SUPREME COURT OF INDIA

C. Cheriathan

Vs.

P. Narayanan Embranthiri

C.A.No.7400 of 2008

(S.B. Sinha and Cyriac Joseph JJ.)

18.12.2008

JUDGM ENT

S.B. Sinha, J.

1. Leave granted.

2. Interpretation of a deed dated 27.10.1969 as to whether the same is one of absolute conveyance with a condition of repurchase or a mortgage with conditional sale, is the question involved in this appeal which arises out of a judgment and order dated 1.11.2006 passed by the High Court of Kerala in Second Appeal No.290 of 2003 setting aside a judgment and decree dated 28.11.1988 passed by the Munsif's Court, Manjeri in Original Suit No.458 of 1984.

3. Respondent herein was owner of the land in question. He took the said land on lease with one Cheriathan jointly from one Gopalan Nair by reason of a deed of conveyance dated 21.12.1967. They made improvements. They constructed buildings thereupon. Half of the said leasehold rights was sought to be conveyed in favour of the appellant by reason of the said deed. Indisputably, the first respondent executed a deed of assignment in favour of the V. Devaki Amma in respect of his half share for a consideration to repurchase the same by a document dated 27.10.1969. She, by a deed of assignment dated 2.3.1976, transferred her right, title and interest being half of the property to the appellant and, thus, according to him, he became the full owner thereof.

> "Indisputably again, the appellant was granted a purchase certificate under the Kerala Land Reforms Act in respect of the entire property in the year 1978. First Respondent did not take any step to set aside the said certificate for a long time. Only in the year 1984, he filed a suit for redemption of mortgage and partition in respect of his half share in the property alleging that the said deed dated 27.10.1969 represented only a loan transaction. Appellant herein, however, took the usual stand that the said deed is in effect and substance a deed of sale with a condition to repurchase.

In view of the pleadings of the parties, several issues were framed; issue No.4 being :

"4. Whether the transaction involved in document No.276/1970 is a mortgage?"

3. On construction of the document in question, the learned Trial Judge opined that the transaction represented a sale. On an appeal having been preferred thereagainst by the respondent, the First Appellate Court held that the transaction was a mortgage by conditional sale and as the respondent did not exercise his option to repurchase the property within a period of three years, the said sale has become absolute.

Respondent filed a second appeal before the High Court which by reason of the impugned judgment has been allowed interpreting the said document to be a deed of mortgage and consequently holding that the suit for partition and redemption was maintainable."

4. Mr. Krishnamoorthy, learned senior counsel appearing on behalf of the appellant, would submit that the High Court committed a serious error in passing the impugned judgment in so far as it failed to construe the provisions of Section 58 of the Transfer of Property Act in its proper perspective. It was urged that apart from the fact that the value of the property could not have been assessed at Rs.6,800/-, the High Court ignored that only half share thereof was transferred. It furthermore failed to take into consideration that no evidence had been brought on record to establish the relationship of creditor and borrower between the parties. Possession having been delivered, permission to attorn having been given and no interest having been stipulated, it was submitted, the High Court should have construed the document to be one of absolute sale with a condition of repurchase.

5. Learned counsel appearing on behalf of the respondent No.1, on the other hand, would contend that as appellant did not prefer any appeal against the judgment and order passed by the First Appellate Court, the contentions raised before us should not be permitted to be raised. For the said purpose, it was contended, even the provisions of Order 41 Rule 33 of the Code of Civil Procedure would not be applicable.

6. Before embarking upon the rival contentions raised before us, we may notice the relevant portions of the deed in question which are (as translated by the parties) as under :

"The scheduled property was outstanding (sic) on lease with Gopalan Nair from whom by Document No.2034 of 1967 myself and Cheriyathan jointly got an assignment of lease hold right and are enjoying the same by effecting improvements and buildings and I humbly (sic) conditionally assign my one half right over the property with possession and with the improvements thereon with a stipulation that within a period of 3 years from today, I shall repurchase the same at my expense. I have received the sale consideration of Rs.2,000/- in cash from you and I hereby relinquish all my = right over the scheduled property and hence by this assignment from today till the period is over you are entitled to enjoy the schedule property as a sale by efflux of time and thereafter as an absolute sale. You will be entitled to

directly attorn to the landlord by paying rent and hereafter I will have no right to deal with the property in any manner. Original sale deed is not handed over as it is a joint document and I hereby assure you that there are no encumbrances created in respect of my half share."

7. Whether a document is a mortgage by conditional sale or a sale with a condition of repurchase is a vexed question.

"Section 58(c) of the *Transfer of Property Act, 1882* reads thus:

"Section 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 a 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."

8. One of the ingredients for determining the true nature of transaction, therefore, is that the condition of repurchase should be embodied in the document which effects or purports to effect the sale. Indisputably, the said condition is satisfied in the present case.

9. A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefor circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety. [See *P.S. Ramakrishna Reddy v. M.K. Bhagyalakshmi & Anr.*[1].

10. In *State Bank of India & Anr. v. Mula Sahakari Sakhar Karkhana Ltd.*[2] it was held :

"22. A document, as is well known, must primarily be construed on the basis of the terms and conditions contained therein. It is also trite that while construing a document the court shall not supply any words which the author thereof did not use."

11. The deed in question is said to be a deed of sale. The source of title has been disclosed. What was sought to be conveyed thereby was the leasehold interest. Assignment was in respect of the vendor's one half share in the property. Possession of the properties had been handed over. A stipulation was made therein that the vendor shall repurchase the same at his expenses within a period of three years from the date of execution thereof. He acknowledged receipt of sale consideration of Rs.2,000/- in cash. The vendor relinquished all his right over the scheduled property. However, the nature of assignment was sought to be clarified as the words "till the period is over" and "efflux of time and thereafter as an absolute sale" are used.

> "It is significant that thereby the vendee in terms of the said instrument became entitled to attorn to the landlord by paying stipulated rent evidently as a tenant and not as a mortgagee. The vendor accepted that he would have no right to deal with the property in any manner. The reason why the original deed of sale had not been handed over was also explained. Declaration has been made that no encumbrances had been created in respect of the vendor's share in the property."

12. The High Court in its judgment proceeded on the basis that the value of the property was Rs.6,800/- and, thus, consideration of Rs.2,000/- ex facie was insufficient. What was not noticed was that by reason of the said deed only half of the right of the vendor was sought to be assigned. It is also not in dispute that the appellant had already acquired the right, title and interest in respect of the other half of the property. As the word `repurchase' has been used, the respondent was aware that he has to repurchase the transferred property. What would be the consideration for repurchase has not been stated. Ordinarily, in a case where deed of mortgage is executed with a condition of repurchase, the amount of consideration remains the same.

> "We would, however, assume that the intention of the parties was that amount of consideration would remain the same. The time for repurchase, however, has been specified, namely, three years. No evidence has been brought on record to show that any relationship of creditor and borrower had come into being. As indicated hereinbefore, appellant had been permitted to attorn to the landlord."

13. So as to enable us to determine the vexed question, it may be profitable to notice a few decisions of this Court on some of which the High Court relied upon.

> "In *Seth Gangadhar v. Shankar Lal & Ors.*[3] whereupon reliance has been placed by the High Court, it was admitted that the transaction was that of a mortgage and Section 60 of the Transfer of Property Act was applicable. It is in that view of the matter, this Court held that the right of redemption could not have been taken away. The Court held that therein the term of mortgage was 85 years and there existed no stipulation entitling the mortgagor to redeem during that term which had not expired. The document in question was held by this Court to be containing a stipulation creating a clog on the equity of redemption which was found to be illegal. Such is not the case here.

In *Pomal Kanji Govindji & Ors. v. Vrajlal Karsandas Purohit & Ors.*[4] this Court held that whether a clause used in a transaction of mortgage amounted to clog on the equity of redemption is a mixed question of law and fact. In that case, there existed a provision for payment of interest at the rate of half per cent per annum payable on the principal amount at the end of the long period which led this Court to conclude that there was a clog on equity on redemption. Furthermore, in that case, materials were brought on record to show that the transaction was entered into by way of security for the loan obtained

In *Shivdev Singh & Anr. v. Sucha Singh & Anr.*[5] this Court was dealing with a case of anomalous mortgage. Therein the mortgage was to remain operative for a period of 99 years. It was in that situation, this Court opined that the original owner having been in great financial difficulty, the mortgagees took advantage of the said fact and incorporated a 99 year's term which constituted a clog on the equity of redemption.

In this case, the term is only for a period of three years which is reasonable."

14. We may notice that in *Bishwanath Prasad Singh v. Rajendra Prasad & Anr.*[6] upon taking notice of a large number of decisions, this Court observing that therein no stipulation had been made that the vendee could not transfer the property and his name was mutated, held:

"18. We have noticed hereinbefore that the nature of deed was stated to be an agreement (ekrarnama), the nature of the document was not stated to be "bai-ul-wafa", the relevant clause whereof reads as under:

"Because the vendor today of this date has sold the property of this deed to the vendee through registered agreement on the vaibulwafa condition and during this period the vendor and the vendee have already agreed that this case will remain as vaibulwafa and as per the said sarait, the vendor of this deed agrees that the vendee of this deed or his successors or heirs whenever will pay the consideration amount of this deed amount to Rs.3000 (three thousand) within 23 months from today i.e. up to the month of June 1978 after harvesting of the crops i.e. paddy or rabi, then I the vendor or my legal heirs or my successors after receiving the said consideration amount of Rs.3000 will execute the sale deed pertaining to the property mentioned in column 5 of this deed in favour of the vendee or his legal heirs or successor."

19. It is of some significance to note that therein the expressions "vendor", "vendee", "sold" and "consideration" have been used. These expressions together with the fact that the sale deed was to be executed within a period of 23 months i.e. up to June 1978, evidently the expression "vaibulwafa" as a condition was loosely used.

20. Furthermore, the agreement was also executed for a fixed period. The other terms and conditions of the said agreement (ekrarnama) also clearly go to show that the parties understood the same to be a deed of reconveyance and not mortgage or a conditional sale."

15. Bishwanath Pratap Singh, it must be placed on record, was distinguished on facts in *Tulsi & Ors. v. Chandrika Prasad & Ors.*[7] stating :

> "18. In the instant case, the scribe of the document was examined. His categorical statement was that he had been asked by the parties to scribe a deed of mortgage and not a deed of sale. Respondent 1, as noticed hereinbefore, in the document itself categorically stated that he was executing a deed of mortgage. Indisputably, the amount of stamp duty was also paid by him. In a case of deed of sale, ordinarily the transferee pays the stamp duty. Why such a deviation from the normal practice was made has not been explained by the appellant.
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> 19. We have noticed hereinbefore that the nature of the deed described that the document is ambiguous as both the terms viz. "Kewala" and "Baibulwafa", were mentioned. The transaction, however, categorically states that Appellant 1 was to maintain the property in its present condition. Of course, permission for reconstruction of the structure was granted. But, if the intention of the parties was to transfer the property absolutely, no such stipulation was required to be made at all. In a case of absolute transfer, the vendee has an absolute right to deal with his property in any manner he likes. It was clearly stipulated in the deed that in the event the executant repayed the entire consideration by 30-12-1971, the purchaser would reconvey the property and furthermore deliver possession thereof. The sale was to become absolute only when the transferee failed to pay the said amount within the stipulated period. The courts below have also taken into consideration the contemporaneous conduct of the parties in treating the transaction to be one of mortgage and not of sale. We are, therefore, of the opinion that the parties intended to enter into a transaction of mortgage and not sale."

16. In *Manjabai Krishna Patil (D) by LRs. v. Raghunath Revaji Patil & Anr.*[8] this Court opined that no relationship of debtor and creditor having come into being and no security had been created, the instrument in question was a deed of sale with a condition of repurchase.

17. Another important factor which must be borne in mind in construing the instrument in question is that appellant was already the owner in respect of half of the property. As the parties were related to each other, it is difficult to conceive that the other half of the property would be subject to mortgage and not a sale. The intention of appellant that by reason of the said transaction dated 27.10.1969, he would become the owner of the entire property was obvious.

18. Submission of the learned counsel that contentions raised before us on behalf of the appellant were not available as the finding of the learned First Appellate Court to the effect that the transaction evidenced on mortgage with conditional sale does not appeal to us. Despite arriving at the said finding, the appeal of respondent was dismissed and in that view of the matter, it was not open to appellant to prefer an independent appeal thereagainst. Order 41 Rule 22 of the Code of Civil Procedure, therefore, had no application. It is in the aforementioned situation, it was legally permissible for the appellant to support the decree

passed in his favour by attacking the finding of the First Appellant Court which were made against him. Order 41 Rule 33 of the Code of Civil Procedure, therefore, was available in this case. In *S. Nazeer Ahmed v. State Bank of Mysore & Ors.*[9], this Court held :

> "Order 41 Rule 33 enables the appellate court to pass any decree that ought to have been passed by the trial court or grant any further decree as the case may require and the power could be exercised notwithstanding that the appeal was only against a part of the decree and could even be exercised in favour of the respondents, though the respondents might not have filed any appeal or objection against what has been decreed."

19. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. In the facts and circumstances of the case, however, there shall be no order as to costs.

[1]*(2007) 10 SCC 231* [2]*(2006) 6 SCC 293* [3]*1959 SCR 509* [4]*(1989) 1 SCC 458*
[5]*(2000) 4 SCC 326* [6]*(2006) 4 SCC 432* [7]*(2006) 8 SCC 322* [8]*2007 (3) SCALE 331*
[9]*(2007 (11) SCC 75*