(1958) 03 PAT CK 0020

In the Patna High Court

Case No : A.F.A.D. No. 582 of 1954

Debnath Bhagat and Others — APPELLANT

Vs

Bhoju Mandal and Others — RESPONDENT

Date of Decision : 31-03-1958

Acts Referred:

Transfer of Property Act, 1882 — Section 58

Citation : AIR 1958 Patna 371 : (1958) 6 BLJR 376

Hon'ble Judges : V. Ramaswami, C.J;R.K. Choudhary, J

Bench : Division Bench

Advocate : B.C. De and Rameshwar Choudhary, for the Appellant; S.N. Dutta, J.C. Sinha and Dineshwar Prasad, for the Respondent

Final Decision : Allowed

Judgement

R. K. Choudhary, J.—The only question which arises in this appeal is whether the document which is the subject-matter of the suit out of which the present appeal arises is a mortgage by conditional sale or a sale out and out with a condition of repurchase.

2. The plaintiffs-respondents executed a registered sudhbarna bond on the 1st of March 1923, in favour of the defendants-appellants for a sum of Rs. 1600 giving 13.17 acres of land in sudbharna. It appears that the defendants could not get possession over the sudbharna land as a result of which they demanded the payment of the mortgage money. On the 23rd of February 1924, therefore, the plaintiffs executed the document in question in favour of the defendants transferring 12.6 acres of land out of the above 13.17 acres of sudbharna land for a sum of Rs. 2800. It is contended on behalf of the plaintiffs that this document of transfer is a mortgage by conditional sale, and they have, therefore, instituted a suit for redemption. On the other hand, the case of the defendants is that it was a sale out and out with a condition of repurchase and as the time fixed for repurchase had expired, the plaintiffs were not entitled to any relief. Both the courts below held that the document in question was a mortgage by

conditional sale and they decreed the suit for redemption. Being, thus aggrieved, the defendants have presented this appeal in this Court.

3. A mortgage by conditional sale has been defined in Section 58(c) of the Transfer of Property Act in these terms :

"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 a mortgage 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."

In order, therefore, that a transaction should be a mortgage by conditional sale, the conditions referred to above must be embodied in the same document under which the transaction is entered into. In this view of the law it has been held that where the condition of repurchase is given by a separate document and not by the same document under which the transaction was entered into, it is a sale out and out and not a mortgage by conditional sale, but the converse is not true. Though the conditions referred to above must be embodied in one and the same document for making that document a mortgage by conditional sale, it does not necessarily follow that wherever, a condition of repurchase is made in one and the same document under which the transaction is entered into, it must be held to be a mortgage by conditional sale. A Full Bench of the Allahabad High Court in Debi Singh and Others Vs. Jagdish Saran Singh and Others, took the view that the proviso added to S. 58(c) lays down the statutory test to be applied in such cases and that irrespective of the intention of the parties wherever a condition of re-transfer is embodied in the same document the transaction must be construed as a mortgage by conditional sale. Similar view was expressed by Mahabir Prasad J. in Mahabir v. Bigan ILR 28 Pat 286 : AIR 1949 Pat 503 (B) who held that regard being had to the definition of a mortgage by conditional sale as given in S. 58(c) of the Transfer of Property Act, it appears that when the transaction is evidenced by one document, the question whether the transaction is a sale with a condition of repurchase can hardly arise. The leading judgment in that case was given by Manohar Lall J., who did not consider this question, but, on the other hand, observed that the question had to be determined on a construction of the document itself and decided the case on the construction of the document.

4. In my opinion, the words used in the section do not justify any such interpretation. The proviso has only attempted not to permit a controversy to be raised for construing a document as being one of mortgage by conditional sale unless the condition is embodied in that very document. That does not, however, say that if the condition is embodied in one and the same document, it must necessarily be a mortgage by conditional sale. In my opinion, the decision of the question whether a particular document is a mortgage by conditional sale or a

sale out and out with a condition of repurchase, depends on the particular facts of each case and the intention of the parties entering into the transaction.

5. The view taken by me is borne out by a decision of the Supreme Court in Chunchun Jha v. Ebadat AH AIR 1934 S C 345 (C), It was held in that case that under the proviso to Section 58(c) of the Transfer of Property 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; 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. It was further held that 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 same case has further laid down that the legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, and 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 that if the conditions of Section 58(c) of the Transfer of Property Act are fulfilled, then the deed should be construed as a mortgage. In the present case, however, the document in question was executed before the proviso was added to Section 58(c) of the Transfer of Property Act. The presumption referred to above will not, therefore, arise in this case in favour of the documents being a mortgage by conditional sale and the question will have to be decided on the construction of the document as well as the intention of the parties as envisaged in that document.

6. The document in question, after omitting the unnecessary words, is in the following terms :

"1. We, the executants, executed a registered sudbharna bond, dated 1-3-1923 in favour of Deo-nath Bhagat and Raghunath Bhagat and received the entire consideration money.

2. We, the executants, are badly in need of some money in cash for repayments of debt of Sumari Kapri, and are in great need of some more money in cash for meeting the expenses of cultivation, purchasing bullocks and also for meeting the household expenses and repayment of petty debts to creditors.

3. We, the executants, cannot arrange the aforesaid money in cash without selling some property.

4. Deonath Bhagat and Raghunath Bhagat aforesaid have not up till now entered into possession of the sudbharna property and they are making a demand for the money and it is absolutely necessary to repay the money to the said creditors,

5. Hence on negotiation for sale of some property with the said Bhagats by way of conditional sale the said Bhagats agreed to purchase our property and to pay

money in cash for repayment of the debts of Sumari Kapri and for meeting other expenses.

6. Hence, we, the executants, have sold and vended 12.6 acres of nakdi jot land for Rs. 2800 to Deonath Bhagat and Raghunath Bhagat.

7. We declare that in the month of Baisakh, 1334 fasli, we shall on repayment of the said document in full and in one lump sum to the said Bhagats, take back the vended property from the said Bhagats and that in case of failure of repayment of the consideration money of this deed of sale in full within stipulated time, this deed of sale will remain in force and we, the executants, or our heirs, shall not be competent to demand the return of the vended property.

8. Out of the consideration money of this sale deed Rs. 1600 due to the said Bhagats under the bond dated 1-3-1923 was paid up in full and on receipt of the remaining consideration money the dues of Sumari Kapri amounting to Rs. 500 was paid up and with the balance of Rs. 700 we met the above expenses.

9. We, the executants, put the said vendees in possession of the vended property and authorise them to remain in possession thereof and appropriate the produce thereof in such manner as they like and the payment of the rent of the vended land from 1332 fasli remained the concern of the said vendees.

10. If due to a defect in the title the said vendees are dispossessed of the vended property or any portion thereof, we shall be liable to refund the consideration money of the sale deed with interest at the rate of Rs. 3-2-0 per hundred rupees per month.

11. Whatever rights and interests the said vendees had under the bond dated 1-3-1923 remained intact under the sale deed.

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."

It is contended on behalf of the plaintiffs that the above recitals are almost similar to the recitals in the documents which were under consideration before their Lordships of the Supreme Court in the case of Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, . It is true that most of the general terms embodied in this document were in the document before the Supreme Court. There are, however, certain terms and circumstances in the present case which were not in the case before the Supreme Court. The most important circumstance in the Supreme Court case was that the money was taken for meeting the cost of the expenses of litigation in connection with the commutation proceeding'' with respect to the very land which was the subject matter of the document in question.

7. Their Lordships treated this circumstance to be a very strong circumstance for holding that the document could not be a sale out and out but must be a mortgage by conditional sale, I may better quote the observation made by their

Lordships in their own language which is as follows :

"This (referring to the fact that the money was taken for meeting the costs of commutation proceedings with respect to the land forming the subject matter of the document under consideration) we think, is crucial. Persons who are selling their property would hardly take the trouble to borrow money in order to continue revenue proceedings which could no longer benefit them and could only enure for the good of their transferees".

In the present case, there is no such circumstance as could be said to be crucial for the purpose of holding the document to be a mortgage by conditional sale. On the other hand, the circumstances are otherwise. The total area of land given in sudbharna in the year 1923 was 13.17 acres and the sudbharna money amounted to only Rs. 1600. Out of this only 12.6 acres was transferred by the document in question for a sum of Rs. 2800. Thus the transferee in this document had only after one year to pay a sum of Rs. 1200 more for having a lesser area of land. No prudent man could be expected to enter into such a transaction if it were a mortgage by conditional sale. After all how the transferee under this document was getting any benefit by giving more money for less land and then to have the Sudbharna for less money over more land satisfied. Moreover, in the Supreme Court case referred to above the bulk of the consideration went in satisfaction of the earlier mortgage dues of the transferee and a very small portion of it was paid in cash, and, therefore, their Lordships held that the relationship of debtor and creditor was intended to continue. In the present case, though a major portion of the consideration went in satisfaction of the earlier Sudbharna dues, of the defendants, they had to pay in cash a substantial amount as consideration for taking lesser area of land and, therefore, there could be no intention to continue the relationship of debtor and creditor. In my opinion, these points in the present case are crucial, and it must be held that the transferee under this document must have intended to take a sale out and out. In my view, therefore, the terms embodied in the document including one for giving back the vended property to the vendor on re-payment of the consideration money on a certain fixed date did not make the document a mortgage by conditional sale.

8. It has then been argued on behalf of the plaintiffs that there is no condition of repurchase attached to the document and, therefore, it must be held to be a mortgage by conditional sale because if it were a sale out and out the title could not revest in the transferor without a document of reconveyance, The principle of law involved in this argument is no doubt correct. In a mortgage by conditional sale title remains with the mortgagor and on payment of the mortgage money he gets back possession over the mortgaged property. In the case of a sale out and out the title passes to the vendee and in order to revest it in the vendor on payment of the consideration money on a certain date there must be a retransfer. In my opinion, the terms of this document clearly indicate that there was a stipulation for repurchase of the vended property. In the Supreme Court

case the term was that on payment being made the transferor will get back Possession of the property dealt with by that document. In the present case, however, the stipulation is not that on such payment being made the transferor will only get back possession but the stipulation is that he will get back the vended property. That, in my opinion, clearly means that he will take back title and possession both with respect to the vended property and that must be certainly through a proper deed of conveyance.

9. On the true construction of the document, my concluded opinion is that the document in question is a deed of sale out and out with a condition to repurchase and not a mortgage by conditional sale.

10. The stipulated time for such purchase has undisputedly expired. In that view of the matter, there could be no suit for redemption and it should have been dismissed.

11. The result, therefore, is that the appeal is allowed, the judgments and the decrees of the courts below are set aside and the suit of the plaintiffs is dismissed with costs throughout.

V. Ramaswami, C.J.

12.I agree.

