

VISHWANATH DADOBA KARALE
v.
PRISA SHANTAPPA UPADHYE (D) TH. LRS.
(Civil Appeal No. 1958 of 2008)

MARCH 13, 2008

(S.B. SINHA AND V.S. SIRPURKAR, JJ.)

Transfer of Property Act, 1882:

s.58(c) - Mortgage by conditional sale – Deed executed selling immovable property for five years with stipulation to re-purchase the same for the same amount within five years – HELD: Having regard to terms of the deed, High Court rightly held that transaction evidenced a mortgage and not sale – Suit for redemption of mortgage was maintainable which was rightly decreed by High Court.

The predecessor-in-interest of the respondent executed a conditional deed of sale of the suit property for Rs.500/- for five years with a stipulation to re-purchase the same by paying back Rs.500/- at any time within the said period of five years. When he offered the said amount of Rs.500/- to the appellant, the latter did not accept it stating that he had acquired an absolute title to the property. The landowner filed a suit for redemption of mortgage against the appellant. The trial court and the first appellate court dismissed the suit, but the High Court in second appeal decreed the suit holding the deed to be a conditional mortgage.

In the instant appeal it was contended for the defendant-appellant that the High Court erred in setting aside the concurrent finding of both the courts below that the transaction was that of a sale and not mortgage.

Dismissing the appeal, the Court

A HELD: 1.1 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. In the instant case, the
B plaintiff in his deposition categorically stated that his
father had taken by way of loan a sum of Rs.500/- from
the appellant. 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. [para 6-7] [997-A, B]

C 1.2 When an absolute transfer of property is made, it
cannot be limited to a period. In the instant case, the
transaction shows that the appellant was to have title in
the property and to remain in possession thereof only for
a period of five years. The plaintiff/respondent was entitled
D 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.
E Such a transaction cannot be construed to be a
transaction of sale. The terms of the sale and condition of
repurchase were recorded in one document. Having
regard to the terms of the transaction the High Court was
correct in its opinion that the transaction evidenced a
mortgage and not a sale. A suit for redemption of
F mortgage, therefore, was maintainable. A suit for
redemption is essentially a suit for recovery of
possession. [para 8-12] [997-C, D; 998-D; 1002-C]

G *P.L. Bapuswami vs. N. Pattay Gounder* (1966) 2 SCR
918; *Tulsi and Ors. Vs. Chandrika Prasad and Ors.* (2006) 8
SCC 322; *Manjabai Krishna Patil (D) by Lrs. Vs. Raghunath
Revaji Patil & Anr.* (2007) 3 SCALE 331 – relied on.

Bishwanath Prasad Singh vs. Rajendra Prasad and Anr.
(2006) 4 SCC 432 – distinguished.

H *Tamboli Ramanlal Motilal (Dead) by Lrs. Vs. Ghanchi*

Chimanlal Keshavlal (Dead) by Lrs. And Anr. 1993 Supp.(1) A
SCC 295 – held inapplicable.

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 1958
of 2008

From the final Judgment and Order dated 17.08.2006 of B
the High Court of Judicature at Bombay in Second Appeal No.
525 of 2001.

Shivaji M. Jadhav for the Appellant.

Vinay Navare and Abha R. Sharma for the Respondents. C

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

1. Parisa Shantappa Upadhye, the predecessor in interest D
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 situate 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 E
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 F
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 G
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 H

A my possession and execute the sale deed in my favour as per the agreement between us.

B 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."

C 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.

D 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.

E 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.

F 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

H

period of five years.

A

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.

B

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.

C

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.

D

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.

E

A suit for redemption of mortgage, therefore was maintainable. A suit for redemption is essentially a suit for recovery of possession.

F

Section 58(c) of the Transfer of Property Act, 1882 reads as under:-

"58 "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-

G

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

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

(c) Mortgage by conditional sale - Where, the H

- A 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
- B 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,
- C 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.”
- D

10. In this case, the terms of the sale and condition of repurchase were recorded in one document.

- E The question came up for consideration in *P.L. Bapuswami*
 Vs. N. Pattay Gounder [(1966) 2 SCR 918], where this Court
 laid down the law in the following terms;

- F “..... 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 one of fact and the High Court
 was not entitled to go into 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
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- H

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* [(2006) 4 SCC 432] noticing *Pandit Chunchun Jha Vs. Sk. Ebadat Ali* [(1955) 1 SCR 174] 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* [(2006) 8 SCC 322] distinguishing *Bishwanath Prasad Singh* (supra), it was held;

“14. Before we consider the stipulations contained in the

A 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.* [2007 (3) SCALE 331], 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* [1993 Supp. (1) SCC 295].

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 executant 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;

A "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
B 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
C 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
D 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/-.

E R.P.

Appeal dismissed.