

(1982) 07 MAD CK 0028
In the Madras High Court

Ayyasami Pillai and Another

APPELLANT

Vs

Subbaraya Pillai and Others

RESPONDENT

Date of Decision : 24-07-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Constitution of India, 1950 — Article 133(1)
Specific Relief Act, 1963 — Section 42

Citation : (1983) ILR (Mad) 129 : (1983) 96 LW 261 : (1983) 2 MLJ 340

Hon'ble Judges : S. Natarajan, J

Bench : Division Bench

Judgement

S. Natarajan, J.—Plaintiffs 2 and 3, who succeeded before the trial Court, but lost their case before the lower appellate Court, are the appellants. The suit giving rise to the appeal was for redemption of a mortgage, or in the alternative, for specific performance of an agreement or reconveyance and for recovery of possession of the suit property.

2. The case of the appellants is as follows The suit property originally belonged to the appellants (plaintiffs 2 and 3) and time mother, late Adhilakshmi Animal. Adhilakshmi Ammal created an usufructuary mortgage over the property on 1st November, 1939 under Exhibit A-1 in favour of Arunachalam Pillai, father of the first respondent. Subsequently, in order to discharge the mortgage, Adhilakshmi Ammal as well as the appellants executed a mortgage deed by conditional sale under the original of Exhibit A-2, dated 7th October, 1944 and in terms of Exhibit A-2, the earlier mortgage was discharged. Consequently, a relationship of creditor and debtor came into existence between the parties on 7th October, 1944. Arunachalam Pillai, the usufructuary mortgagee and the first respondent were members of a joint family and Arunachalam Pillai acted as manager of the family. The sale deed under the original of Exhibit A-2 was taken by Arunachalam Pillai in the name of his son, the first respondent. It was Arunachalam Pillai, who paid the sale consideration under Exhibit A-2 to the executants of the document. Though Exhibit A-2 was styled as a sale deed, it was indeed a mortgage by

conditional sale and it was stipulated in the document that the first respondent should reconvey the property whenever called upon to do so by the appellants. However, if for any reason the Court were to take the view that the transaction under Exhibit A-2 was not a mortgage by conditional sale, but an outright sale, with an agreement of reconveyance, the appellants were ready and willing to pay the amount of Rs. 1,000 mentioned in the document. Subsequent to the execution of Exhibit A-2, there was a partition in the first respondent's family and in that partition, the property was allotted to the share of the first respondent's son, by name, Velayutham Pillai. Velayutham Pillai died about two years before the filing of the suit and his mother, the second respondent is the sole heir entitled to succeed to his properties. Adhilakshmi, mother of the appellants also died about ten years ago and her right in the suit property, has devolved on her husband, the first plaintiff (since dead) and her sons, the appellants 1 and 2 herein. During Adhilakshmi Ammal's lifetime, a notice was issued on 31st March, 1962 on her behalf and on behalf of the appellants regarding the redemption of the mortgage by conditional sale; but, there was no reply to the said notice. Hence, the appellants had to seek the intervention of the Court for redemption of the mortgage by conditional sale, and in the alternative, for specific performance of the right of reconveyance.

3. The suit was contested by respondents 1 and 2 by means of a written statement filed by second respondent, which was adopted by the first respondent. Therein, it was stated that the transaction, dated 7th October, 1944 was not a mortgage by conditional sale, but, an outright sale. No doubt, the document contains a stipulation regarding reconveyance of the property, but the said condition is opposed to law and void, since no time-limit has been prescribed for enforcing the right of reconveyance. As such, the stipulation amounted to a restraint on the powers of alienation of the vendee and offends the rule against perpetuities. Moreover, the restraint clause was an interpolation in the document and it had been surreptitiously introduced in the document without the knowledge of the first respondent. At the time the sale was obtained under the original of Exhibit A-2, Arunachalam Pillai and the first respondent were divided members and hence, there was relationship of debtor and creditor between the executants of Exhibit A-2 and the first respondent. In any event, the first respondent was not a necessary party to the suit and hence, the suit against him should be dismissed. Besides, the appellants, there were other heirs for Adhilakshmi Ammal and since they had not been made parties to the action the suit was bad for non-joinder of parties. The so-called restraint clause contained in Exhibit A-2 came to the notice of the first respondent only when Adhilakshmi Ammal and her sons issued a notice on 31st March, 1962. Thereupon, the first respondent took exception to the fraud played by the appellants and their mother in interpolating surreptitiously the restraint clause. Unable to meet the charge levelled against them, the appellants and Adhilakshmi Ammal agreed orally to give up their demand for reconveyance and hence, the first respondent did not deem it necessary to send a formal reply to the notice issued to him.

Moreover, the appellants have subsequently entered into an agreement of sale with one Balakrishnan and as such, the said Balakrishnan was also a necessary party to the suit and without his presence, the appellants were not entitled to maintain the suit. In any even, the appellants had lost their right to demand reconveyance by reason of estoppel by, conduct. Hence the suit filed by them deserved an outright dismissal.

4. The trial Court framed as many as eight issues touching the various aspects of the case and held that Exhibit A-2 was only a mortgage deed by conditional sale and not a deed of outright sale; that consequently, the appellants are entitled to redeem the property after paying the amount due as per Exhibit A-2 subject to scaling down under Act IV of 1938; that the first respondent was a necessary party to the suit, that Balakrishnan was not a necessary party to the suit, that the appellants are not estopped by conduct from claiming redemption; the appellants are entitled to redemption and possession of the suit property and in view of this position, the question of granting the relief of reconveyance to the appellants does not arise. On the above findings, the trial Court passed a preliminary decree for redemption and possession in favour of the appellants.

5. The respondents filed an appeal, A.S. No. 75 of 1976 on the file of the Court of the Subordinate Judge, Thiruvannamalai, The learned Subordinate Judge construed Exhibit A-2 to be an outright sale; he further held that the clause in Exhibit A-2 regarding the reconveyance of the property was; a personal right and inasmuch as the right had not been enforced within a period of 12 years from the date of demand for reconveyance, the suit was barred by limitation; that as far as the impleading of Balakrishnan was concerned, the agreement of sale in his favour has come into existence only after the filing of the suit and as such, he was not a necessary party to the suit. In accordance with the finding that the transaction was not a mortgage by conditional sale, but an outright sale and that since the suit had been filed beyond a period of 12 years from the date of demand for reconveyance, it was barred by limitation the learned Subordinate Judge allowed the appeal of the defendants and set aside the judgment and decree of the trial Court and dismissed the plaintiff's suit. It is against that judgment and decree, plaintiffs 2 and 3 have filed this appeal.

6. C.M. P. No. 3376 of 1979 has been filed by Balakrishnan for being impleaded as a party in the suit and for being arrayed as the third appellant in the appeal. In the affidavit filed in support of the petition, Balakrishnan has stated that he had entered into an agreement with the appellants to purchase the property for a sum of Rs. 10,000, and he had paid an advance of Rs. 7,000 and having regard to the stakes involved in the appeal for him, he must be made a party to the suit and given an opportunity to safeguard his interests. He has further stated that he is ready and willing to perform his part of the contract and as such his rights should be protected.

7. The second respondent has, filed a counter-affidavit and opposed the application of Balakrishnan for getting himself impleaded as a party to the suit.

In the counter-affidavit, it is stated that in spite of the objection raised by the second respondent before the Courts below that Balakrishnan was a necessary party, the trial Court as well as the lower Appellate Court have rejected the contention. Balakrishnan as well as the appellants had not challenged the findings rendered by the Courts below On this aspect of the matter and in such circumstances, Balakrishnan cannot be allowed to reopen a closed issue.

8. When the appeal was taken up for arguments, Mr. R.S. Venkatachari, learned Counsel for the respondents argued that one of the appellants had entered into a compromise with the respondents and given up his demand for redemption of the mortgage by conditional sale and the alternate claim for enforcement of the agreement for reconveyance and in such a situation, the appeal itself was not maintainable and should be dismissed. Mr. R.S. Venkatachari flourished a paper in Court and stated that it was the compromise memo, entered into between the respondents and one of the appellants. However, he did not file the alleged compromise memo, into Court. Mr. M.N. Padmanabhan, learned Counsel for the appellants, refuted the statement of Mr. Venkatachari and stated that to his knowledge, there had been no compromise by either of the appellants with the respondents; and that he continues to hold vakalat for both the appellants in the appeal. Since, Mr. Venkatachari did not file into Court any compromise memo, and since his statement was refuted by Mr. Padmanabhan, and as the vakalat given by the appellants in favour of Mr. Padmanabhan continues to be in force, I am unable to accept the statement of Mr. Venkatachari that the matter has been compromised between the parties and as such, the appeal is itself not maintainable.

9. I will first dispose of C.M.P. No. 3376 of 1979, filed by Balakrishnan for being impleaded as a party in the appeal. For deciding the controversy in the appeal, Balakrishnan is really not a necessary or proper party. The scope and effect of Exhibit A-2, which is the crucial document has to be construed on the basis of its terms and as such Balakrishnan who is not a party to the document, is not a necessary party to the appeal. The only ground on which Balakrishnan wants to come on record is that subsequent to the filing of the suit, he has entered into an agreement with the appellants for purchase of the suit property after the appellants had obtained a decree in their favour and recovered possession of the property. It is needless to say that by reason of the agreement of sale, Balakrishnan cannot be deemed to have acquired an interest in the suit property-Vide AIR 1934 235 (Privy Council) ; Mohammed Siddiq v. Ghasiram AIR 1946 Lah. 322 and Rambaran Prosad Vs. Ram Mohit Hazra and Others, . The further well-settled position is that if a person seeking impleadment has no subsisting right over the property in suit, then he cannot be made a party vide- In Re: Kelloth Ibrahim Haji and Others, . Another dictum is that unless a party is a necessary or proper party, and without whose presence, the question in the suit cannot be completely and effectually adjudicated upon the Court will have no jurisdiction to add him as a party-vide Firm of Mahadeva Rice and Oil Mills and Others Vs. Chennimalai Goundar, , But, a different view was expressed in Razia Begum Vs.

Sahebzadi Anwar Begum and Others, , and it was observed therein as follows:

The question of addition of parties under Order 1, Rule 10, Civil Procedure Code, is generally not one of initial jurisdiction of the Court, but a judicial discretion; in a suit for a declaration as regards status or a legal character u/s 42 of the Specific Relief Act, the rule that in order that a person, may be added as a party, he must have a present or direct interest in the subject-matter of the suit, is not wholly applicable, and the rule may be relaxed in a suitable case where the Court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy.

Even by application of this, dictum, the petition of Balakrishnan cannot be allowed, because, as already pointed out, his presence is not at all necessary for adjudicating the controversy in the appeal. Hence C.M.P. No. 3376 of 1979 will stand dismissed.

10. Coming now to the merits of the appeal itself, Mr. Padmanabhan, learned Counsel for the appellants strenuously argued that Exhibit A-2 was undoubtedly a mortgage deed by conditional sale. On the other hand, Mr. Venkatachari, counsel for respondents, asserted with equal vehemence that Exhibit A-2 was only an outright sale and not a mortgage deed by conditional sale. In support of their respective contentions, the learned Counsel cited a large number of authorities. Before considering the authorities, it will be pertinent to refer to some of the salient features of Exhibit A-2. The document is styled as an outright sale deed.

11. The disposition clause stated that from the day of sale onwards, the vendee was entitled to enjoy the property from generation to generation with absolute powers of sale. There is also a warranty clause regarding the good title of the property. Besides these recitals, it has to be pointed out that the consideration for the sale was a sum of Rs. 1,000. The oral evidence is to the effect that the property was worth only that amount on the date of sale. The earlier usufructuary mortgage, Exhibit A-1, was only for a sum of Rs. 100. A property, which had been usufructuarily mortgaged for Rs. 100 could not have once again been mortgaged in a period of five years for a sum of Rs. 1,000. Having regard to all these features, I am clearly of opinion that the transaction under Exhibit A-2 was an outright sale and not a mortgage by conditional sale.

12. As already stated, the counsel for the parties have cited a large number of decisions. *Bhagwan Sahai v. Bhagwan Din* I.L.R.(1890) All. 387; *Maruthi Goundan v. Dasappa Goundan* (1917) 5 L.W. 141 : 31 M.L.J. 375; *Jhanda Singh v. Wahiduddin* 5 L.W. 189 : L.R. 43 IndAp 284 : 31 M.L.J. 750 : AIR 1916 P.C. 49; *Muthuvelu Mudaliar Vs. Vythilinga Mudaliar and Others*, ; *C. Ganesa Mudaliar and Another Vs. V. Gnanasikhamani Mudaliar and Another*, and *Bhoju Mandal Vs. Debnath Bhagat*, , are all cases where the relevant document, which required construction in each of the cases, was held to be deed of outright sale. On the other hand *Srinivasaraghavan alias Srinivasa Chakravarthi and Others Vs.*

Kalianna Goundan and Others, ; Gonela Krishnamurthy and Another Vs. Kalidindi Venkateswaran (died) and Others, ; Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, ; Venkatamma Iyer v. Ranganatha Pillai (1965) 2 M.L.J. 480 : 78 L.W. 607; Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, ; Murugan Vs. Jayarama Pillai and Others, ; Karuppanna Gounder v. Thirumalai Gounder (1976) 89 L.W. 364; L. Manmohan Das v. Shaikh Bahad Uddin 1957 A.L.J. 724; P.L. Bapuswami Vs. N. Pattay Gounder, ; Prakasam alias Padmini Vs. Rajambal and Others, and Ramachandrayya Vs. Laxminarayana Rao, , are all cases where the document requiring construction was held to be a mortgage deed by conditional sale. Though a large number of decisions have been cited, they cannot provide a complete answer for deciding the question one way or the other. The futility in relying upon case law for the construction of a document, has been succinctly set out by the Supreme Court in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, , in paragraphs 5 and 6 at page 346,:

The question whether a given transaction is a mortgage by conditional sale or a sale outright, with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train, make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain.

The first is that the intention of the parties is the determining factor. See *Balkishan Das v. Legge* (1895) L.R. 27 IndAp 58 : ILR All. 149. 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. As Lord Cranworth said in *Alderson v. White* (1858) 44 E.R. 924 , the rule of law on this subject is one dictated by common sense; 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 Lordships of the Privy Council applied this rule to India in *Bhagwan Sahai v. Bhagwan Din* (1890) 17 I.A. 98 : ILR All. 387 and *Chanda Singh v. Wahiduddin* (1916) 43 I.A. 284 : 1916 31 M.L.J. 750 : 5 L.W. 189 : AIR 1916 P.C. 49 .

Applying the broad spectrum tests laid down by the Supreme "Court, it will be seen that Exhibit A-2 can only be construed as a deed of sale and not a deed of mortgage by conditional sale. The salient features of the document have already been referred to above. Hence, the conclusion of the lower appellate Court that Exhibit A-2 is a deed of outright sale, is a sustainable one.

13. There remains the further question whether in spite of the finding that Exhibit A-2 is an outright sale, the appellants are not entitled to get a reconveyance of the property. On this aspect of the matter the respondents would say that the covenant in Exhibit A-2 for reconveyance of the property was a subsequent interpolation. They have not been able to substantiate this contention. Therefore, it has to be taken that the parties intended at the time of entering into the agreement that the first respondent was bound to reconvey the property to the appellants and their mother, whenever they tendered the sale price of Rs. 1,000 and sought reconveyance of the property. Notwithstanding this position, the respondents would say that the clause relating to reconveyance of the property cannot be enforced, because it does not contain any time limit and is therefore, opposed to law and void. The respondents would also say that it offends the rule against perpetuity. The lower appellate Court has not rendered any finding on this aspect of the matter. A Division Bench of this Court had to consider in *Charamudi v. Bhagavalu* ILR (1916) Mad. 462 : 1916 28 M.L.J. 471, whether an agreement to reconvey certain lands to a party whenever demanded on payment of the sale amount and interest at 10 per cent. per annum created any interest in the immovable property and further more whether the agreement for reconveyance was void as contravening the rule against perpetuity. The Bench held as follows:

A contract to convey or reconvey immovable properties, whenever demanded, for a certain amount, is only a personal contract and does not create any interest in immovable property and is therefore enforceable and not void as contravening the rule-against perpetuity.

The dictum in this decision will directly apply to the facts of the instant case. I may also refer to *Rambaran Prosad Vs. Ram Mohit Hazra and Others*, , where it was held that personal contracts (In that case pre-emption clause) will not offend the rule against perpetuity. Merely because it had been stipulated in Exhibit A-2 that whenever the vendors under the document repaid the sale amount, the vendee should reconvey the property without raising any objection, it cannot be said that the clause offends the rule against perpetuities. It was not necessary for the parties to fix up a time limit within which the reconveyance could be asked for. This is because the agreement for reconveyance does not create an interest in the property and hence the vendee, viz., the first respondent was not interdicted in any manner from selling the property in favour of a third party. There fore, it is not open to the respondents to raise the contention that the clause regarding the reconveyance in Exhibit A-2 is not enforceable, as it offended the rule against perpetuities.

14. Once this position is reached, it follows that the appellants are entitled to demand a reconveyance of the property. The respondents would however plead limitation and say that their contention in this behalf, has been accepted by the lower appellate Court, viz., that the suit is barred by limitation, because the respondents and Adhilakshmi Ammal had demanded the reconveyance of the property as early as 31st March, 1962, but the suit had been filed only on 9th September, 1974, i.e., after a lapse of 12 years and 5 months, and hence beyond the period of 12 years provided by Article 62 of the Indian limitation Act. The contention of the respondents is clearly not tenable. The lower appellate Court has committed a mistake in taking the view that Article 62 of the Indian Limitation Act would be attracted to the facts of the case. The lower appellate Court has failed to see that Article 62 relates to suits filed for enforcing payment of money secured by a mortgage or otherwise charged upon immovable property. When the lower appellate Court had rightly construed Exhibit A-2 to be a deed of sale, there is no question of the appellants and the respondents standing in the relationship of debtor and creditor. Moreover, the suit has not been filed for enforcing payment of money secured by a mortgage or a charge upon the suit property. On the other hand, it has been filed for redemption of mortgage, or in the alternative, for securing reconveyance of the property. Such being the case, it is Article 54 that will be attracted. Under this Article, a period of 3 years is provided for filing the suit and time will begin to run from the date fixed for the performance of the contract and if no such date is fixed, then from the date when the plaintiff had notice that performance is refused. The evidence in this case is that for the notice issued on 31st March, 1962, under the original of Exhibit A-3, there was no refusal by the first respondent. In order to get over the situation, the respondents have stated that subsequent to the issue of Exhibit A-3 notice there was an oral talk between the parties and at that time, it was agreed by Adhilakshmi Ammal that the notice had been mistakenly issued and that she will give up her demand for redemption of the mortgage or for enforcing the agreement of reconveyance. The explanation is hardly a believable one. If any such understanding had been reached between the parties the first respondent would have safeguarded his rights by getting an endorsement in writing from Adhilakshmi Ammal that she was not pressing her demand under Exhibit A-3 for recovery of possession of the property. Hence, it can never be said that the period of limitation will begin to run from the date of issue of Exhibit A-3 notice or from the date when its original was served on the first respondent. Inasmuch as there had been no refusal till the time of filing of the suit by the respondents for effecting reconveyance of the property it must be held that the suit had been filed within time and it was not barred by limitation in any manner. The law on the subject has been clearly laid down in the following decisions: *New Beerbhoom Coal Co. v. Bhulo ram Mahat* I.L.R.(1880) Cal. 175, *Ma Ma Gyi v. Ma Nyo Pc* AIR 1923 Rang. 44 and *Venkanna v. Venkatakrishnayya* (1918) 41 Mad. 18 : 6 L.W. 192 : 33 M.L.J. 35. In all these cases it has been held that where no date has been fixed for specific performance, the time will not commence to run till specific performance is demanded and refused. In the

absence of evidence to show that the specific performance demanded under Exhibit A-3 had been refused, it is not open to the respondents to contend that the suit was barred by limitation on the date it was filed.

15. Mr. Venkatachari argued that having regard to the long delay on the appellants' part in seeking specific performance of the agreement to reconvey, the appellants must be non-suited. Alternatively, he contended that the inaction of the appellants after issue of notice under Exhibit A-3 for a period of 12 years and 5 months, must be taken to mean that the appellants had abandoned their right for obtaining reconveyance of the suit property. The former contention is not tenable because, as pointed out in *Arjuna Mudaliar Vs. Lakshmi Ammal and Others*, , mere delay does not by itself preclude the plaintiff from obtaining specific performance, if his suit is otherwise in time. As regards the second contention, viz., abandonment of the right of reconveyance, there is nothing in evidence to show that the appellants had given up their right to obtain reconveyance of the property. In *Arjuna Mudaliar Vs. Lakshmi Ammal and Others*, , the delay was as high as 22 years. Even so, it was held that presumably the plaintiff was under the impression that the transaction was a mortgage and he had a period of 60 years (under the old Limitation Act) to redeem the mortgage and in such circumstances, the delay of 22 years in filing the suit, cannot be considered fatal to the action. The same view can be taken in this case also, because the appellants principal contention is that the transaction under Exhibit A-2 was a mortgage by conditional sale. It is only alternatively they claim the transaction to be an outright sale subject to an agreement for reconveyance. Hence, the contentions of Mr. Venkatachari cannot be accepted.

16. As a result of the findings rendered above it follows that Exhibit A-2 is not a mortgage deed by conditional sale, but an outright deed of sale. Even then, in view of the agreement contained therein for reconveyance of the property on payment of a sum of Rs. 1,000, the respondents are bound to reconvey the property to the appellants. The clause relating to the agreement for reconveyance is not void on account of a time-limit not having been provided, nor does it offend the rule against perpetuities. Since there was no refusal of the demand for reconveyance before the suit was filed, the suit was not barred by limitation on the date it was filed. In such circumstances, the second appeal deserves to succeed and will accordingly stand allowed. The judgment and decree of the lower appellate Court will stand set aside and instead the suit will stand decreed with respect to the prayer for specific performance and recovery of possession of the suit property. The parties will however bear their respective costs, throughout. Since the appellants have already deposited the sum of Rs. 1,000 into Court, they are given a month's time to furnish stamp papers for the sale deed being engrossed thereon.

17. Mr. Venkatachari, learned Counsel for the respondents, makes an application orally under Article 134-A read with Article 133(1) of the Constitution of India for leave being granted to prefer an appeal to the Supreme Court.

18. In my opinion the matter does not involve any substantial question of law of general importance which needs determination by the Supreme Court. The main issue in the case is regarding the construction of Exhibit A A-2. If the document is to be construed as an outright deed of sale, as contended by It the respondents themselves, the question is whether the appellants' right to seek specific performance of the agreement was lost in any manner. The question has been decided with reference to the terms of the document and the settled case law on the subject. Hence, I decline to grant leave to the respondents to prefer an appeal to the Supreme Court.