

UPREME COURT OF INDIA

Vishwanath Dadoba Karale

Vs.

Prisa Shantappa Upadhye

C.A.No.1958 of 2008

(S.B.Sinha and V.S.Sirpurkar,JJ.)

13.03.2008

JUDGMENT

S.B. Sinha, J.

(Arising out of SLP (C) No. 18127 of 2006)

1. Leave granted.

2. Parisa Shantappa Upadhye, the predecessor in interest of the respondent, was the owner of the land. He entered into a transaction with the appellant herein on or about 7.10.1969. The deed was titled as Conditional Sale Deed of immovable property. The land, in question, was situating in the town of Kolhapur in a market area. A shed was constructed thereupon. The relevant terms of the said document evidencing the transaction in question are as under:-

"2.The property described above is sold by me for a period of five years and you are put into possession thereof. Consideration of Rs. 500/- for the said sale is paid by you to me and I have received the same and there is no grievance with respect to the said receipt."

3. You are entitled to enjoy the possession of the said property till the said period and get the property transferred in your name and pay the municipal assessment with respect thereto.

4. In case the above said amount of Rs. 500/- is repaid to you by the end of the above said period or prior thereto, you will accept the same and restore the said property in my possession and execute the sale deed in my favour as per the agreement between us.

5. At the end of the period mentioned hereinabove or also before the expiry of the said period at any time if we return the sale deed amount of Rs. 500/-, after accepting the said amount you have to return the possession in our favour and to execute sale deed in our favour. This is agreed between us."

“2. The plaintiff/respondent offered to return the said amount of Rs. 500/- to the appellant/defendant. It was not accepted on the premise that he had acquired an absolute title thereto. A suit for redemption of mortgage was filed on or about 24.2.1981. The issue which arose for consideration before the courts below was as to whether the transaction in question contemplated conditional sale with an option to purchase or it was a conditional mortgage.

3. The High Court by reason of the impugned judgment upon construction of the said deed dated 7.10.1969 (Exhibit 40) opined that the transaction constituted a mortgage and not an out and out sale. Notice was taken of the fact that only one document was executed.

4. Mr. Shivaji M. Jadhav, learned counsel appearing on behalf of the appellant would submit that the High Court committed a serious error in passing the impugned judgment insofar as it failed to take into consideration the concurrent finding of both the learned Trial Judge as also the first appellate court that the transaction was that of a sale and not a mortgage. The High Court, it was urged, committed a serious error in re-appreciating the evidence in a second appeal.

5. Mr. Vinay Navare, the learned counsel appearing on behalf of the respondent, on the other hand, would support the judgment contending that not only that a sale for a fixed period is not envisaged under the Transfer of Property Act, the amount of loan could have been returned even before the expiry of a period of five years.”

6. An answer to the question as to whether the transaction is a sale or a mortgage not only would depend upon the language used in the deed, but also the circumstances attending thereto. The plaintiff in his deposition categorically stated that his father had taken by way of a loan a sum of Rs. 500/- from the appellants.

7. There are also evidences on record to show that the market price of the land was higher than Rs. 500/- at the relevant point of time.

8. When an absolute transfer of property is made, it cannot be limited to a period. The transaction shows that the appellant was to have title in the property for a period of five years. Appellant was to remain in possession thereof only for the said period. Plaintiff/respondent was entitled to tender the said amount of Rs. 500/- not only at the expiry of the said period but even prior thereto. On tender of such document, the appellant was required to execute a deed of reconveyance in favour of the plaintiff/respondent.

9. Such a transaction, in our opinion cannot be construed to be a transaction of sale. It was a mortgage as has rightly been held by the High Court. A suit for redemption of mortgage, therefore was maintainable. A suit for redemption is essentially a suit for recovery of possession. Section 58(c) of the Transfer of Property Act, 1882 reads as under:-

"58 "Mortgage", "mortgagor", "mortgagee",

"mortgage-money" and "mortgage-deed" defined.

(a) **** **** ****

(b) **** **** **** **** ****

(c) Mortgage by conditional sale Where, the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

10. In this case, the terms of the sale and condition of repurchase were recorded in one document. The question came up for consideration in *P.L. Bapuswami Vs. N. Pattay Gounder*¹ where this Court laid down the law in the following terms;

".. In the first place, there is the important circumstance that the condition for repurchase is embodied in the same document. In the second place, there is the significant fact that the consideration for Ex. B-1 was Rs. 4,000/-, while the real value of the property was, according to the Munsif and the Subordinate Judge, Rs. 8,000/-. The high Court has dealt with this question and reached the finding that the value of the property was Rs. 5,500/-, but it is submitted by Mr. Ganapathi Iyer on behalf of the appellant that the question of valuation was the question in the second appeal. The criticism of learned Counsel for the appellant is justified and we must proceed on the basis that the valuation of the property was Rs. 8,000/- and since the consideration for Ex. B-1 was only Rs. 4,000/- it was a strong circumstance suggesting that the transaction was a mortgage and not an out right sale. In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Ex. B-1 by Palani Moopan. It appears that defendant no. 1 did not apply for the transfer of patta and the patta admittedly continued in the name of Palani Moopan even after the execution of Ex. B-1. Exhibits A-6 and A-7 are certified copies of thandal extract of patta for the years 1945-54 and they prove this fact. These exhibits also show that the plaintiff had obtained patta for the land on the basis of Ex. A-2. The registered deed of transfer of patta was executed by the sons of Palani Moopan in favour of the plaintiff. There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000/-, the same amount as the consideration for Ex. B-1. Having regard to the language of the document, Ex. B-1 and examining it in the light of these circumstances we are of the opinion that the transaction under Ex. B-1 was

mortgage by conditional sale and the view taken by the High Court with regard to the legal effect of the transaction must be reversed.."

11. This Court in *Bishwanath Prasad Singh Vs. Rajendra Prasad and Another*² noticing *Pandit Chunchun Jha Vs. Sk. Ebadat Ali*³ and several other decisions, opined that although the deed was termed as "vaibulwafa", but therein the transfer was complete and not partial. However, in *Tulsi and Others Vs. Chandrika Prasad and Others*⁴ distinguishing *Bishwanath Prasad Singh* (supra), it was held;

"14. Before we consider the stipulations contained in the deed dated 30-12-1968, it may be noticed that in terms of Section 58(c) of the Transfer of Property Act, a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must contain a condition that on default of payment of mortgage money on a certain date, the sale shall become absolute or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller.

15. A distinction exists between a mortgage by way of conditional sale and a sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby.

16. The proviso appended to Section 58(c) of the Transfer of Property Act was added by Act 20 of 1929 for resolution of the conflict in decisions on the question whether the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed.

17. The transaction in this case has been evidenced by one document. Section 58(c) of the Transfer of Property Act will, therefore, apply."

Recently in *Manjabai Krishna Patil (D) by LRs. Vs. Raghunath Revaji Patil & Anr*⁵. it was held;

"12. Proviso appended to Section 58(c) is clear and unambiguous. A legal fiction is created thereby that the transaction shall not be held to be a mortgage by conditional sale, unless a condition is embodied in the document which effects or purports to effect the sale. Were two documents are executed, the transaction in question would not amount to a mortgage by way of conditional sale. In a case of this nature, ordinarily the same would be considered to be a deed of sale coupled with an agreement of reconveyance."

In the facts of that case, however, it was held that no relationship of debtor and creditor came in existence and no security was created and in fact conveyance of the title of the property by the respondent to the appellant was final and absolute.

12. Strong reliance, however, has been placed by Mr. Jadhav on *Tamboli Ramanlal Motilal (Dead) by Lrs. Vs. Ghanchi Chimanlal Keshavlal (Dead) by Lrs. and Another*⁶. The said decision cannot be said to have any application in the instant case. Therein an absolute title was conveyed. It was in the aforementioned fact situation, this Court held;

"21. The last important clause is after the period of five years the transferee will have a right to get the municipal record mutated in his name and pay tax. Thereafter, the transferee will have an absolute right to mortgage, sell, or gift the suit property. Neither executants nor any one else could dispute the title. All the above clauses are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. Ex. 39 was pressed into service. But we do not think much assistance can be derived by the appellant. That only shows there were dealings between the parties. Further, it also contains account relating to betel leaves. That has nothing to do with the suit transaction."

Therein also this Court observed;

"16. ...Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just observed, that it not conclusive of the matter." Having regard to the terms of the transaction, we are of the opinion that the High Court was correct in its opinion that the transaction evidenced a mortgage and not a sale.

13. For the reasons aforementioned, there is no merit in this appeal which is dismissed with costs. Counsel's fee assessed at Rs. 10,000/-.

Judgment Referred.

¹(1966) 2 SCR 0918

²(2006) 4 SCC 0432

³(1955) 1 SCR 0174

⁴(2006) 8 SCC 0322

⁵(2007) 3 SCALE 0331

⁶(1993) Supp. 1 SCC 0295