

(2015) 11 RAJ CK 0061
In the Rajasthan High Court
Case No : SB Civil First Appeal No. 149/1997

Amarnath Bhargava and Others

APPELLANT

Vs

Suraj Prakash Bhargava and Others

RESPONDENT

Date of Decision : 18-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 2, 96
Evidence Act, 1872 — Section 91, 92, 92(1)
Transfer of Property Act, 1882 — Section 54, 58, 58(a), 58(c)

Citation : (2015) 11 RAJ CK 0061

Hon'ble Judges : Prakash Gupta, J.

Bench : Single Bench

Advocate : Narendra Malik and Priti Malik, for the Appellant; R.K. Agrawal, M.M. Ranjan, Senior Counsels, Rajendra Prasad, Daulat Sharma, Raunak Singhvi, Vishnukant Sharma, Namoo Narain Sharma and Rajat Ranjan, for the Respondent

Final Decision : Allowed

Judgement

Prakash Gupta, J.—The instant Civil First Appeal under Section 96 of the Code of Civil Procedure has been filed by the appellant-defendants being aggrieved by the impugned judgment and decree dated 13.3.1997 passed by the learned Additional District Judge No. 1, Ajmer (hereinafter referred to as "the learned trial court") in Civil Suit No. 238/1992 whereby the learned trial court decreed the suit filed by plaintiff-respondents for redemption of the disputed property.

2. Briefly stated, the facts giving rise to the present appeal are that plaintiff-respondents namely; Shri Suraj Prakash Bhargava, Rama Bhargava, Laxman Kumar Bhargava, Santosh Kumar Bhargava and Sudhir Bhargava sons of Late Shri Shyam Sunder Bhargava, Smt. Tara Bhargava, Smt. Sudha Bhargava, Smt. Shashi Bhargava, Abha Bhargava daughters of Late Shri Shyam Sunder Bhargava and Shri Resham Bhargava son of Late Shri R.C. Bhargava filed a civil suit against the appellant-defendants and proforma respondents for redemption of the disputed property, the description of which has been given in Paragraph No.

8 of the plaint. It is stated in the plaint that for some reasons, debt became due on the plaintiffs and because of this, decrees for the amount of Rs. 22,500/-, Rs. 15,600, Rs. 10,500/- and Rs. 8,700/- were passed by the various courts against the plaintiffs and in favour of S/Shri Dayashanker Bhargava, Advocate, Shri Somdutt Bhargava, Shri Sachchidanand Bhargava Advocate and Shri Y.N. Bhargava and the proceedings for execution of the decrees were pending. As per the averments in the plaint, with a view to saving the properties from auction, Shri Daya Shanker Bhargava, who was the father of defendant No. 1 and was father-in-law of defendant No. 2, advised to mortgage the disputed property for Rs. 57,400/-. He also told that he would repay the loan amount to the debtors. As per the plaintiffs at the relevant time, provisions of Bombay Money Lending Act were in force and since neither Shri Daya Shanker Bhargava nor any of his family member had any license under the provisions of Money Lending Act, he advised them to mortgage the disputed property in such a manner that the provisions of the Act could not be made applicable. However, in the fact situation, the plaintiffs agreed to the suggestions of Shri Daya Shanker Bhargava and plaintiff Nos. 1 to 5 namely; Shri Suraj Prakash Bhargava, Rama Bhargava, Laxman Kumar Bhargava, Santosh Kumar Bhargava, Sudhir Kumar Bhargava and Smt. Kalawati W/o Shri Ramesh Chand Bhargava executed a sale-deed in favour of defendant Nos. 1 and 2. As per the plaintiffs it was also agreed between the parties that for the same property, defendant Nos. 1 and 2 will execute an agreement to sale in favour of plaintiff i.e. Smt. Kalawati W/o Late Shri RC Bhargava. On the date of the alleged sale-deed i.e. 14.12.1961 an agreement of sale was also executed in favour of defendant Nos. 1 and 2. It was mentioned in the plaint that the plaintiffs had never sold the disputed property but it was a usufructuary mortgage because at the time the sale-deed was executed, the value of the disputed property was three-four times of Rs. 57,400/-. The sale-deed was executed as the parties were related to each other and related to Late Syam Sunder Bhargava. The document seemed to be a sale-deed but in fact it was a usufructuary mortgage. Thus, it was prayed by the plaintiffs that a decree for redemption of the mortgaged property be passed in their favour.

3. Defendant Nos. 1 and 2 filed their written statement and denied the averments made in the plaint. Disputing the date of execution of the document, it was mentioned that it was a simple case of selling the disputed property and not of a usufructuary mortgage. After sale of the disputed property on 14th December, 1961, on the same day, an agreement to sale was executed in between the parties to the effect that in the event of repayment of the amount of Rs. 57,400/- till 15th December, 1966, the disputed property would be re-sold by defendant Nos. 1 and 2 but the plaintiffs have failed to fulfill the terms and conditions of the agreement as they did not repay the amount of Rs. 57,400/- by the stipulated date. Therefore, defendant Nos. 1 and 2 were not bound by the condition regarding resale of the property to the plaintiffs and the suit is liable to be dismissed as the agreement to sale was not a usufructuary mortgage. It was also mentioned that the suit is barred by limitation. It was further mentioned

that they duly replied to the telegram dated 15th December, 1966 of the plaintiff and being satisfied by the same, the plaintiffs did not file any suit for specific performance. Thus, it was prayed that the suit of the plaintiffs be dismissed as they have no right to file the suit showing the transaction as usufructuary mortgage.

4. On the basis of the pleadings of the parties, the learned trial court framed following issues:--

5. To prove the aforementioned issues, plaintiffs Shri Suraj Prakash was examined as (PW-1) and Agreement dated 14th December, 1961 (Ex. 1), sale deed dated 14th December, 1961, registered on 16th December, 1961 (Ex. 2) and Notice (Ex. 3) were exhibited. On behalf of the defendants Smt. Shail Bhargava was examined as (DW-1) and Shri Amar Nath Bhargava was examined as (DW-2) and as many as 16 documents were exhibited.

6. Learned trial court after recording evidence of the parties and hearing both the sides decided issue Nos. 1 in favour plaintiffs, holding that the sale deed (Ex. -2) and agreement to sale (Ex. -1) are usufructuary mortgage and also mortgage by conditional sale and issue No. 2 was also decided in favour of the plaintiff. Thus, by the impugned judgment dated 13th March, 1997 decreed the suit and passed the preliminary decree in favour of the plaintiff.

7. Hence, this appeal by the defendants-appellants.

8. During the pendency of the appeal the appellants filed an application under Order 41 Rule 2 CPC.

9. I have heard the learned counsels for the parties on appeal as well as on application filed under Order 41 Rule 2 CPC and perused the material on record minutely and carefully.

10. Before deciding the appeal on merits, it would be appropriate to decide the application filed by the appellants under Order 41 Rule 2 CPC on 12/02/2014.

After having considered the rival submissions made by the learned counsel for the parties and having perused the same, I find no good ground to allow the application, the said application is accordingly dismissed.

11. It was submitted by the learned counsel for the appellant Ms. Priti Malik that the learned trial Court grossly erred in holding that the transaction in question entered into through (Ex. -2)-sale-deed and (Ex. -1) -agreement to sale dated 14/12/1961 was conditional sale with mortgage and not a sale with right to re-purchase. In this regard the learned trial Court failed to consider the various terms contained in the sale deed-(Ex. -2) which clearly indicates that the transaction was a complete sale. The title was transferred to the appellant on the execution of the sale-deed (Ex. -2), mutation of the property was effected in the name of defendant, tenants were directed to pay the rent of the property to the defendants, municipal and other taxes were paid by the defendants from the

date of the sale. In view of these facts, the defendants became absolute owners. It is submitted that the proviso to Section 58(c) of the Transfer of Property Act (for short "the Act"), clearly provides that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which affects or purports to effect the sale. It was submitted that in the present case, (Ex. -1) and (Ex. -2) are two separate documents and (Ex. -2) does not contain any clause for repurchase. The learned trial Court did not consider this aspect and grossly erred in holding that the transaction was not a complete sale. It is further submitted that while interpreting the documents, the learned trial Court misread the evidence. The learned trial Court grossly erred in accepting that the value of the property in the sale proclamation was shown as Rs. 1,00,000/-. It was submitted that the learned trial Court unnecessarily laid emphasis on the fact that the property was sold for Rs. 57,400/- and under the separate agreement to purchase the same property after five years i.e. upto 15/12/1966, the price was kept to be the same. It was also submitted that it is not proved from the evidence that there was a relationship of debtors and creditors between the parties but it is proved from the (Ex. -2) that the defendants had acquired full ownership rights over the property and as such the learned trial Court erred in misinterpreted the documents (Ex. -2) and holding the same to be a mortgage with conditional sale. It is submitted that one of the plaintiff Sh. R.C. Bhargava was a practicing lawyer and he fully knew the nature of the document in question i.e. (Ex. -2)- Sale deed. It was also submitted that it is evident from the conduct of the plaintiff that they were not interested in re-purchasing the suit property in pursuance to (Ex. -1). In support of her submissions, the learned counsel for the appellant has placed reliance on *Tyagaraja Mudaliyar and Another vs. Vedathanni* AIR 1936 70 (Privy Council) , *Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another* , *Tyagaraja Mudaliyar and Another vs. Vedathanni* AIR 1936 70 (Privy Council) , *Bishwanath Prasad Singh Vs. Rajendra Prasad and Another* , *State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd.* , *Shri Nath Rai and Others Vs. Shri Kalyan Sahai Dangachayach* , *Padmashree S.N. Swamy Vs. Smt. Gowramma* , *Kasturi Venkata Subbarao and Another Vs. Bikkina Veeraswami and Others* , *K. Simrathmull Vs. S. Nanjalingiah Gowder* , *Bahadur v. Motiram And Anr.* RLW-1971, *Gauri Shankar Prasad and Others Vs. Brahma Nand Singh* , *Umabai and Another Vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Another* , *Manjabai Krishna Patil (D) by L.Rs. Vs. Raghunath Revaji Patil and Another* , & *Raj Kishore (Dead) By L.Rs. Vs. Prem Singh and Others* , .

12. On the other hand, learned senior counsels for the respondents Sh. M.M. Ranjan & Sh. R.K. Agrawal submitted that while interpreting a document to judge its nature and the category it falls in, not only the words used in the document but intention of the parties and other attending circumstances must also be seen. In the case at hand, it is proved from the evidence that the execution of the sale-deed (Ex. -2) was never intended by the executants. It was submitted that in the present case admittedly more than one documents i.e. (Ex. -1)-agreement to

sale and (Ex. -2)- sale deed were executed contemporaneously, and both the said documents have to be taken into consideration to find out the true intention of the parties and nature of transaction. It can be proved by oral evidence that the document (Ex. -2)-sale deed was actually a sham document. It was argued that (Ex. -2)-sale-deed and (Ex. -1)-agreement to sale were executed for the same consideration and on the same day. Therefore, it is proved that the transaction was mortgage with conditional sale and not a complete sale. Two documents were executed with the intention to deprive the plaintiffs of their right of redemption. It was submitted that oral evidence is admissible to show that the document executed was never intended to operate as agreed but was brought into existence for some other purpose as well. Use of expression or words such as "vendee" and "vendor", sale, sale price etc. are not to be construed in their literal or grammatical sense. Attending circumstances and their affect have to be considered. It was submitted that intention can be gathered from the admission of (DW-1). In his testimony (DW-1) admitted that (Ex. -2)-sale-deed and agreement to sale-(Ex. -1) were executed on the same day i.e. on 14/12/1961 because plaintiff was of the view that he would re-purchase the disputed property within a period of five years after saving the money. It was submitted that since the defendants were not having money lending license therefore, the transaction of lending and borrowing of money was not clearly mentioned in the said two documents. Shri Dayashanker Bhargava is one of the decree holders being the maternal uncle of the plaintiffs. Thus, his son and daughter-in-law provided loan amount to the plaintiffs in consequence thereof documents (Ex. -1) and (Ex. -2) were executed by the plaintiffs. These facts are also proved from the evidence of (DW-1), who stated that she was not able to point out so as to whether any amount was paid to plaintiff No. 1 by cheque or cash. This proves that defendant No. 2 who was beneficiary of sale-deed (Ex. -2) and executant of agreement to sale (Ex. -1) did not participate actively and positively. It is submitted that it is established from the evidence of (PW-1) that no amount was handed over to him at the time of execution of the sale deed (Ex. -2). The amount of the sale of the suit property was exactly the same which was required to satisfy the amount of the decree demanded by the four decree holders, including father of defendant No. 1 and father-in-law of defendant No. 2. It is proved from the evidence that the price of the suit property as provided in the sale-deed (Ex. -2) was below the market value. It was submitted that the stamp duty of Rs. 1495/- was paid by one of the sellers, S.P. Bhargava. This fact also shows that the transaction was not an outright sale but mortgage. It was submitted that the agreement to sale (Ex. -1) contains a stipulation that on receiving the amount by vendor, property will be re-conveyed. It is also contains that on payment of entire amount due, the vendor will re-convey the property. It also contains that on the failure of the purchasers to pay the entire amount due along with registration and stamp charges, the defendants will become absolute owner of the property. It also proves the nature of transaction is mortgage and fulfills the entire requirement of Section 58(c) and its proviso. In support of his submissions, the learned counsel for the respondent has placed reliance on

Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Ganga Bai v. Chhabu Bai 1982(1) SCC 4 , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Gulab Chand v. Babu Lal & Ors. 1988 (9) SCC 211 , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Santa Kumari & ors. v. Lakshmi Amman 2009 (9) Judgments Today 233 , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Ramniwas v. Law Notes 303, Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Murari Lal Jain v. Rukhasana & ors. 2006 (3) MPU 262 : 2006 (44) AIC 662 , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Moti Lal Pandey v. Kailash Pathak 2009(4) MPU 10, Ram Dulari Devi & Anr. v. Uday Narayan Sunar 2011 (2) Calcutta la Journal (Calcutta) 49 , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) , Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) & Swaroop Chand v. Kanhiyalal 1990 (2) RLW 229.

13. To decide the controversy arising in this appeal, following question is to be decided:--

"1. Whether (Ex. -1) and (Ex. -2) which were executed together and registered on same day fall within the parameters of a mortgage with conditional sale or an outright sale?"

14. For the purpose of adjudicating the question above, I would like to discuss the relevant case laws cited by both the parties.

15. The Apex Court in Tyagaraja Mudaliyar and Another vs. VedathanniAIR 1936 70 (Privy Council) observed as under:--

(6) The first is that the intention of the parties is the determining factor: see Balkishen Das V. Legge (1). But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed the intention must be gathered, in the first place, from the document itself. 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 to the surrounding circumstances to determine what was intended.

(emphasis supplied)

As Lord Cranworth observed in-"A Aderson v. White", (1858) 44 E.R. 924 at p.928 (B)-

"The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase..... In every such case the question is, what, upon a fair construction, is the meaning of the instruments?

Their Lord-ships of the Privy Council applied this rule to India in -Bhagwan Sahai v. Bhagwan Din, 17 Ind. App. 98 at p. 102 (P.C.) (C) and in Jhanda Singh v. Wahid-ud-din, , AIR 1916 P.C. 49 at p. 54 (D) ."

8) 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."

(emphasis supplied)

16. The Apex Court in Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, observed as under:--

13. The attendant circumstances could be looked into only to gather the

intention. Such an intention, if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. If, therefore, there is no relationship of the debtor and the creditor, the Question of it being a mortgage by conditional sale does not arise.

14. On the date of the execution the title is transferred. The option for repurchase is to be exercised within a period of five years. Upon such payment there will be reconveyance in favour of the executant of the document. But strangely, there is no corresponding right for the mortgagee to foreclose the right of redemption. These were the points held in favour of this respondent, and each one of the reasons is valid.

(emphasis supplied)

17. The Apex Court in Tyagaraja Mudaliyar and Another vs. Vedathanni AIR 1936 70 (Privy Council) observed as under:--

"7. The question whether there was a transaction of mortgage or sale between the parties is to be decided, not only in the light of the recitals made in the deed, but also in the light of other circumstances which are established on record. It is true that there is a difference between a "mortgage by conditional sale" and a "sale with a condition to re-purchase." The basic fact remains that the form of transaction is not always the final test and the true test is the intention of the parties in entering into the transaction.

14. Applying the principles laid down above, the two documents read together would not constitute a "mortgage" as the condition of re-purchase is not contained in the same documents by which the property was sold. Proviso to Clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a "mortgage by conditional sale."

(emphasis supplied)

18. The Apex Court in Bishwanath Prasad Singh Vs. Rajendra Prasad and Another, observed as under:--

"16. A deed as is well known must be construed, having regard to the language used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors.

(emphasis supplied)

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 executed to be within a period of 23 months, i.e., upto 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.

27. A bare perusal of the said provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of re-transfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal right to the purchaser, and such a personal right would be lost, unless the same is exercised within the stipulated time.

(emphasis supplied)

46. Going by Section 58(c) of the Transfer of Property Act, it is clear that for an ostensible sale deed to be construed as a mortgage by conditional sale, the condition that on repayment of the consideration by the seller the buyer shall transfer the property to the seller is embodied in the document which effects or purports to effect the same. It has so been clarified by this Court also in Pandit Chunchun Jha v. Sk. Ebadat Ali by stating: (SCR. 178)

"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."

Therefore, it is clear that what was involved in this case was the sale followed by a contemporaneous agreement for reconveyance of the property. Such an agreement to reconvey is an option contract and the right has to be exercised within the period of limitation provided therefor. It has also been held that in such an agreement for reconveyance, time is of the essence of the contract. The plaintiffs not having sued within time for reconveyance, it would not be open to them to seek a declaration that the transaction of sale entered into by them construed in the light of the separate agreement for reconveyance executed by the purchaser, should be declared to be a mortgage. Such a suit would also be hit by Section 91 of the Evidence Act, subject to the exceptions contained in Section 92 of that Act."

19. The Apex Court in State Bank of India and Another Vs. Mula Sahakari Sakhar Karkhana Ltd., observed as under:--

"17. 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.

The document in question is a commercial document. It does not on its face contain any ambiguity. The High Court itself said that *ex facie* the document appears to be a contract of indemnity. Surrounding circumstances are relevant for construction of a document only if any ambiguity exists therein and not otherwise."

(emphasis supplied)

20. The Coordinate Bench of this court in *Shri Nath Rai and Others Vs. Shri Kalyan Sahai Dangachayach*, observed as under:--

"8. The Supreme Court in various cases has considered the said provisions to deal with the issue whether the particular transaction was mortgaged by conditional sale or sale with an option to repurchase. In case of *Raj Kishore (Dead) By L.Rs. Vs. Prem Singh and Others*, it has been held *inter alia* that for a transaction to constitute mortgage by conditional sale, it is necessary that one of the conditions mentioned in Section 58(c) should have been embodied in the documents that purports to effect the sale. In case of *Umabai and Another Vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Another*, it has been held as under:--

"19. It may be true that level of a document is not decisive. The true nature of transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wordings used in the document in question.

21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See *Pandit Chunchun Jha v. Sk. Ebadat Ali, Bhaskar Waman Joshi v. Narayan Rambilas Agarwal, K. Smrathmull v. S. Nanjalingiah Gowder, Mushir Mohammed Khan and Tamboli Ramanlal Motilal.*)"

21. The Division Bench of Madras High Court in *Kasturi Venkata Subbarao and Another Vs. Bikkina Veeraswami and Others*, observed as under:--

"The proviso runs thus:

"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."

The language of the proviso is perfectly clear and unambiguous and its effect is that an ostensible sale with a stipulation for repurchase shall not be regarded as a mortgage unless the stipulation is contained in the same document which effects the sale.

The appellant's learned Counsel argues that, as the new provision has been introduced as a proviso to Clause (c) which defines a mortgage by conditional sale, it should not be understood as having a wider scope than the clause itself and should not be taken to limit or qualify in any way Clause (a) which defines a mortgage : in other words, that the proviso should be read as providing only that such a transaction shall not be deemed to be a mortgage by conditional sale, with the consequence that it can still be regarded as a mortgage falling under Clause 58 (g) if it is established that the intention of the parties was that the transaction should operate as a mortgage and not an outright sale with a condition of re-transfer. This argument cannot be accepted. The construction suggested would involve reading into the proviso words which are not there and it would, moreover, stultify the new enactment as it would leave the previous state of the law practically unchanged. For it would not make much difference in the legal effect of a sale accompanied by a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an anomalous mortgage. We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an inquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document."

22. The Apex Court in K. Simrathmull Vs. S. Nanjalingiah Gowder, observed as under:--

"(4) 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."

(emphasis supplied)

23. The Coordinate Bench of this Court in Bahadur v. Motiram And Anr. RLW-1971 observed as under:--

"6. In the present case admittedly the agreement by the defendant to retransfer the property to the seller is not embodied in the document which effects the sale, that is, Ex. 2. A separate agreement has been executed though on the same day by the defendant in favour of the plaintiff for resale of the property. Consequently, the plaintiff is debarred from asserting that the transaction shall be deemed to be a mortgage."

24. The Apex Court in Gauri Shankar Prasad and Others Vs. Brahma Nand Singh, observed as under:--

"In Chunchun"s case (supra) it was observed as follows: (AIR p. 347, para 8)

"8..... 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.

In the case of agreement of re-purchase, the conditions of repurchase must be construed strictly against the original vendor and the stipulation with regard to time of performance of the agreement must be strictly complied with as the time must be treated as being of the essence of the contract in the case of an agreement of reconveyance."

25. The Apex Court in Umabai and Another Vs. Nilkanth Dhondiba Chavan (Dead) by Lrs. and Another, observed as under:--

"19. It may be true that level of a document is not decisive. A true nature of transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wordings used in the document in question.

20. In this case, admittedly, two documents were executed on the same day. In view of the express provisions contained in Section 58(c) of the Transfer of Property Act, indisputably the transaction in question was not a mortgage by way of conditional sale.

21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor: but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c) , however, states that if the condition for re-transfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See Pandit Chunchun Jha v. Sheikh Ebadat Ali and Another, Bhaskar Waman Joshi and Others v. Shri Narayan Rambilas Agarwal, K. Smrathmull v. Nanjalingiah Gowder, Mushir Mohammed Khan (supra); and Tamboli Ramanlal Motilal)"

(emphasis supplied)

26. The Apex Court in Manjabai Krishna Patil (D) by L.Rs. Vs. Raghunath Revaji Patil and Another, observed as under:--

"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. Where 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."

(emphasis supplied)

17. In the instant case, no relationship of debtor or creditor came into being. No security was created and in fact conveyance of the title of the property by the respondent to the appellant was final and absolute."

27. The Apex Court in *Raj Kishore (Dead) By L.Rs. Vs. Prem Singh and Others*, observed as under:--

"15. 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.

16. 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 12 case does not embody any condition like the one referred to in clause (c) of Section 58 extracted above."

28. The Apex Court in *Tyagaraja Mudaliyar and Another vs. Vedathanni* AIR 1936 70 (Privy Council) observed as under:--

"12. Hence we have put into writing these few words by way of a deed of absolute sale conditional sale, so, that it may be of use when required,"

(4) There is a clear legal distinction, between the two concepts-a mortgage by conditional sale and, a sale with a condition of repurchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the, property to the, purchaser reserving a personal right of repurchase. The question, to which category a document belongs presents a real difficulty which can only be solved by ascertaining the intend of the parties on a consideration of the contents of a document and other, relevant circumstances. Decided cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. Let us therefore look at the terms of the document extracted above."

29. The Apex Court in *Tyagaraja Mudaliyar and Another vs. Vedathanni* AIR 1936 70 (Privy Council) observed as under:--

"5. By s. 58(c) of the Transfer of Property Act a mortgage by conditional sale is defined as follows:

"58. (c) Where the mortgagor ostensibly sells the mortgaged property-

On condition that on default of payment of the mortgaged-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."

The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts."

30. The Apex Court in *Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi*, observed as under:--

"The next contention on behalf of the appellant is that sub-s.(1) of s. 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parole evidence in support of the contention. Section 91 of the Evidence Act provides that when the terms of contract, or of a grant, or of any other disposition of

property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the 1183 terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Sub-s. (1) of s. 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to s. 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contradicting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-s. (1) of s. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties (Tyagaraja Mudaliyar and another v. Vedathanni). The Trial Court was right in permitting the respondent to lead parole evidence in support of her plea that the sale deed dated January 7, 1953 was a sham document and never intended to be acted upon. It is not disputed that if the a role evidence is admissible, the finding of the court below in favour of the respondent must be accepted. The second contention on behalf of the appellant must also fail."

31. The Apex Court in *Gulab Chand (Dead) by Lrs. Vs. Babulal (Dead) by Lrs. and Others*, observed asunder:--

"6. We have taken into consideration the three documents which were executed between the parties on 10-8-1962 and the subsequent loan agreement executed on 1-8-1963 and agreement of sale dated 20-8-1965 executed by Narayan Prasad and another rent note executed by Gulab Chand on 20-8-1965. It appears to us on considering the said documents executed on 10-8-1962 that the transaction was in substance and essence a mortgage. It is an admitted position that later on no other sale deed was executed by Gulab Chand. Therefore, no relationship of landlord and tenant between the parties was created at any point

of time. It may be indicated here that no hard and fast rule is to be laid down for determining the question as to whether separate transactions form a single transaction or not. The real intent and purpose of the documents should be judged in the facts of each case in the context of the intent of the parties and the language in which the documents are couched."

32. The Apex Court in *Tyagaraja Mudaliyar and Another vs. Vedathanni* AIR 1936 70 (Privy Council) observed as under:--

"15. The point here is whether oral evidence is admissible under Section 92(1) of the Evidence Act to prove that a document though executed was a sham document and whether that would amount to varying or contradicting the terms of the document.

16. This Court has held in *Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi*, that in spite of Section 92(1) of the Evidence Act, it is permissible for a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. In the above case, it was observed by D.A. Desai J as follows:

"the bar imposed by Section 92(1) applies only when a party seeks to rely upon the document embodying the terms of the transaction and not when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties".

33. The Apex Court in *Santakumari and Others Vs. Lakshmi Amma Janaki Amma (D) By Lrs. and Others*, observed as under:--

"11. Unless there was no intention to re-convey there would be no question of a purchaser simultaneously executing the Agreement to Sell the property after 10 years. The two documents were executed immediately one after the other and were also registered simultaneously one after the other. There would not be two such documents executed simultaneously unless the intention was that the property was to be reconveyed to the vendor i.e. Krishnan Nair."

34. The Apex Court in *Vanchalabai Raghunath Ithape (D) by L.Rs. Vs. Shankarrao Baburao Bhilare (D) by L.Rs. and Others*, observed as under:--

"12. Section 58(a) and (c) of the Transfer of Property Act, 1882, needs to be reproduced here:--

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

deed" defined. --(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(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."

13. From a perusal of the aforesaid provisions especially, Section 58(c) , it is evidently clear that for the purpose of bringing a transaction within the meaning of "mortgage by conditional sale", the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition that on such payment being made, the buyer shall transfer the property to the seller. Although there is a presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage transaction.

14. In *Williams v. Owen*, a similar question arose for consideration as to whether a conveyance by the plaintiff's father to the defendant was to be considered as having been a mortgage as contended by the plaintiff, or as having been a sale, with a right of repurchase at a given date? It was held that in a mortgage the debt subsists and a right to redeem remains with the debtor, but a sale with a condition of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a personal right to purchase. This personal right can only be enforced strictly according to the terms of the deed and at the time agreed upon.

15. In the instant case, the trial court committed grave error in construing the document and erroneously held that the transaction is mortgage and hence, the plaintiff is entitled to decree of redemption.

16. In *Vasudeo Bhikaji Joshi v. Bhau Lakshman Ravut* a Bench (comprising Sr. C. Farran, Kt., CJ and Mr. Justice Parsons) of the High Court at Bombay considered a similar question in which the fact was that the plaintiffs sued to redeem an alleged mortgage made in 1823 by their ancestor to the ancestor of the defendant. The alleged mortgage recited a previous mortgage under which the mortgagee Gopal Gokhale was in possession, and it stated that a sale had been contemplated, but the parties could not agree as to price, but that they had now settled it at Rs. 125/- and the amount due on the mortgage at Rs. 200/-, and that it was agreed that if within four years the mortgagor paid Rs. 125/- with interest, he should get back the land; if not, that the land should be the absolute property of Gokhale. On these facts, the Court held that:

"This was not a mortgage but a sale. It was an agreement which put an end to the previously existing mortgage. A mere stipulation for repurchase does not make a transaction a mortgage. To make a mortgage there must be a debt, and here there was no debt, nor was the property here conveyed as security."

17. In *Tamboli Ramanlal Mot Hal v. Ghanchi Chimanlal Keshavlal*, the facts of the case were similar to this case. In that case, a document of transfer was executed and the property was handed over. At the same time, the document proceeded to state that the property is sold conditionally for a period of five years and possession is handed over. The document stated: "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right." The further clause in the document was to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives would have any right to take back the said properties. The last important clause was that after the period of five years the transferee would have a right to get the municipal records mutated in his name and pay tax. On these facts, this Court held that: (SCC pp. 298-99, paras 16-17)

"16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex. 26 dated December 11, 1950. Before that, it is necessary to utter a word of caution. 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 now observed, that is not conclusive of the matter.

17. What does the executant do under the document? He takes a sum of Rs. 5,000/- in cash. The particulars are (a) Rs 2,499/- i.e. Rs 899/- by mortgage of his house on 27-1-1944 and (b) Rs. 1,600 by a further mortgage on 31-5-1947

totalling to Rs 2,499/-. Thereafter, an amount of Rs 2,501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs 5,000/- was not taken as a loan at all.

As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs 5,000/- with the conditional sale is executed, we are unable to see how the relationship of debtor and creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor.

This is a vital point to determine the nature of the transaction." This Court, therefore, held that the document was not a mortgage by conditional sale, rather the document was transfer by way of sale with a condition to repurchase."

35. The other rulings cited by the parties are not applicable in the facts and circumstances to the present case.

36. To summarize the position of law, as can be gathered from the decision discussed above suffice it is to say that if the document is clear and unambiguous then surrounding circumstances are not relevant for the construction of a document. The attending circumstances can be looked into and taken into account only when the intention of the parties is not explicitly clear from the document itself. It is now a well settled law that if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be mortgage. Whether they are contemporaneously executed or not. A sale with a condition of repurchase is not a lending and borrowing transaction. An agreement to sale confers merely transaction right which can be enforced strictly according to the terms of the deed and at the time agreed upon.

37. Coming to the instant case in order to judge the nature of the transaction, it is essential to re-produce the sale deed (Ex. -2) and agreement of sale (Ex. -1) which reads as follows:--

Sale deed (Ex. -2)

This Deed of sale made on the 14th day of December, 1961 between (1) Shrimati Kalawati Devi widow of R. Shyam Sunder Bhargava, (2) Suraj Prakash Bhargava, for sale the guardian of his minor sons, (3) Ramesh Chandra Bhargava (4) Rama Bhargava (5) laxman Bhargava, (6) Santosh Kumar Bhargava, (7) Sudhir Kumar Bhargava, sons of R. Shyam Sunder Bhargava, all residents of Hat hi Bhata, Ajmer (hereinafter called the Vendor), of the part and, (1) Shri Amarnath Bhargava, son of it Daya Shankar Lal Bhargava, and Shrimati Shail Bhargava, wife is Shri Amar Nath Bhargava, resident of Kutchery Road, Ajmer (hereinafter called the purchasers) of the other part, with as follows-

Whereas, Messers (1) Daya Shankar Bhargava, Advocate (2) Somdutt Bhargava

(3) Sachhda Nand Bhargava (4) Y.N. Bhargava, having obtained money decrees against the Vendors, and whereas their execution petition are pending in Ajmer Court and whereas orders for sale the property fully detailed and described hereinafter been passed and whereas the Vendors do think that they will suffer a heavy loss if the said property is sale by public auction in the execution of the said decrees and whereas the Vendors are unable to pay the decreetal amount in lump sum before the date of sale fixed in the said Execution Petition, and whereas the vendors have considered it fit and proper to sell the property specially below for Rs. 57,400/- Rupees Fifty Seven Thousand and Four Hundred) only to the purchasers and whereas the purchasers have paid to the aforesaid creditors in full and final satisfaction of their decreetal amount of Rs. 57,400/- (Rupees Fifty Seven Thousand and Four Hundred) as detailed below, it is hereby agreed and convented as under-

(1)That in consideration of the said sum of Rs. 57,400/- the vendors as owners of the property hereby transfer, sell assign and convey to the said purchasers their heirs, executors administrations, and assigns and legal representatives, property bearing No. ... CXVII/2. (New Number) situated in the road linking Kutchery Road and Jaipur Road, Ajmer, fully described and detailed at the foot of this indenture and all the right, title, interest, property, claim and demand whatsoever of the vendors" into or upon the said property and every part thereof to have and to hold the said property hereby conveyed upto the purchasers, their heirs, executors, administrators, assigns and their legal representatives and convenient with the purchasers, their heirs, executors, administrators, and assigns that they the vendors have sound title to convey the property hereby conveyed or expressed so to be unto the purchasers, their heirs, executors, administrators, representatives and assigns in the manner as aforesaid and that the purchasers shall hereafter passably hold, use and enjoy the same as their owners chattals and property without any hindrance, interruption, claim or demand by or from vendors or any other person whatsoever.

(2)That the vendors do hereby declare and assure the purchasers that the aforesaid property together with all rights of easement and passage which is hereby conveyed to the purchasers, is free from any right, lien or encumbrance.

(3)That the vender have agreed to deliver to the purchasers all deeds and writing now in their possession and custody relating to the title of the vendors.

(4)That the aforesaid property at present is occupied by the following tenants who are paying rent at the rates marked against their names and who have been asked by the vendor to pay rent the purchasers in future and to hand over vacant possession of the premises in their respective occupation as tenant when so demanded by the said purchasers, the purchasers are also hereby authorized to recover rents from the date of the sale from the tenants and in the event of the tenants not paying rent to the purchasers, the purchasers are competent to recover through a competent court-

The date of the tenancy of the said tenants is from first of every English calendar month.

5. That the purchasers will be liable to pay the house tax and other taxes from the date of this deed and the previous arrears of houses tax etc. upto the date of the sale shall be paid by the vendors.

6. That the vendor hereby agreed to indemnify the purchasers their heirs, executors, administrators and assigns to the event of any claimant coming forwards and establishing any claim to any portion or the whole of the property hereby conveyed.

7. That the vendors hereby acknowledge to have received the consideration of this sale deed i.e. Rs. 57,400/- in full from the purchasers as stated below-

(i) Paid to Shri Daya Shankar Bhargava Advocate Rs. 22,550/-.

(ii) Paid to Shri Som Dutt Bhargava, Rs. 15,600/-

(iii) Paid to Shri Sachidanand Bhargava, Rs. 10,500/-.

(iv) Paid to Shri Y.N. Bhargava, Rs. 9,750/-

Description of the Property

One two storeyed building bearing A.M.C. No. VII/2 (New Number) situated on the Kutchery Road, Ajmer with passage lying towards its East, West, South alongwith Nohra enclosed by compound walls with constructions recently put up therein together with passage lands towards its north, South, East and the quarter and Motor Garage, together with corrugated sheets, motor Garage and compound walls towards South.

East- Joint passage by the vendors and the purchasers.

West- Compound of Smt. Sushila Jain.

North- Public Road

South- Nail ah.

In witnesses where of the vendors have affixed their signatures this day and year above written stamp duty Rs. 1495/- have been paid Sd. S.R. Bhargava"

Agreement of Sale (Ex. -1)

"An agreement made on 14th Day of December, 1961 between (1) Shri Amar Nath Bhargava, Pleader & o Shri Daya Shankar Bhargava, Advocate, Ajmer and (2) Smt. Shail Bhargava W/o Shri Amar Nath Bhargava, R/o Kutchery Road, Ajmer (hereinafter called the vendor) on the part and (1) Shrimati Kalawati Devi widow of Shyam Sunder Bhargava, (2) Suraj Prakash Bhargava, for himself and guardian of his minor sons, (3) Ramesh Chandra Bhargava (4) Rama Bhargava (5) laxman Kumar Bhargava, (6) Santosh Kumar Bhargava, (7) Sudhir Kumar

Bhargava, sons of Late R. Shyam Sunder Bhargava, all residents of Hat hi Bhata, Ajmer (hereinafter called the purchaser) at the other part.

Whereas, the vendors have purchased the property fully described and detailed below from the purchasers for a sum of Rs. 57,400/- (Rupees Fifty Seven Thousand Four Hundred only) by means of sale deed dated 14.12.1961 executed by the purchasers in favour of the vendors and whereas the vendors hereby agree to sale the said property to the purchaser for the sum of Rs. 57,400/- (Rupees Fifty Seven Thousand Four Hundred only) that in case the amount referred to above is not received by the vendor on or before the 15th day of December, 1966. The vendor shall be under no obligation to convey the said property to the purchasers and the vendors shall continue to own, possess and enjoy the said property as absolute owners. That in case the vendors failed to execute the sale deed of the said property in favour of purchaser or purchasers mentioned in para 1 above on payment of the entire amount due to the vendors within the aforesaid period the purchaser or the purchasers shall be entitled to file a suit for specific performance of this agreement and the vendors shall be liable to pay all costs. Now, know all persons by their presence that it is agreed between the parties that the purchaser or purchasers will make the payment of Rs. 57,400/- (Rupees Fifty Seven Thousand Four Hundred only) to the vendor on or before 15th December, 1961 and it is further agreed that it is not necessary that all the purchasers should make the payment jointly and the vendor shall be found to execute a proper sale deed in favour of such purchaser or purchasers who may make the payment of the full amount due to the vendors on or before that it is further agreed that the purchaser or purchasers shall pay the costs of the stamps and registration charges and the amount of taxes due upto this day and which the vendors will have to pay on behalf of the purchaser and respect of the said property. Description of the Property One double storeyed building bearing A.M.C. No. XVII/2 (New Number) situated on the Kutchery Road, Ajmer with passage land towards the East, West, South alongwith the Nohra enclosed by compound walls with constructions recently put up therein together with passage land towards its North, South, East and the pacca quarter and Motor Garage, and compound walls towards South as bounded as under-East-Joint passage of the vendors and the purchasers. West-Passage Land and Compound of Smt. Sushi la Jain. North -Public Road, South -Nallah.

In witness where of the vendors have affixed their signature to the agreement of sale on Thursday and here mention above.

Witnesses 1. Sd/-Rajeshwar Sahay 2. Sd/-Devi Dayal Sharma

Vendors: 1. Amarnath Bhargava, 2. Shail Bhargava

On page 1 in lying No. 22 there is XXX cut which is rightly.

On page No. 2 there is XX cut in it lying which is rightly cut. Stamp duty of Rs. 2.75/- has been paid on this agreement dated 14th day of December, 1961.

38. From a perusal of the sale deed (Ex. -2) re-produced above, the narration of the facts brought on record as well as on the basis of the case law cited at the bar, I am of the considered view that the learned trial Court has made patent aberration in arriving at a conclusion that the documents in question viz sale deed (Ex. -2) and agreement to sale (Ex. -1) were conditional sale with mortgage and not an outright sale with right to repurchase. Needless to say that on the date of the execution of sale deed and its registration, the title in the disputed property was transferred by the plaintiffs in favour of the defendants for the consideration mentioned therein. Mutation of the property was also effected in the name of the defendants thereafter. It is clearly provided in the sale deed that the rent of the disputed property would be realized by the appellants henceforth. The learned trial Court had laid emphasis on the fact that the document (Ex. -1) and (Ex. -2) were executed to save the prestige of the family, as the same was going to be auctioned publically otherwise. However, the learned trial Court failed to consider the fact that the property in dispute had already been put up for auction by the creditors of the plaintiffs, wherein bid started from Rs. 15,000/- and the highest bid was made by Shri Amarnath Bhargava. In this way, the learned trial Court has not only misread the oral evidence but ignored the important document (Ex. -A-5.). The learned trial Court also unnecessarily and by ignoring the other evidence had laid emphasis on the fact that value of the property shown in the auction notice was Rs. 1,00,000/-. However, it is revealed from the auction notice (Ex. -3) that the said value was assessed by the Judgment debtor himself. The fact remains that in the same auction notice, one of the creditors mentioned the value of the property to the tune of Rs. 35,000/-. And another creditor, valued the property to the tune of Rs. 18009/- only. There is no evidence on record which proves that at the time of the auction the value of the property was Rs. 1,00,000/-. Therefore, the finding of the learned trial Court accepting the value of the property to be Rs. 1,00,000/- is liable to be rejected.

39. It is true that in both the contemporaneous documents, the consideration of Rs. 57,400/- was mentioned. But considering the close relationship between the parties it can safely be concluded that the property was agreed to be sold at the same price. In addition to this, considering the intention of the parties it can also be safely concluded that the transaction was a sale transaction and more so, there is no evidence on record which suggest that after five years value of disputed property was enhanced. The fact that possession was handed over to the appellants also fortifies my view that the parties only intended to sell the property in dispute.

40. Although, it has been mentioned in (Ex. -1) that the purchasers shall pay the costs of the stamps and registration charges and the amount of any taxes due upto this day and which the vendors will have to pay on behalf of the purchasers in respect of the said property. While interpreting any document the courts are obliged to gather intention of the parties while construing the document as a whole and intention cannot be gathered by picking only a few words from it.

In this regard, Hon"ble Apex Court in P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another, observed asunder:--

"13. A document, as is well known, must be read in its entirety. The intention of the parties, it is equally well settled, must be gathered from the document itself. All parts of deed must be read in their entirety so as to ascertain the nature thereof."

41. I find no substance in the contention of the learned counsel for the respondents that the stamp duty of sale deed (Ex. -2) was paid by the plaintiff No. 1. The said fact appears to be wrong from the perusal of the sale deed (Ex. -2). In the said document, it is not mentioned that the stamp duty was paid by the plaintiff No. 1.

42. The learned trial Court relied upon the case of Smt. Indra Kaur (supra). The case is not applicable to the facts and circumstances of this case. In the said case, possession was not handed over to the defendant. Also, a condition in the sale deed was to the effect that the purchaser would not transfer the property, in any manner, for ten years. Whereas, in the present case, no such condition is mentioned in the sale deed (Ex. -2) and possession has been handed over by the plaintiffs to the defendants. The learned trial Court has also relied upon the case of P.L. Bapuswami (supra). The facts whereof is also totally different from those of the present case. In the said case, the condition for re-purchase was embodied in the same document. In addition to this, the consideration for the transaction was Rs. 4,000/- while the real value of the property was proved to be Rs. 8,000/-. Moreover, the patta was not transferred to the defendant after the execution of the document. But in the present case, it is not proved that real value of the property was higher than 57,400/-, or that possession has not been transferred. Thus the said case is also not applicable to the present case. So far as the case of Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, is concerned, this case is also not applicable to the facts of the present case.

43. The learned trial Court considered the oral evidence of the parties in the wrong perspective. The finding of the learned trial Court that if the transaction was outright sale then there is no requirement to execute agreement to sale (Ex. -1) is perverse.

Further and most importantly the learned trial Court also failed to consider the proviso to Section 58(c) , which provides that no transaction shall be deemed to be a mortgage, unless the condition is embodied in the document itself effects or purports to effect the sale.

44. The term sale is defined in Section 54 of the Act which reads as follows:--

"54. "Sale" defined.--"Sale is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made.--Such transfer, in the case of tangible immovable property of the

value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contact for sale.--A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property."

45. (Ex. -2)-Sale deed is clear and unambiguous. It is revealed from (Ex. -2) that there was a transfer of ownership of immovable property mentioned therein for the price paid and the document was also registered on that day and therefore, it was a "sale" within the meaning of Section 54 of the Act. Considering the entire document (Ex. -2), it is clear that there was no intention, whatsoever, on the part of the parties to the documents to create any mortgage in favour of the defendants. It clearly transpires from (Ex. -2) that there was a transfer of absolute ownership and the sale was not ostensible but actual because upon execution of the sale deed, title was passed to the defendant and possession was also handed over to the defendants.

46. It is proved from (Ex. -A-12), (Ex. -A-13) &(Ex. -A-14) that the tenants had attorned to the defendants after the execution of sale deed (Ex. -2). It is also not in dispute that the property was mutated to the name of the defendants after execution of the sale deed. This fact is also proved from (Ex. -A-10 and (Ex. -A-11). It is also not in dispute that the names of the defendants were recorded as owners in the house tax department. Notice (Ex. -A-7 and (Ex. -A-8) were sent by the Municipal Council to the defendants on account of construction done by one of the tenant Shri Balkrishan Tripathi who had executed the rent deed (Ex. -A-16) on 14/12/1961 in favour of the defendants. Para 6 of the sale deed, which is indemnity clause, is also clear and unambiguous and clause of indemnity in the sale deed too supports that the transaction between the parties was a sale out and out.

47. As per section 58 (a) , A "mortgage" is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, Section 58(c) reads as under:--

"(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."

48. In the instant case, neither in document (Ex. -2), it is mentioned that the transfer of interest in the property in question was for the purpose of securing payment of any money advanced or ought to be advanced by way of loan or for an existing or future debt nor does the sale deed (Ex. -2) embody a condition which effects or purports to effect the sale. Therefore, in view of Section 58(c) and its proviso the transaction in question is not a mortgage with conditional sale. In view of the clear provision i.e. proviso to Section 58(c) of the Act, 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. In view of this, intention of the parties and other aspect of the matter which have been argued by the learned counsel for the respondents have no force.

49. It transpires from (Ex. -1)-agreement to sale that the plaintiffs have a right to re-purchase the property from the defendant on payment of Rs. 57,400/- within five years. It is also mentioned in that in case the vendee failed to execute the sale-deed of the said property, the plaintiffs would be entitled to file a suit for specific performance.

50. Notice (Ex. A-3) dated 15/12/1966 is very relevant in this regard and reads as follows:

"You agreed to sale property No. 17/2 of Kuchearly Road, Ajmer to me and my mother and brother as per agreement dated 14/12/1961 and execute sale deed at any time by 15/12/1966 I approached you with money. Request to execute the sale deed to you decline. I request you again to execute a sale deed within a week failing which suit shall be filed at your responsibility".

51. There is not even a whisper in the said notice about mortgage. It is relevant to mention here that together with the sale deed (Ex. -2) and agreement to sale (Ex. -1). Rent deed-(Ex. -A-16) was also executed in favour of the defendants. (Ex. -A-16) bears the signature of plaintiff No. 1, Shri S.P. Bhargava as witness. This fact also shows that intention of the plaintiffs was to sell. The documents (Ex. -1) and (Ex. -2) are clear and unambiguous and there is no stipulation as to any interest in either the sale deed or the agreement to sale has any such words suggesting mortgage.

52. (PW-1) has stated that the property in dispute was mortgaged to their maternal uncle Sh. Daya Shankar Bhargava and that is why document (Ex. -1)

was executed along with sale deed (Ex. -2). The statement of the plaintiff to the effect that the property was mortgaged is not admissible in evidence, in view of Section 91 and 92 of the evidence Act. This provision is being reproduced as under:--

"91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document

When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. - When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. - Wills 75 [admitted to probate in 40 [India] may be proved by the probate.

Explanation 1- This section applies equally to cases in which the contracts grants or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2-Where there are more originals than one, one original only need be proved.

Explanation 3. - The statement, in any document whatever, of a fact other than the facts referred to in this section, shall, not preclude the admission of oral evidence as to the same fact."

53. In the present case also the parties willingly executed the documents (Ex. -1) and (Ex. -2). From the perusal of these documents the clear intention of the parties is spelt out. Therefore, the oral evidence given by the plaintiff in contradiction to the terms of the said documents cannot be considered by the Court. Since the document (Ex. -2) i.e. the sale deed is clear and unambiguous, no oral evidence is permitted to contradict its terms.

In view of the above discussions, this appeal deserves to be allowed, hence, is allowed. The impugned judgment and preliminary decree are hereby set aside and suit filed by the plaintiffs is hereby dismissed. There shall be no order as to costs.