



2017 INSC 690

Non-Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.7023 of 2012

BIBI FATIMA & ORS.

.... Appellant(s)

Versus

M. AHAMED HUSSAIN & ORS.

....Respondent(s)

J U D G M E N T

L. NAGESWARA RAO, J.

The first Respondent-Plaintiff filed a suit for redemption of a mortgage and for re-conveyance of the suit schedule property which was decreed. The Appeal filed by the Appellant-first Defendant in the suit was allowed and the judgment and decree of the Trial Court were set aside. The High Court reversed the judgment of the first Appellate Court and restored the judgment of the Trial Court in favour of the first Respondent-Plaintiff. Hence, this appeal.

2. For the sake of convenience, the parties will be referred to as they were arrayed before the Trial Court. The father of the Plaintiff, Mavada Mokthesar Ummar Saheb (hereinafter referred to as Ummar Saheb), obtained a loan from Vijaya Bank and

defaulted in repayment of the loan. The suit filed by Vijaya Bank was decreed. In the execution petition filed by the Bank, the land and building belonging to Ummar Saheb were brought to sale. He approached his son-in-law, the first Defendant and took Rs.5,900/- for which he executed a document on 02.07.1964, which was exhibited as P-1 in the suit. It was stated therein that he needed the money for repayment of his debts which were to the tune of Rs.5,900/-. The breakup of Rs.5,900/- was also given in the document as Rs.4,577/- for payment to the Bank and Rs.1,323/- for clearing other debts. The suit schedule property was sold to the first Defendant who was given an absolute right to enjoy the property and the income realised therefrom. It was mentioned in the deed that if the amount of Rs.5,900/- was repaid after two years and within five years, the first Defendant would have to re-transfer the property to Ummar Saheb and in case the re-transfer is not made on payment of Rs.5,900/-, damages not exceeding Rs.5,900/- would have to be paid.

3. Ummer Saheb died on 17.07.1978. Thereafter, the Plaintiff requested for re-conveyance of the property which was the subject matter of the document dated 02.07.1964. The

first Defendant refused the request of the Plaintiff which led to the filing of a suit for redemption and re-conveyance of the property in dispute. Plaintiff asserted that the document was a mortgage by conditional sale governed by Section 58 (c) of the Transfer of Property Act, 1882 (hereinafter referred to as '*the Act*'). He averred that his father took a loan of Rs.5,900/- from the first Defendant to clear his debts. He further urged that the property was worth more than Rs.10,000/-. Reliance was placed on the condition pertaining to re-conveyance of the property on payment of Rs.5,900/- which according to the Plaintiff would show that the document was a mortgage by conditional sale. It was also pleaded by the Plaintiff that his father continued to be in possession of the property till the date of his death i.e. 14.07.1978.

4. The first Defendant through a general power of attorney filed a written statement in which he contended that the document is a sale deed with a condition of re-purchase. The first Defendant stated in the written statement that Ummar Saheb requested him to purchase the property as he had to clear his debts. He further submitted that the condition of re-purchase by itself does not make the document a mortgage

deed. Though Ummar Saheb offered to give possession of the house, the first Defendant permitted him to continue in possession. According to the first Defendant, a Badige Karar (rental agreement) was executed by the first Defendant in 1969 pursuant to which Ummar Saheb resided in the house as a tenant.

5. Amongst others, the Trial Court framed an issue as to whether the transaction covered by the document dated 02.07.1964 is a mortgage by conditional sale or an outright sale. After appreciating the evidence on record, the Trial Court accepted the case of the Plaintiff and held that the condition of re-conveyance of the property on payment of Rs.5,900/- by Ummar Saheb created a relationship of debtor and creditor between him and the first Defendant. The Trial Court held that the transaction covered by document Exhibit P-1 dated 02.07.1964 was a mortgage by conditional sale and decreed the suit.

6. The First Appellate Court reversed the judgment of the Trial Court by holding that Exhibit P-1 was a sale deed and not a mortgage by conditional sale. The First Appellate Court held that Ummar Saheb sold the property to the first Defendant to

clear his debts. It was also held that the possession of Ummar Saheb was pursuant to a rental agreement. The First Appellate Court further held that the amount of consideration shown in the sale deed was at par with the market price at the relevant time. The Plaintiff filed a second appeal which was allowed by the High Court. The High Court restored the findings of the Trial Court and decreed the suit.

7. The question whether a transaction is a mortgage by conditional sale or a sale with a condition of re-purchase has to be decided on the basis of interpretation of the document itself. The intention of the parties is the determining factor. The intention has to be gathered, in the first place, from the document. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look into the surrounding circumstances to determine what was intended (See: ***Pandit Chunchun Jha v. Sheikh Ebadat Ali, (1955) 1 SCR 174***). The extrinsic evidence of surrounding

circumstances, as may be required to show in what manner the language of the document is relating to the existing facts, is a relevant criteria. (See: ***Balkishen Das v. Legge [(1899) L.R. 27 IA 58]***).

8. This Court in **Pandit Chunchun Jha's case (supra)** considered the background in which the amendment was made to Section 58 (c) of the Act by the Transfer of Property (Amendment) Act, 1929 and held as follows:

“Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded

transactions embodied in more than one document from the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage”.

9. One circumstance which favours the document being read as a mortgage by conditional sale is that the relationship between the parties is of a debtor and creditor and the transaction is a loan (See: *Bhaskar Waman Joshi v. Narayan Rambilas Agarwal*, (1960) 2 SCR 117, at p.122-123). The consideration amount being lesser than the market value is another circumstance by which the document can be treated as a mortgage by conditional sale. (See: *P.L. Bapuswami v. N. Pattay Gounder*, (1966) 2 SCR 918 at p. 923). The mutation not being done in favour of the transferee (See: *Tulsi v. Chandrika Prasad*, (2006) 8 SCC 322 ¶9), the possession being with the transferor and the length of the period for re-transfer of the property (See: *Indira Kaur v. Sheo Lal Kapoor*, (1988) 2 SCC 488¶5), are all circumstances which are indicative of a

document being a mortgage by conditional sale.

10. On the other hand, it is settled law that a mere condition of repurchase will not make a document a mortgage by conditional sale as there can be an absolute sale with a condition for repurchase. It is also no more *res integra* that the mere title of the document is not determinative of the nature of the document and the document must be looked at in its entirety. (See: P.L. Bapuswami v. N. Pattay Gounder (1966) 2 SCR 918 at p. 921).

11. In the light of the principles laid down by this Court regarding the resolution of a dispute as to whether a document is a mortgage by conditional sale or a sale with a condition for repurchase, we proceed to interpret the sale deed dated 02.07.1964 which is reproduced below:

"ABSOLUTE SALE DEED OF IMMOVABLE PROPERTY AND BUILDINGS HELD ON MOOLY RIGHTS FOR RUPEES 5,900/-

This sale deed is executed on this the 2nd day of July 1964 by Moktesai Ummer Saheb, S/o. Mavada Koktesai Moidin Saheb, Farmer, Majkooru Taluk and Village,

In favour of

Mohammed Hussain Athra Miraja Saheb, S/o. Haji Borappa yane Ummer Saheb, Farmer, resident of No.2, Yedthare Village, Kundapur Taluk, WITNESSETH AS FOLLOWS:

WHEREAS, myself and 4 others had obtained a loan from Vijaya Bank Ltd., Mangalore through its Byndoor Branch,

AND WHEREAS, the said bank had obtained a money decree against us in O.S. No. 190 of 1961 on the file of the sub-ordinate Judge of Udupi and had also filed an execution petition in Ex. Case No. 45 of 1963 and in the said execution case, the lands and buildings mentioned below were brought for auction,

And whereas out of the said sums, as I could not repay the amounts due by me namely Rs. 4577-00, I, after thought, in the interest of my family decided to sell the below mentioned land and buildings for payment of the debts of (Mavada Mattesra Ummer Saheb) upon receipt of Rs. 5900/- in the manner stated here below, hereby execute this sale deed in your favour in respect of the land and buildings mentioned hereinbelow. Hence hereafter you should hold and enjoy the property hereby sold and held Muli rights and also the income thereof from this Krodhi year and also to pay assessment to the Government from 1965 and also shall enjoy the profit and income thereof as well as land and the buildings sold hereby absolutely by you and your family from generation to generation. Hereafter I shall have no rights over the said land and buildings or over the produce or income thereof or over the land and buildings and neither myself nor my legal heirs shall have any right to make any claim demanding payment of any more sums for whatever reasons. Particulars of the receipt of consideration under this sale deed. I have received a consideration of Rs. 4577/- for payment of debts due in Ex. Case No. 190 of 1961 and another sum of Rs. 1323/- to pay off the debts arisen on account of the legal necessities of the family. Thus, in all I hereby acknowledge the receipt of a sum of Rs. 5900/- as consideration for this sale deed.

Particulars of the property sold

Immovable property situated in No. 2, Yothere Village, Kundapur Taluk within the registration sub-district of Byndoor sub-division of D.K. District held on absolute rights and comprised within the limits of Kundapur Taluk Development Board.

Boundaries

East : Portion of Survey No. 77/1

West : Road

North : Portion of Survey No. 75/12B

Including the tree growth, right of way, water right, residential house, bathroom, toilet room etc. etc.

The sum of Rs. 5900/- which is the consideration of this sale deed if repaid after 2 years and within 5 years from this date in one lumpsum, you deserve to make a transfer deed to give the same to me. Thus, when the Vendor makes the repayment of Rs. 5900/-, if the PURCHASER fails to give back, the PURCHASER and his family members are liable to make good to the Vendor an amount of loss not exceeding the amount of consideration under this sale deed to the Vendor or his successors subject to which this sale deed of muli rights is executed.

Sd/-

M.H.M. Mirana

(M.H. Ahmed Mirana in Husain)

Witnesses

M. Mohammed Hussain,
S/o. Mukta Ummer Saheb,

Adthare Village.

Written by

Mary Muthu Shunge,
S/o. S. Suhaya Shunge,
H.O.S.O.R.P. Village,
Book No.1, Volume No. 207,
Pages 407 in the year 1964,
Registered as No. 2531
16th July 1964

Sd/-
Govindan Naidu
Sub-registrar"

(Underlining supplied)

12. It is clear from a plain reading of the document that there has been an absolute transfer of rights in the property by Ummar Saheb in favour of the first Defendant for a consideration of Rs.5,900/-, which was the exact amount he required to clear his debts. There is a condition in the document that the first Defendant had to transfer the property back to Ummar Saheb on repayment of Rs.5,900/- after two years and within five years from the date of execution of the document i.e. from 02.07.1964.

13. It is the admitted case of both sides before us that the transaction was entered into by Ummar Saheb for clearing his existing dues, which were to the tune of Rs.5,900/-. A breakup of the said dues was also mentioned in the sale deed dated 02.07.1964. It is apparent from the document that there has been an absolute sale. It is also clear that there is a condition

for transfer of the property in favour of the transferor on repayment of Rs.5,900/-. It is very difficult to decide the present dispute only on the basis of the aforesaid two facts.

14. As it is very difficult to find out the intention of the parties on a plain reading, it is necessary to look into the surrounding circumstances for the purpose of determining whether the document dated 02.07.1964 was intended to be a genuine sale deed or was merely an ostensible sale.

15. The Defendant, who appeared through his general power of attorney, contended that the transaction was an outright sale. According to the first Defendant, Rs.5,900/- represented the then existing market value of the schedule property. Though the First Appellate Court found this point in favour of the first Defendant, the Trial Court and the High Court did not accept the submission of the first Defendant.

16. We are unable to accept the submission on behalf of the first Defendant that Rs.5,900/- was the market value of the property in 1964. It is clear from the sale deed dated 02.07.1964 that there was a decree obtained by the Bank against Ummar Saheb for Rs.4,577/-. Ummar Saheb also required Rs. 1,323/- on account of debts incurred for domestic purpose. The amount of Rs.5,900/- was the exact amount

which Ummar Saheb needed to repay his creditors. By no stretch of imagination can it be said that the parties even considered the market value of the property at the time of execution of the document in 1964.

17. The first Defendant further submitted that he permitted Ummar Saheb to continue in possession of the property after execution of the sale deed dated 02.07.1964. He further urged that Ummar Saheb continued in the property as a tenant. In support of this contention, the first Defendant relied upon a Badige Karar (rental agreement) executed by Ummar Saheb. Though the First Appellate Court placed heavy reliance on this document, the Trial Court and the High Court held that the first Defendant could not prove the Badige Karar. After a detailed examination of the record, we are unable to find any evidence regarding the actual amount of rent or the details of payment of such rent by Ummar Saheb. Hence this submission of the first Defendant also deserves to be rejected.

18. Having rejected the submissions of the first Defendant, we have to examine the points urged on behalf of the Plaintiff to find out whether the document is a mortgage by conditional sale. There is no dispute that there is only one document which was executed on 02.07.1964 which, according to the

presumption postulated in Section 58 (c) of the Act should be construed as a mortgage. Undisputedly, Ummar Saheb continued to be in possession from 02.07.1964 till the date of his death i.e. 17.07.1978. Evidence was adduced by the Plaintiff to show that notices from the Electricity Department, etc. were received in the name of Ummar Saheb. The mutation was also not affected by the first Defendant in his name till 17.07.1978. In light of the above, the Plaintiff's case that his father raised a loan to discharge his debts for which purpose he executed the mortgage dated 02.07.1964, merits acceptance. The Plaintiff is also right in submitting that there is no condition in the deed that the sale will become absolute after the expiry of five years' period. Ummar Saheb's continuance in possession until the time of his death, payment of statutory dues and absence of mutation by the first Defendant of the property during Ummar Saheb's lifetime would all point to the document being a mortgage by conditional sale. One of the conditions of sale was that the transferor would be entitled for the loss incurred, not exceeding Rs. 5,900/-, in the event of the first Defendant not re-transferring the property after the re-payment by the transferor. It is evident from this condition

that Rs. 5,900/- is a debt and a relationship of debtor and creditor existed between the parties. In view of the above, we hold that the document dated 02.07.1964 is a mortgage by conditional sale.

19. For the aforesaid reasons, we uphold the judgment of the High Court and dismiss the appeal.

.....J
[L. NAGESWARA RAO]

.....J
[NAVIN SINHA]

New Delhi,
August 01, 2017