but there is one factor which dispels any doubt in regard to the construction of the document. The total area of the land mortgage in the year 1923 was 13.17 acres and the amount advanced thereunder was Rs. 1,600/-. Only one year thereafter out of the said extent 12.6 acres was transferred by the document in question for a sum of Rs. 2,800/-, that is if the contention of the appellant was correct, a smaller extent of land was mortgaged for higher amount. It is improbable that a mortgagee would advance an additional amount and take a mortgage of a smaller extent in discharge of an earlier mortgage whereunder a larger extent of land was given as security. Unless there are extraordinary reasons for this conduct, this would be a clinching circumstance in favour of holding that a document was a sale. The learned counsel for the appellant realizing the importance of this circumstance attempted to explain it away by a suggestion that under the earlier document the respondents were not put in possession of the land and that the reduction of the extent of the mortgaged property under the subsequent document was due to the fact that they secured possession of the lands mortgaged thereunder. This was not put either to the witnesses or suggested in any of the three courts below. We cannot therefore accept this argument advanced for the first time before us, for there may have been many explanations for the respondents in respect of this suggestion. What is more, it is not disputed that the sum of Rs. 2,800/- represents the real value of the land sold to the respondents and it is highly improbable to say the least that a person would advance the amount equivalent to the value of the land mortgaged without keeping a reasonable margin for realizing his amount. This is sought to be explained by throwing a suggestion that as the respondents were put in possession, they would be getting the interest and therefore there was no chance of the debt exceeding the value of the property. Even so a mortgagee in lending monies would insist upon a reasonable margin in the value of the property to provide against the possible contingency of the properties going down in value and the amount due to him swelling by the addition of cost, damages etc., in the event of his filing a suit to recover the same. In our view whatever ambiguity there may be in the document, the fact that only a portion of the land already mortgaged was sold for a proper and adequate consideration is a circumstance which stamps the document as an out and out sale.

Reliance is placed by the learned counsel for the appellants on a judgment of this court in 'Pandit Chunchun Jha v. Sheikh Ebadat Ali' ([1955] 1 S.C.R. 174.). It may be stated at the outset that for ascertaining the intention of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other. It is true that some of the terms of the document in that case may be approximated to some of the terms in the present document but the judgment of this Court really turned upon a crucial circumstance. There is one important recital found in the document in that case which does not appear in the document in question and there is another important recital found here which is not present there. There the document under scrutiny was executed on April 15, 1930.

Before the execution of the document the executants initiated commutation proceedings under s. 40 of the Bihar Tenancy Act. Those proceedings continued till February 18, 1931 i.e., for some ten months after the deed. The executants borrowed Rs. 65/6/- to enable them to carry on the commutation proceedings even after they executed the document. Bose, J., speaking for the court adverting to the said circumstance observed at page 183 : "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 ensure for the good of their transferees." It is, therefore, obvious that this circumstance clinched the case in favour of the executants. The crucial circumstance in the present case, namely that a smaller extent was sold for a higher amount in discharge of an earlier mortgage of a larger extent for a smaller amount was not present in that case. The said crucial circumstances make the two cases entirely dissimilar and therefore the said judgment of this court is not of any help in construing the document in question. On a consideration of the cumulative effect of the terms of the document in the context of the surrounding circumstances we hold that the document in question is not a mortgage but a sale with the condition of repurchase. The conclusion arrived at by the High Court is correct.

The appeal fails and as the advocate for the respondent is not present in Court it is dismissed without costs.

Appeal dismissed.

</html