

SUPREME COURT OF INDIA

Raj Kishore (Dead) By Lrs.

Vs.

Prem Singh

C.A.No.7471 of 2003

(Markandey Katju and T.S. Thakur JJ.)

10.12.2010

JUDGMENT

T.S.Thakur, J.

1. This appeal by special appeal arises out of a judgment and order dated 25th February, 2003, passed by the High Court of Madhya Pradesh at Jabalpur, Gwalior Bench, whereby Second Appeal No.230 of 1995 filed by the appellants-plaintiffs was allowed but only in part and to the extent of granting a decree for injunction restraining the defendants-respondents from interfering with the possession of the appellants over the suit property till such time the said property is partitioned between them through the competent Revenue Court concerned. The facts necessary for disposal of this appeal may be briefly stated as under:

2. Late Shri Raj Kishore the predecessor-in-interest of the plaintiffs-appellants herein owned jointly with his brother defendant-respondent no.2 Shri Jugal Kishore agricultural land situate in different survey numbers of village Morasa, Tehsil Kurwai in the State of Madhya Pradesh. In terms of a sale-deed executed and registered on 6th July, 1974 by Shri Raj Kishore an extent of 14 bighas and 15 biswas of the land aforementioned from out of survey nos. 436, 439/1 and 441 was transferred to the defendant-respondent no.1 for a sum of Rs.6,000/- only. The plaintiff's case is that the transfer was only by way of security for the repayment of Rs.6,000/- which according to the plaintiff was taken only as a loan. The plaintiff's further case is that return of the loan amount by the 6th July, 1981 would result in the land in question being transferred back to the plaintiff to which effect an agreement was also executed between the parties to the transaction on the 6th July, 1974 itself. The plaintiff alleged that the possession of the land in question continued with him and defendant no.2 as agreed. It was also agreed between the parties that defendant no.1 shall not get the disputed land mutated in their name till 6th July, 1981, the date by which the plaintiff could repay the amount of loan and secure the return of their land.

3. The plaintiff further alleged that contrary to the agreement between the parties defendant no.1 got a mutation regarding the land in question attested in his favour although he had no

right to do so in view of the specific stipulation contained in the agreement between the parties forbidding any such mutation. The plaintiff asserted that they had approached defendant no.1 several times to receive back the sum of Rs.6,000/- borrowed from him and to get the land in question transferred back to them, but the said defendant had refused to do the needful. The plaintiff in that backdrop prayed for a decree for declaration to the effect that the sale-deed executed by him in favour of defendant no.1 was void and ineffective and that he continued to be in cultivating possession of the land as owner thereof.

4. Defendant-respondent no.1 contested the suit by filing a written statement in which he denied the assertion that the sale-deed in question was executed by way of security for repayment of any loan. It was also alleged that the defendant was in possession of the land in question ever since the execution of the sale-deed and that a mutation based on the sale-deed had been attested in his favour. Defendant no.1 further alleged that he had made improvements over the land and that a suit for declaration simplicitor was not maintainable as the plaintiff was out of the possession of the land in question.

5. On the pleadings of the parties the Trial Court of Civil Judge First Class, Kurwai, District Vidisha, framed as many as eight issues for determination and recorded evidence adduced by the parties before it. The Trial Court eventually held that the sale-deed in question was not executed as security for any loan as alleged by the plaintiff nor was the execution of agreement dated 6th July, 1974 proved. The Trial Court further held that defendant no.1 had not forcibly occupied the land in question during the pendency of the suit as alleged by the plaintiff.

6. Aggrieved by the dismissal of the suit the plaintiff appealed to the District Judge, Vidisha, M.P. During the pendency of the said appeal the plaintiff filed an application for permission to amend the plaint to add an alternative prayer to the effect that in case the sale-deed in favour of defendant no.1 was held to be validly executed, the plaintiff be given a decree for specific performance by execution of a sale-deed for the transfer of the suit property in his favour. This application was allowed by the Trial Court but in revision the same was set aside and the amendment application directed to be considered along with the main appeal.

7. The First Appellate Court accordingly heard the appeal and the application for amendment together and by its judgment and order dated 19th July, 1995 dismissed both. The First Appellate Court held that the prayer for amendment of the plaint to seek a decree for the transfer of the land in question in favour of the plaintiffs-appellant was time barred and that the amendment would in any case alter the nature of the suit.

8. On the merits of the case the First Appellate Court held that there was no stipulation in the sale-deed that the land transferred thereby shall be retransferred to the Vendor by executing a sale-deed in his favour. In so far as agreement (marked Ex.D1) for retransfer of the land in question to the plaintiff was concerned, the First Appellate Court held that while the execution of the agreement was proved there was no mention in the same about the sale-deed

in question being by way of security for repayment of the loan. The First Appellate Court observed:

“It is clear from the above analysis that the alleged sale deed of Ex.D-1 and agreement Ex.P-1 for which dispute has been raised and evidence adduced is actually a Sale deed. This Sale deed was not written for the security of loan. Similarly it is also clear that agreement of Ex.P-1 was written by the Defendant No.1 but writing of Sale deed Ex.D-1 for Security on the basis of this agreement is not proved and the Appellants/Plaintiffs do not have eligibility of any relief from Defendant No.1 on the basis of this agreement. Hence, the judgment and decree passed by the lower court is not erroneous.”

9. Aggrieved by the judgment aforementioned the plaintiffs-appellants filed second appeal No.230 of 1995 before the High Court of Madhya Pradesh, Gwalior Bench. The High Court held that the dismissal of the application for amendment by the First Appellate Court on the ground that the prayer sought to be incorporated by the amendment was barred by limitation was not correct. All the same the proposed amendment would make no material difference unless the plaintiff also pleaded that he was ready to perform his part of the contract so as to entitle him to any relief based on the agreement executed between the parties. The dismissal of the application was on that ground upheld.

10. On the merits of the case the High Court took the view that whenever a sale-deed was accompanied by a document for re-conveyance of the property sold the transaction between the parties would amount to a mortgage, subject to the condition that the mortgagee must get the property re- conveyed within the period stipulated for that purpose. The High Court further held that there was no cogent evidence on record to prove that defendant no.1 was in possession of the suit land on the date of the filing of the suit. Even in Ex.D-2 relied upon by the defendant, the property was recorded jointly in the names of the plaintiff and defendant no.2 in the revenue records for the year 1980-81. The High Court on that basis held that the finding of the Courts below that the property was not held jointly by the plaintiff and defendant no.2 was perverse. The appeal was accordingly allowed in part and defendant no.1 restrained from interfering with the possession of the plaintiff till such time he obtained a decree for partition from the revenue court concerned. The present appeal assails the above judgment and order of the High Court as noticed earlier. Raj Kishore the plaintiff in the suit having passed away during the pendency of this appeal, his legal representatives were brought on record on 5th November 2008.

11. We have heard learned counsel for the parties at length. As seen above, the High Court has, while dealing with the substantial question of law framed by it for determination, held that whenever conveyance of any property is accompanied by a document for re-conveyance of the same to the seller the transaction would amount to a mortgage. That proposition of law is not in our opinion correctly stated. Although the High Court has not elaborated as to what kind of mortgage an agreement for re- conveyance would bring about, it is obvious that the

High Court meant to say that the transaction would constitute a mortgage by conditional sale. Mortgage by conditional sale is described by Section 58 as under:

“58 (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.”

12. A bare reading of the above would show that for a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale. That requirement is stipulated by the proviso which admits of no exceptions.

13. The High Court it is manifest from the judgment under appeal overlooked the proviso according to which the condition regarding payment of the mortgage money as a condition for transfer of the property to the seller must be embodied in the sale-deed itself. That is not so in the instant case. The sale-deed executed by the plaintiff in the instant case does not embody any condition like the one referred to in clause (c) of Section 58 extracted above. The broad statement of law made by the High Court to the effect that every sale accompanied by an agreement for re-conveyance of the property will constitute a mortgage by conditional sale is not, therefore, correct. That is also the view taken by this Court in *K. Simrathmull v. Nanjalingiah Gowder*¹ where the plaintiff had borrowed a certain amount from the defendant and in lieu thereof executed a deed of conveyance of certain land together with the house standing thereon in favour of the defendant. Another deed of re-conveyance was executed by the defendant on the same date by which the defendant-purchaser of the property agreed to re-convey the house provided the exercise of the right of demanding re-conveyance took place within two years and rent payable by the plaintiff is not in arrears for more than six months at any time. On the breach of the second condition stipulated by the agreement for re-conveyance the defendant-purchaser refused to re-convey. In a suit for specific performance the plaintiff sought to invoke the equitable jurisdiction of the Court to give him relief against the forfeiture clause. This Court held that the sale-deed and the deed of conveyance and rent were no doubt parts of the same transaction yet the transaction did not constitute a mortgage by conditional sale. This Court observed:

“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 a transaction of mortgage by conditional sale is inadmissible, because the sale deed and the covenant for reconveyance are contained in separate documents.”

14. The finding of the High Court as to the legal effect of the transaction of sale followed by an agreement for re- transfer of the property is not, therefore, legally sound.

15. Mr. Jain learned counsel for the appellants all the same argued that the transaction in question was in the nature of an English Mortgage as defined under Section 58(e) of the Transfer of Property Act, 1882 which reads as under: "58 (e) English mortgage.- Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

16. A plain reading of the above would show that for a transaction to constitute an English mortgage the following essential conditions must be satisfied:

“(1) The Mortgagor must bind himself to re-pay the mortgage money on a certain date.

(2) The property mortgaged should be transferred absolutely to the Mortgagee.

(3) Such absolute transfer should be made subject to proviso that the Mortgagee shall re-convey the property to the Mortgagor upon payment by him of the mortgage money on the date the Mortgagor binds himself to pay the same.”

17. It is only in cases where all the three requirements indicated above are satisfied that the transaction constitutes an English mortgage and not otherwise. The case at hand does not satisfy all the three requirements mentioned above. In particular the first requirement where under the Mortgagor binds himself to re-pay the mortgage money on a certain date is not satisfied in the instant case. We say so because the sale-deed executed by the plaintiffs-appellants does not contain any such stipulation binding the seller to pay the amount of Rs.6,000/- on a certain date. As a matter of fact, the sale-deed does not even remotely suggest that the transaction is in the nature of a mortgage or that there is any understanding or agreement between the parties whereunder the property sold has to be re-transferred to the seller. The only other document which could possibly contain such a stipulation binding the Mortgagor to return the mortgage money is the agreement for re-conveyance. Significantly, this document is signed only by Prem Singh the purchaser and not by the seller. The document signed by Prem Singh is described as an agreement for re-conveyance. There is no doubt a stipulation that Prem Singh has agreed to re-transfer the property to the seller in case the plaintiff Raj Kishore returns the sum of Rs.6,000/- by 6th July, 1981 yet there is nothing in the document to suggest that the seller had bound himself to abide by that stipulation. What is important in terms of the requirement of Section 58 (e) is not that the purchaser has agreed or bound himself to transfer the property by a particular date but that seller has bound himself to pay the amount by a certain date. Since the seller is not a signatory to the agreement of re- conveyance it is difficult to see how he can be said to have bound himself to

re-pay the mortgage money by the 6th July, 1981. We have, therefore, no difficulty in rejecting the contention urged on behalf of the appellants that the transaction was in the nature of an English Mortgage and the suit was in essence a suit for redemption of such a mortgage. We have also in that view no difficulty in repelling the contention urged by Mr. Jain that the stipulation of a date for payment of money as a condition for re-conveyance of the property is a clog on equity of redemption. We cannot overlook the fact that the suit filed by the appellants did not proceed on the basis that the transaction between the parties tantamounted to a mortgage nor did the plaintiff pray for a decree for redemption from the Court. The suit was, as noticed earlier, one for declaration to the effect that the sale-deed executed by him was void and the plaintiffs continued to be owner and in occupation. The contention that the transaction between the parties was in reality one in the nature of a mortgage or that the suit was in substance one for redemption has not, therefore, impressed us and is accordingly rejected.

18. The only other question that arises for consideration is whether the plaintiff could rely upon the agreement for re-conveyance and pray for a decree for specific performance thereof. The plaintiff had, in that regard, sought an amendment which was declined by the Courts below. The first appellate Court was of the view that even if the relief sought to be incorporated by amendment was allowed to be incorporated the same would be time-barred. The High Court was on the contrary of the view that even if the prayer was allowed to be incorporated by amendment since there was no averment in the plaint to the effect that the plaintiff was ready and willing to perform his part of the contract any such amendment would be of little value. The High Court was, in our opinion, correct in the view taken by it. In a suit for specific performance it is absolutely necessary for the plaintiff to assert that he/she was always ready and willing to perform the essential terms of the contract sought to be enforced against the defendant. Section 16(c) of the Specific Relief Act 1963 makes that requirement mandatory. There is, in the present case, no averment as to the readiness and willingness of the plaintiff to perform his part of the contract. In the absence of such an averment, amendment of the plaint to incorporate a prayer for specific performance of the agreement for re-conveyance would not have advanced the case of the plaintiff or the appellants who have succeeded him.

19. More importantly, in a case where the parties have entered into a transaction of sale and also executed an agreement for re-conveyance of the property sold, time stipulated for re-conveyance is the essence of the contract. The law on the subject is fairly well-settled by the decisions of this Court in *Chunchun Jha v. Ebadat Ali*², *Bismillah Begum (Smt) Dead by Lrs. v. Rahmtullah Khan (Dead) by Lrs.*³ and *Gauri Shankar Prasad and Ors. v. Brahma Nand Singh*⁴. Relying upon the decision of Federal Court in *Shanmugam Pillai v. Annalakshmi Ammal*⁵, this Court in *Caltex (India) Ltd. v. Bhagwan Devi Marodia*⁶, held that in contracts relating to re-conveyance of property time is always the essence of the contract. This Court observed:

“At common law stipulation as to time in a contract giving an option for renewal of a lease of land were considered to be of the essence of the contract even if they were

not expressed to be so and were construed as conditions precedent. Equity followed the common law rule in respect of such contracts and did not regard the stipulation as to time as not of the essence of the bargain.”

20. This Court also held that the principle stated by the Federal Court in *Ardeshir H. Mama v. Flora Sassoon*⁷ to the effect that time is not normally the essence of the contract in contracts relating to immovable property did not apply to contracts for re-conveyance of the immovable property. This Court observed:

“The above passage refers both to options for renewal and options to repurchase where, in regard to immovable property, as a matter of law time becomes the essence of the contract. Therefore in regard to contracts of reconveyance relating to immovable property the principle laid down in *A.H. Mama v. Flora Sassoon* - that time is not normally the essence of the contract in contracts relating to immovable property - does not apply. It is in fact, so observed in *Caltex (India) Ltd. case*. In view of the abovesaid decision of this Court relating to contract of reconveyance, and inasmuch as the amount was not paid within the stipulated time, the said option in favour of the plaintiff must be deemed to have "lapsed". For the aforesaid reasons, the appeal fails and is dismissed. No costs.”

(emphasis added)

21. The Courts below have concurrently held that the plaintiff had failed to prove that he had tendered the amount of Rs.6,000/- to the purchaser within the date stipulated in the agreement for re-conveyance. That being a finding of fact any claim for re-conveyance made in default of the said stipulation must fail for the right of re-conveyance cannot in the case of default be saved from forfeiture. The general principle of law that equity grants relief against penalty in a money bond and also against the penal sums made payable on breach of bonds has an exception to it. The exception was recognized by the Federal Court in *Shanmugam Pillai case* (supra) where by a majority the Court held that if under an agreement an option to a vendor is reserved for repurchasing the property sold by him, the option is in the nature of a concession or a privilege and may be exercised in fulfillment of the conditions on the fulfillment 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 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. The Court followed the principle set out in *Davis v. Thomas*⁸. The above principle was recognized to be correct in *K. Simrathmull case* (supra). This Court also quoted with approval the following passage from *Halsbury's Laws of England Vol.14, III Edn., page 622, paragraph 1151*:

“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.”

22. In the present case there is no allegation of fraud, accident or surprise to call for intervention of equity so as to save the plaintiffs right of re-conveyance of the property against forfeiture.

23. In the result this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.

¹*AIR 1963 SC 1182*

²*AIR 1954 SC 0345*

³*(1998) 2 SCC 0226*

⁴*(2008) 8 SCC 0287*

⁵*AIR 1950 FC 38*

⁶*AIR 1969 SC 0405*

⁷*AIR 1928 PC 208*

⁸*(1830) 39 ER 195*