

(1979) 08 KAR CK 0039

In the Karnataka High Court

Case No : Writ Petition No's. 8353 and 10820 of 1976 and 410 of 1977

Amir Bee

APPELLANT

Vs

The Sub-Divisional Magistrate, Sakaleshpur and Others

RESPONDENT

Date of Decision : 22-08-1979

Acts Referred:

Karnataka Debt Relief Act, 1976 — Section 4, 4 (e), 4 (f)
Transfer of Property Act, 1882 — Section 58 (c)

Citation : AIR 1980 Kar 154

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : S. Vijay Shaker, B. Vedantaiengar and M. Gopalakrishna Shetty, for the Appellant; T. Radhakrishna, G.M. Rego, S.V. Shama Rao and T.S. Mohammed Ali, Govt. Pleader, for the Respondent

Judgement

1. These writ petitions were heard together and are disposed of by a common order as they involve common questions of law.

W. P. No. 410/77: In this petition under Arts. 226 and 227 of the Constitution, the petitioner who has purchased the agricultural land measuring 2 acres 31 guntas in Sy. No, 62 of Belur, Taluk Belur, district Hassan, from the 3rd respondent under a registered sale deed dated 18-7-1968, has challenged the correctness of the order passed by the Sub Divisional Magistrate, Sakaleshpur Sub Division, Sakaleshpur, in Case No. DRC. 132/766-77, "dated 28-10-1976 allowing the application filed by the 3rd respondent u/s 4(f) of the Karnataka Debt Relief Act, 1976 (hereinafter referred to as "the Act") and further directing the petitioner to hand over the possession to the land in question to the 3rd respondent.

2. Before the Sub-Divisional Magistrate, a registered sale-deed dated 18-7-1968 and also another registered document of the same date executed by the petitioner in favour of the 3rd respondent agreeing to reconvey the property sold under the aforesaid sale-deed on payment of the amount named therein, were

produced. On reading these two documents together and on the basis of the recitals contained in the agreement of reconveyance, the Sub-Divisional Magistrate has come to a conclusion that the, sale was only nominal. He has also further held that the transaction was one of mortgage and has accordingly, declared that the alleged debt under the document stood discharged. The Sub-Divisional Magistrate has not recorded a necessary finding as to whether the 3rd respondent was a debtor within the meaning of the Act. without recording a positive finding about the 3rd respondent being a debtor within the meaning of the Act, the application of the 3rd respondent filed under Sec. 4 (f) of the Act, could not have been allowed by the Sub-Divisional Magistrate. On this score alone, the impugned order would be quashed and the matter would have been remitted for fresh consideration. But, it was contended on behalf of the petitioner that in view of the fact that the transaction in question being one of sale, there is no scope for remitting the matter for fresh consideration.

3. Sri S. Vijayashankar, the learned counsel for the petitioner, submitted that the Sub-Divisional Magistrate had no jurisdiction to enquire into the transaction evidenced by a registered sale-deed as to whether the transaction was one of mortgage or sale. In other words, it was contended that the Sub-Divisional Magistrate, had no jurisdiction to go behind the document and enquire into the nature of the transaction in view of the fact that the transaction in question was evidenced by a registered sale-deed. Merely because the petitioner has executed an agreement of reconveyance of the same date, it was intended that it cannot be held that the transaction was one of mortgage, therefore, the Sub Divisional Magistrate had no jurisdiction to go into the matter and to declare that the transaction in question was one of mortgage. It was also further submitted that in view of the Provisions contained in the proviso to Sec. 58 (c) of the Transfer of property Act, the document of sale shall not be treated to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. Relying upon the aforesaid proviso, it was contended that in the instant case, the agreement of reconveyance having been incorporated in a separate document, both cannot be read together in order to find out whether the transaction is a mortgage. It was also further contended that the execution of a separate agreement of reconveyance is itself a proof of the fact that the transaction evidenced by the document in question was an absolute sale as otherwise, there was no question of reconveyance.

4. Sri Radhakrishna, the learned counsel for the 3rd respondent, submitted that in view of the recitals contained in both the documents which have to be read together the transaction was one of mortgage, therefore, the Sub-Divisional Magistrate had the Jurisdiction to entertain the application and to grant the relief to the 3rd respondent. He further submitted that the opening words contained in Section 4 of the Act, have got overriding effect and as such, notwithstanding anything contained in the proviso to. Section 58(c) of the Transfer of property Act, it was open for, the Sub-Divisional Magistrate to enquire into the nature of the transaction and to find out whether in substance there was a mortgage The

learned counsel also further relied upon the definition of the word "debt" contained in the Act, which means any liability in cash or in kind, whether decreed or not and includes any amount which is in substance a debt. As such, it was submitted that if the two documents are read together, they create a liability which can be said to be in substance a debt, hence according to the learned counsel for the 3rd respondent, the "Sub-Divisional Magistrate had jurisdiction to go into the matter. But, however, the learned Counsel was not in a position to point out that the Jurisdiction of the Sub-Divisional Magistrate under the Act extended to debts other than those covered by mortgages and pledges in view of the provisions contained in Section 4 (e) and (f) of the Act. The learned Counsel however submitted that the expression mortgage occurring under sub-section (f) of Section 4 of the Act, must also be construed to include a transaction which is, in substance a mortgage even though there is no mortgage. The Learned Counsel tried to receive support from a decision of the High court of Calcutta reported in Banku Behari Chandra Vs. Sm. Kalyani Debi,

5. In view of these contentions, the following questions arise for consideration:

(i) Whether the two documents in question could be read together and if so, whether the said documents spell out a mortgage?

(ii) Having regard to the provisions contained in Section 4 of the Act, whether in the case of a sale coupled with an agreement of reconveyance evidenced by two separate documents is it open to construe that it is a transaction of mortgage by conditional sale?

6. The contention of the learned Counsel for the 3rd respondent is that in view of a non obstante clause occurring in the first portion of Section 4 of the Act, the Sub-Divisional Magistrate notwithstanding the provisions contained in the proviso to Section 58(c) of the T. P. Act can go behind the document and enquire into, the nature of transaction in order to find out whether the transaction is in substance, a mortgage and whether there is, in substance a debt. Prior to the addition of the proviso to Section 58(c) of the T. P. Act, by the T. P. Amendment Act (XX of 1929), there was controversy as to whether in the case of the transaction evidenced by two documents, one evidencing the sale and the other evidencing the agreement of reconveyance, the transaction should be interpreted as a mortgage by conditional sale or sale with a condition of re-purchase. In order to do away with this controversy the T. P. Act came to be amended by adding a proviso to Section 58(c) of the T P Act. The said proviso reads as follows:

"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 effect of this proviso is that no document of sale can be treated as mortgage unless the document effecting the sale itself contains a recital to that effect. The whole object is to exclude or shut out the oral evidence to be adduced in the case when such a condition is contained in a separate document. Thus, if the

document effecting a sale does not contain a stipulation regarding the conversion of the sale into a mortgage and such a stipulation is contained in a separate document, in such a case, it is not at all open in law to enquire into the nature of the transaction and to take extrinsic evidence for holding that the document which purports to be an absolute sale is in reality, a mortgage. In the instant case, the document in question purports to be an absolute sale and it does not contain any stipulation for treating the sale as mortgage. The agreement of reconveyance is embodied in a separate document. Both the documents cannot be treated as one document irrespective of the fact that both the documents are contemporaneous and the transaction also cannot be regarded as a mortgage. The Supreme Court, in the case of Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, , has 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."

7. However, it was contended that in the agreement of reconveyance the sale-deed has been described as nominal one, therefore, though the document purports to be an absolute sale but in fact, it is not so in view of the recitals contained in the agreement of reconveyance. Such a recital in the agreement of reconveyance cannot have any effect on the document which purports to be an absolute sale. The fact that the parties have entered into an agreement or reconveyance by a separate deed, itself is a proof of the fact that the document which purports to be an absolute sale is in reality, a sale and had the effect of transferring the title in favour of the vendee, therefore, there was an agreement of reconveyance entered into between the parties. If such a recital in the agreement of reconveyance had the effect of making the sale ineffective or regarding it as one of mortgage, there was no question of having an agreement of reconveyance executed by the vendee in favour of the vendor inasmuch as in such a situation, no title would have passed to the vendee.

8. Even otherwise, and without prejudice to what has been held above, and assuming for a moment that it is permissible in law to read both the documents in question together as one document in order to find out whether the transaction is a mortgage or not, the best general test is to find out whether there does or does not exist a power in the original purchaser to recover the amount fixed in the document as the price for such repurchase. If there is no such power existing in the original purchaser as per the recitals contained in the

document of reconveyance, the transaction cannot at all be treated as mortgage inasmuch as the essential right of a creditor to recover the money from a debtor is not existing, thereby there will not be a relationship of creditor and debtor which is one of the essential features of a mortgage. On a reading of both the documents in question, it is clear that no right is given to the purchaser to recover the amount fixed in the agreement of reconveyance as the price for such repurchase. Therefore the essential right which a creditor enjoys to recover the amount from a debtor is itself not found. Hence, apart from the provisions contained in the proviso to Section 58(c) of the Transfer of property Act, the transaction in question cannot be regarded as a mortgage. Therefore, the first question raised for determinations to be answered in the negative.

9. The answer to the second question depends upon the interpretation as to the scope and effect of the first portion of Section 4 of the Act and also clauses (e) and (f) thereof Section 4 of the Act reasoning as follows :

"Relief from indebtedness - Notwithstanding anything in any law for the time being in force or in any contract or instrument having force by virtue of any such law and save as otherwise expressly provided in this Act, with effect from the date of commencement of this section :-

a) every debt advanced before the commencement of this section including the amount of interest, if any, payable by the debtor to the creditor shall be deemed to be wholly discharged;

(b) no civil court shall entertain any suit or proceeding against the debtor for the recovery of any amount of such debt including interest, if any:

Provided that where a suit or proceeding is instituted jointly against the debtor and any other person, nothing in this section shall apply to the maintainability of the suit or the proceeding in so far as it relates to such other person;

(c) All suits and proceedings (including appeals, revisions, attachments or execution proceedings) pending on the said date against any debtor for the recovery of any such debt shall abate:

Provided that nothing in this clause shall apply to the sale of -

(1) any movable property held and concluded before the commencement this section;

(ii) any immovable property confirmed before such commencement;

(d) every debtor undergoing detention in a civil person in execution of any decree for money passed against him by a Civil court in respect of any such debt shall be released;

(e) every moveable property pledged by a debtor shall stand released in favour of such debtor and the creditor shall be bound to return the same to the debtor forthwith and where the creditor fails to do so, the debtor shall an application

made to the Sub-Divisional Magistrate or any other executive Magistrate authorised by the State Government in this behalf having jurisdiction over the place where the debtor resides be entitled to the return of the same.

(f) every mortgage executed by the debtor in favour of the creditor shall stand redeemed and the mortgaged property shall be released in favour of such debtor and where the creditor fails to do so, the Sub-Divisional Magistrate or any other executive Magistrate authorised by the State Government in this behalf having jurisdiction over the place where the mortgaged property in stand may, suo motu or on application of the debtor and after such inquiry as he may deem fit, put the debtor in possession of the mortgaged property.

Explanation. - Nothing in this section shall be construed as entitling any debtor for refund of any part of any debt already repaid by him or recovered from him before the commencement of this section."

The expression "debt" is defined by Section 3 (b) of " "debt" means the Act, as follows :

" "debt" means any liability in cash or in kind, whether decreed or not and includes any amount which is in substance a debt; but does not include arrears of taxes due to the Central or the State Government or a local authority."

It was contended that the provisions contained in the proviso to Section 58 (c) of the T. P. Act, cannot be taken into consideration for the purpose of finding out as to whether the transaction in question is one of mortgage or not in view of the non obstante clause contained in the first portion of Section 4 of the Act. As quoted above, Section 4 of the Act opens with the clause that notwithstanding anything in any law for the time being in force or in any contract or instrument having force by virtue of any such law "and save otherwise expressly provided in the Act, with effect from the date of commencement of Section 4 the consequences mentioned in cls. (a) to (f) of the Section will follow.

10. The scope and effect of a non obstante clause has been dealt with by the Supreme court in more than one case. Therefore, it is necessary to advert to the relevant portions in the two decisions of the Supreme court on this point :

"Turning now to the non obstante clause in Section 2 of the new Act, which appears to have furnished the whole basis for the reasoning of the court below and the argument before us closely followed that reasoning we find the learned Judges begin by inquiring what are the provisions which that clause seeks to supersede and then place upon the enacting clause such construction as would make the right conferred by it co-extensive with the disability imposed by the superseded provisions, . "The meaning of the section will become clearer", they observe if we examine a little more closely what the section in fact supersedes or repeals..... the disability which the section removes and the right which it confers are co-extensive". This is not, in our judgment, a correct approach to the construction of, Section 2. It should first be ascertained what the

court provides, that every debt or interest thereon, payable for the force of S. 4 of the Act, against before said provides, that every debtor including appeals, revisions, and attachment in a Civil person in execution for the recovery of a debt go section interest if any. Clause (c) of S. 4 provides Including the to the creditor shall be deemed as the date of the coming into force of the Act at any time for money passed shall entertain suits at execution proceedings pending suit or proceedings provides that all suit detention in a against him by a Civil court Civil person in execution and notwithstanding clause and the proceedings binding of cutting down the clear terms of on the date of the coming into force of S. 4 of the Act, against provides, that every debt or interest payable for the force of S. 4 of the Act, against a provides that respect of any such debt shall be the effect from coming into force of detention in a Civil person in execution Clause (e) of S. 4 provides that with effect of the debt for the recovery of at the Sub-Divisional Magistrate or any other Executive Magistrate authorized by the Government any time for money passed against debtor for the recovery of a debt or interest other Executive Magistrate authorize detention at any time for money passed in proceedings appeals, revisions, attachment grammatical construction Of the against the debtor for the recovery of fully discharge Clause (b) of S. 4 provides, that by the State Government payable by against him by a Civil court Civil Court the date of this before the term of a debt advanced any amount of cutting down the clear terms of amount of such debt including, notwithstanding the clause and the half to direct the creditor to return cutting down by, every or than any immovable property confirmed by other again by grammatical ease of enforcement of enforcement of the coming into force of S. 4 read the mortgage executed by mortgage executed by actual construction Of the debtor for the recovery of a debt the debtor for the debtor in favour of the creditor. recovery of the debtor in favour of the creditor. of including appeals, revisions, attachment by the State Government Above it is clear that S. 4 of the Act from what has been stated detention at any time for money passed against debt advanced this between deals with extinguishing of the debt or interest thereon before above it is clear that S. 4 of the Act the commencing provisions contained in the existing on the date of commencement of fully discharge Clause (b) deals with extinguishing of the debt of the said section which notwithstanding any amount of such debt Including,) of S. 4 of the said existing on the date of the Act and takes away the right of the creditor to return a Civil Court section Inc such debt Including, the creditor to remove the debt and shall be deemed to provide, that every respect debtor. Similarly, sub-section (f) of S. 4 of the Civil court from conditionally such debt shall be subject to undergo any transaction is In reality, a sale or a mortgage such claim of the creditor.

12. It may also be that the Act, empowers the Sub-Divisional Magistrate of the coming into force of the Act provided here that the provisions of S. 4 of the Act shall be in effect from the date of the coming into force of the Act or any other Executive Magistrate authorized by the Government any clause (e) of S. 4 further makes it clear suit or interest if any. Clause (c) of S. 4 provides that the provisions relating to the attachment authorized by the state the Sub-Divisional -

XagLstrate cc &A* Thus, hment of the proceedings "I nd ap.aving detention in a Civil Governnunt in this behalf, no nioteperson in execregar ply to the ode of any movable pro force other ExeciAive MagLstrate authorad at on application of the debtorisedof S. 4 of the Act, against ad to "the scope and object of the Act afully discharge Clause grammreleas erty held and concluded and sale ofe the mortgaged property in theatical construction Of the(b) of ides that all suits any immovable property confirmed be debtor fease of every mortgage eatecuted recovery of a debtdn prfore the conijneneement of S. 4r ad theoceby the State nment ieding 0 the debtor in favour of Oia creditor.tion at any deem for money passssS. 4 ofnd theagainst the debtor foe the recovery of provisions contaith Thujk froin what has been statedis be words thereoned in S. 4 of th pro,e Act, in which the no including apabove it is clear that S. 4 of the Ackpeals, revisions,attnon obstante achrn n obstante clause Is bicorported, it cannot deals with extinguishing of the.debt against him by a Civil Cou half to direct the creditor to return existing an the date adementrte Acany amount of such debtIncluding,t provides that no Civi tweel Courte held that the of the said section which wincurevery movable property Pledged of cutting down the clear terms o Act covers any transaction red by a debtor as defined under thewhich does not involve a debt the non obstante clause and thementsAct and takes away the right of the at execution proceedings pend andinterest idebtor on the application made by thef any. Clause (c) of S 4 creditor to remm the debt and banpro In which there ividerespect of any such debt shall be ses, that every d debtor. Similarlythe Civil court from condertV =7, eL (f) atS 4 ofebtorundergon no re shall entertain any suit such claim of the creditor. it may also r the Act, empowersthe Sub-Division leased Clause (e) of S. 4 euq be noticed here that the provisotonviem proceedingslationship of creditor Magistrate or my other Executi:ve l. (e) of & 4 further makes it clear vides that all suits and procee the Sub-DivWonal -XagLstrate cc that the provisions relating the abate Magistrate authorized by the statedings debtor. Hence,ing an the date of the coming intoment of the proceedings "I nd ap. it ca detention in a Governnunt in this behalf, no nioteCivil other Execply to the ode of any movable proiAive MagLstrate authorisedperson in execcannot be held that the non obstante clause wh ad at on application of the debtor toich is inagainst the debtor foe thgrammatical construction Of the perty held and concluded and sale ofee rec release the mortgaged property in the in force of S. 4 of the Act, against aclany immovable property confirmed beuding appeals, revisions, by the ease of every mortgage eatecuted byfore the conijneneement of S. 4r ad theState Government iovery of corporated section at any deem for money pass the debtor in favour of Oia creditor.In S. 4 of the Act, has the efthis bewrds thereofect of excluding thdebtor Thujk froin what has been statedor the recovery of adebte application of the provnon obstante isions contained in the. above it is clear that S. 4 of the Ack any amount of such debtbluding,rovis half to deals with extinguishing of the.debtndirect the creditor to return against him by a Civil Courtro,o to S. 58(c) of the T. existing an the date adncementP. Ac ments at exe every movable property Pledgedcution proceedings pendt of the said section which w incur- to

the proc of cutting down the clear terms of proceedings under- the Act. If it is to be interpreted thus by a debtor as defined under that by reinterest if any. Clause (c) of S 4 proase debtor on the application Act and takes away the right of the made by then o ef a non obstante clause occurring in S. 4 of the Act, the bar contained creditor to remm the debt and ban in the proviso tore debtor. Similarly, eL (f) at S 4 of spect of any such debt shall the Civil court from condertV =7be se Section 59 (the non obstante clause and the vidingthe Act, emp such claim of the creditor. it may alsoowers the Divisional an the date of the coming intoes that leased be noticed here that the proviso to use (e) of S. 4 euqnvien all suits and Magistrate or my other Executive proceedingsc) of the T. P. clause (e) of & 4 further makes it clear vides, that every debtor undergo Act, is removed Magistrate authoriz that the provisions relating the abateed by the the Sub-Div Wonal -XagLstrate cc&A* or taken away, it would be ment of the proceedings "I nd ap. wid force of Governnunt in this behalf, no niote S. 4 of the Act, against aening the ply to the ode of any movable proscop other ExeciAive MagLstrate authorise ad at on application of the debtortode and intendment of S. 4 of th including appeals, revisions, attachrrelea perty held and concluded and sale of sethe mortgaged property in detention in a Civil ease of every mortgage eatecutedyb person in fore the conijneneement of S. 4r ad theexec debtor for the recovery of aebtt. Section 4 of by the State Government the debtor in favour of Oia creditor. i the Act, as pointed out, Intend to extinguish the existing debt of the debtor within the me ro, aning oThujk froin what has been stated f the this beords eoAct and to take away the rightion at any above it is clear that S. 4 of the Ack deem for money pass of ments at execution proceedings pendhat bein half to direct the creditor to reexisting an the date adncementturng so, the non obstante clause occurring in S. 4 of the Act, can not of the said section which wncur-be every movable property Pledged Inte against him by a Civil Court rpreted inred by a debtor as defined under the such a manner so as to exclude the applicability of the provisions conthe non o Act and takes away the right of the f cutting down the clear terms obstante clause and tdebtor on the application made by thehetained creditor to remm the debt and ban in the proviso to S. 58(c) of the T., P. Act, to thing an the date of the comin dthe Civil court from condertV =7ebtor. Similarly, eL (f) at of intoe proceedings unvides, that every debtor undergo der the Act. Hencesuch claim of the creditor. it may also. the contention of Sri the Act, empowersthe Sub-Divisionalspect of any such be noticed here that the proviso to debt shall be seRadhakrighna, the learned counsel for the 3rd Magistrate or my clause (e) of & 4 further makes it clear other Executive S. 4 of the Act, against a spon that the provisions relating the abateleased Clause Magistrate authorized by thestate) of S. 4 euqnvienment, enactment of the proceedings "I nd ap. hat in view of the non obstante clause occurring in S. 4 Governnunt in this behalf, no nioteo ply to the ode of any movable prof deteniv Wonal -XagLstrate cc&A* tion in a Civil person in ed at on application of the debtortoxec Act. it was open for the S ebtor f perty held and concluded and sale of for the recovery of a other Erelease the mortgaged property in theexecany immovable property confirmed beiAive MagLstrate riseddebtub-

Divisional Magistrate to go behind the sale deed and for the confirmation of S. 4 read the enactment of every mortgage executed by him into the application in order to find grammatical construction of the deed out with the debt in favour of the creditor. Section at any time for money passed the transaction in question by the State Thujk from what has been stated was, in reality, a sale or mortgage, cannot. It can be accepted. If the Legislature these be- words the above it is clear that S. 4 of the Act against him by a Civil Court notwithstanding deals with extinguishing of the debt cutting off all rights existing on the date of advancement of the creditor to return down the clear terms of the non obstante clause and the Magistrate, Sakaleshpur of the said section which in every movable property pledged by a debtor as defined under the Pledge Act and takes away the right in respect of any such debt shall be satisfied by the debtor on the application made by the creditor to remove the debt and ban to exclude the application of the provisions contained in the proviso to S. 58(c) of the Civil court from coming into force of the debtor. Similarly, clause (f) of S. 4 of the Pledge Act (e) of S. 4 of the Act empowers the Sub-Divisional Civil person in being noticed here that the proviso executed there would have been a pro Sub-Divisional Magistrate clause (e) of S. 4 further makes it clear or my other Executive Magistrate vision in the Act enabling the authorities function under the Act, to reopen the matter that the provisions relating to the attachment of sale in or Magistrate authorized by the order to mention of the proceedings "I and other Executive Magistrate authorized find out whether the transaction Government in this behalf, in reply to the order of any movable property was, in reality, a sale or mortgage. In fact, grammatical construction of the deed at any time for money application of the debtor passed such a provision is partly held and concluded and sale found in S. 23 of the Karnataka Agricultural Debtors' Relief by the State Government the movable immovable property confirmed pledged property in the Pledge Act, 1966. In the absence of any such provision, it is not possible to go before the confirmation of S. 4 read the enactment of every mortgage executed by him in favour of the creditor against him by a Civil Court notwithstanding contained in the proviso to S. 58(c) of the Act, from what has been stated T. P. Act, are excluded from operation in respect of half to direct the above it is clear that S. 4 of the Act, deals with extinguishing of the debt every movable property existing on the date of advancement of the creditor to remove the debt and ban in the case of pledges and where the the the Act, empowers the Sub-Divisional Civil court from coming into force of the Sub-Divisional Magistrate and mortgage property is situated in the case of such claim of the creditor. It may also mortgages shall be sent Magistrate or my other Executive Magistrate.

to deal with every moveable property be noticed here that the proviso to other Executives Magistrate or magistrate authorized by the State for the disposal of property clause (e) of Section 4 further makes it clear that a mortgage executed by a debtor in favour of the creditor is not valid in this that the provisions relating to the abatement of the proceedings. Therefore, it is clear that in the absence of any pledge of the proceedings "I do not apply a deed of mortgage on application of the debtor mortgage, the authorities exercising power to the order of any movable property by the State Government under clause (e) and Section 4 of the Act release the mortgaged property in the Act, shall not have jurisdiction to entertain the application. Therefore, the words hereby held and concluded and sale of the mortgage executed by the debtor must be a document evidencing the any immovable property confirmed by mortgage executed by a deed dealing with extinguishing of the movable property. Pledge of absence of a mortgage deed to enquire into the application in order to find existing on the date of the application whether on the facts and circumstances of the case, there exists in substance, a mortgage. of the said section which will curtail on the application made by the debtor as defined under the Act. Similarly, in Section 4 of Sri Radhakrishna, the learned counsel for the respondent and takes away the right of the respondent, sought to place reliance on the following the Act, empowers the creditor to remove the debt and ban Divisional Judge from a decision of the High Court of Calcutta reported in AIR 1961 Cal. 351. (Banku Beth Civil Court from condert V = 7 hari v. K Magistrate or my other Executive Magistrate Deb!) -such claim of the creditor. it may also be noticed here that the proviso to the Government in this behalf, no note My attention has been drawn to the decision of the Supreme Court, clause (e) of Section 4 further makes it clear that in Chunchun Jha v. Ebadat Ad on application of the debtor to AIR 1954 SC that the provisions relating to the abatement 345 and to the subelement of the proceedings "I do not apply the mortgaged property in the order of any movable property of every mortgage executed by the debtor in favour of the creditor. hereby held and concluded and sale of the property from what has been stated in Amir Bee v. Suany immovable property confirmed by Divisional Magistrate, Sakaleshpur before the on the judgment of Section 4 of the Act it is clear that Section 4 of the Act deals with extinguishing of the debt by subsequent decisions of the same Court, substantially to the same effect, in Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, and Simrathmull v. Nanjalingiah Gowder, AIR of the said section which will curtail - 963 SC 1182 at page 1184 for the purpose of emphasising that, in view of the above two separate deeds by a debtor as defined under the Act, no question of mortgage under the law, that is, under, the T. P. Act, would arise in the instant case and takes away the right of the creditor. That, however, as we have said in our above judgment ILR (1965) Cal 59, vide, in particular, pages 6 creditor to remove the debt and ban 3-64, would not conclude the matter, so far as the Bengal Money Lenders Act is concerned, and the Civil Court from condert V = 7 arned Additional District Judge is right in treating our said decision as an authority for the proposition that such claim of the

creditor. it may alsoat even though invalid as a mortgage, the transaction may still be a "loan in substance" so as to be a "loan" w noticed here that the provisotoithin the meaning of S. 2 (12) of the Bengal Money Lenders Act." clause (e) of & 4 further makes it clearInthat the provisions relating the abate this connection, Sri B. Vedanta 1yengar, the learned counsel for the petitioner in writ petition 10820 of 1ment of the proceedings "I nd ap.976, which was also heard along with this writ petition; submitted that the aforesaid decision is not aply to the ode of any movable propplicable to the facts of the present case inasmuch as S. 37 (a) of the Bengal Money Lenders Act specifically provided for reopening the transaction of sale in order to find out whether in reality there was a serty held and concluded and saleofale or mortgage. As already pointed out, the Act in question does not provide for re-opening of a sale trany immovable property confirmed beansaction. Further, while dealing with the cases falling under cls. (e) and (f) of S. 4 of the - Act, it is not nfore the conijneneement of S. 4r ad theecessary to go into the question as to whether there is, in substance, a debt as per the definition of the word "debt" found in S. 3 (b) of the Act, inasmuch as both in the case of a pledge and a mortgage, there will be a debt and there will be a relationship of creditor and debtor. Therefore, in respect of the cases falling under cls. (e) and (f) of S. 4 of the, Act, it is not necessary to find out whether there is, in substance, a debt. Thus the aforesaid decision of the Calcutta High court is not of any assistance and Is not applicable to the facts of the, case on hand.

13. Sri Radhakrishna, the learned counsel for the 3rd respondent upon a Full Bench decision of this court reported in (1964) Kar I.T 254 : AIR 1965 Mys 54, (Dasappa V. Jogiah). It is to be pointed out that the said decision is not applicable to the facts of the present case inasmuch as the two questions that were considered in the aforesaid decision, are as follows:

"1. Whether the provisions of S. 5 of the Mysore Agriculturists Relief Act apply only to transactions which took place at any time within a period of 6 years before the Act was extended to the local area concerned or whether those provisions are also applicable to transactions entered into subsequent to such extension?

"2. Whether the above provisions have ceased to be operative after the introduction of the Central Evidence Act and Central Transfer of property Act to Mysore, as being contrary to the provisions of those enactments?"

It is very pertinent to note that S. 5 of the Mysore Agriculturist's Relief Act (18 of 1928) provided for determining the nature of transaction and to admit evidence of an oral agreement or statement ,Therefore, the said decision is of no assistance to the learned counsel for the 3rd respondent.

14. Accordingly, the second question is also answered in the negative W. P. No. 10820 of 1976

15. In this writ petition, the petitioner has challenged the correctness of the

order passed by the Sub-Divisional Magistrate, Bangalore Sub-Division, Bangalore, in No. MAG.2/76-77, dated 22-6-1976, allowing the application filed by the 2nd respondent under S. 4 (f) of the Act.

16. It is not in dispute that the 2nd respondent sold the property in question bearing Site No. 15, A. K. Colony, Suddaguntapalya, to the petitioner for Rs. 8,000/- under a registered sale deed dated 10-9-1973 and on the same date, the petitioner had also executed an agreement of reconveyance in favour of the and respondent agreeing to reconvey the property in favour, of the 2nd respondent provided the 2nd respondent pays the amount as mentioned in the sale deed within five years along with the amount spent on repairs of the house and also the interest on the amount spent on repairs. There is also a further recital in the said document that if the 2nd respondent fails to pay the amount as mentioned in the agreement of reconveyance, the transaction shall be treated as absolute sale and the agreement of reconveyance shall be treated as cancelled.

17. Sri Rego, the learned counsel for the 2nd respondent, submitted that the decision rendered on the aforesaid two questions, cannot at all be applied to this case inasmuch as in the instant case, in the agreement of reconveyance itself, it has been stated that on the failure to perform the conditions mentioned in the agreement of reconveyance, the transaction shall be treated as absolute and not otherwise. Therefore, the learned counsel submitted that the parties did not intend to treat the first document as a document evidencing the sale, as such the earlier document which purports to be a sale cannot be considered as a sale in view of the recitals contained in. the agreement of reconveyance, and the first document should be regarded as mortgage by conditional sale. It has been pointed out in the preceding paragraphs that the provisions certain in the proviso to S. 58(c) of the T. P. Act, are applicable and as such, the document Exhibit-A (sale deed) cannot be read as a mortgage by conditional sale in view of the fact that the recitals regarding reconveyance are found in a separate document of agreement of reconveyance and not in the document which has effected or purported to effect the sale. Therefore, the contention advanced by Sri Rego, the learned counsel for the 2nd respondent, cannot at all be accepted.

18. Sri Rego, learned counsel for the 2nd respondent, contended that though the petitioner had purchased the entire property for Rs. 8,000/-, subsequently, he also sold a portion of the schedule property under a registered sale deed for Rs. 8,500/- to another person and this circumstance goes to indicate that the transaction was a mortgage by conditional sale and not a sale as otherwise the entire property would not have been sold for 8,000/-. This argument is nothing but an attempt to overcome the effect of the proviso to S. 58(c) of the T. P. Act. The very object of the said proviso is to do away with the enquiry into the nature of the transaction in order to find out whether the document is one of mortgage by conditional sale or sale. Therefore, the submission made by Sri Rego cannot at all be accepted.

19. Thus, it is clear that the document executed by the 2nd respondent being

one of sale merely because there is an agreement of reconveyance executed by the petitioner, the document of sale cannot be treated as mortgage by conditional sale so as to give jurisdiction to the Sub-Divisional Magistrate to enquire into the matter. Consequently, the order passed by the Sub-Divisional Magistrate is without jurisdiction and the same is liable to be quashed.

20. Writ Petri. No. 8353 of 1976, In this petition, the petitioner who has purchased the premises bearing Municipal No. 208, in Temple Street, Sakaleshpur, Hassan District, from the 2nd respondent, has challenged the correctness of the order passed by the Sub-Divisional Magistrate, Sakaleshpur, in Case No. DRO. PRS. 12/76-77 dated 29-7-1976, allowing the application filed by the 2nd respondent under S. 4 (f) of the Karnataka Debt Relief Act.

21. It is not in dispute that the 2nd respondent had executed a registered sale deed dated 4-6-1969 in favor of the petitioner transferring the property in question for Rs. 10,500/-. On the same date, the petitioner and her husband both together have executed an agreement of reconveyance in favour of the 2nd respondent agreeing to reconvey the property in question on payment of the amount of Rs. 10,501 and also the interest at the rate of 12 % per annum.

22 During the course of this order, it has already been held that in view of the provisions contained in the proviso to S. 58(c) of the T. P. Act, it is not open to read both the documents together and hold that the transaction is a mortgage by conditional sale. However, Sri S. V. Shama Rao, the learned counsel for the 2nd respondent, submitted that it was open for the Sub-Divisional Magistrate to find out whether there was a mortgage as according to the learned counsel, a reading of both the documents together would lead to an inference that the transaction was a mortgage, therefore, on being found that 2nd respondent was a debtor within the meaning of the Act, the Sub-Divisional Magistrate had jurisdiction to grant the relief. He also further submitted that in view of the agreement of reconveyance executed by the petitioner and her husband on the same date agreeing to reconvey the property on payment of the sale consideration plus the interest Thereon; and specially in view of the recitals contained in the agreement of reconveyance regarding the payment of interest, it was submitted that the amount paid under the sale deed was a loan and the parties intended to create a " mortgage by conditional sale only and not a sale as such. Hence; it was submitted that the order passed by the Sub-Divisional Magistrate is not liable to be interfered with.

23. The document Exhibit-A is a sale out and out. As far as Exhibit-B is concerned, it, is an agreement of reconveyance, under which the petitioner and her husband have agreed to reconvey the property sold under the sale deed Exhibit "A" on payment of the sale consideration plus the interest. It is also stated in the agreement that the consideration amount was taken as a loan. In view of the fact that the conditions of reconveyance are not contained in the document of sale itself and as the same,, are found in the other document it is not open to hold on the basis of the recitals contained in the agreement of

reconveyance that the transaction was one of mortgage by conditional sale. It will be contrary to the provisions contained in the proviso to S. 58(c) of the T. P. Act. This aspect of the matter has already been dealt with in the preceding paragraphs of this order. The existence of mortgage executed by the debtor" is a condition precedent for the exercise of jurisdiction under S. 4 (f) of the Act, which provides that every mortgage executed by the debtor in favour of the creditor shall stand redeemed and the mortgaged property shall be released in favour of the debtor. In the absence of any such document, it is not open for the Sub-Divisional Magistrate to go behind the document of sale and to enquire into the matter and to find out by extrinsic evidence as to whether there is, in substance, a mortgage. That being so, the aforesaid contention of Sri Shama Rao, cannot be accepted.

24. In view of the fact that the transaction was one of sale, the order passed by the Sub-Divisional Magistrate is without jurisdiction. Consequently the same is liable to be quashed,

25. For the reasons stated above, all the three writ petitions are allowed. The order dated 28-10-1976 passed by the Silb-Divisional Magistrate, Sakaleshpur Sub-Division, Sakaleshpur in .No. DRC.1321106-77 produced in Ex. B. in W. P. No. 410/77, the order dated 22--6-1976 passed by the Sub-Divisional Magistrate, Bangalore, in No. MAG. 2 of 1976-77, produced as Exhibit-G in writ petition No. 10820 of 1976 and the order dated 29-7-1976 passed by the Sub-Divisional Magistrate, Sakaleshpur Sub-Division Sakaleshpur, in Case No. DRO.PRS.12/76-77, produced as Exhibit-C in writ petition No. 8353 of 1976, are hereby quashed. Rule is made absolute.

26. Ordered accordingly.