

(2006) 06 MAD CK 0063

In the Madras High Court

Case No : Second Appeal No. 90 of 1994

Gurrappa Gowdu (died) and Others

APPELLANT

Vs

Pethanna @ Gurrappa, Chinnappa, Nethappa @
Munivenakatappa and Venkatasamy

RESPONDENT

Date of Decision : 14-06-2006

Acts Referred:

Debt Relief Act, 1970 — Section 9(5)
Transfer of Property Act, 1882 — Section 58, 9

Citation : (2007) 1 LW 959 : (2006) 3 MLJ 953

Hon'ble Judges : S. Ashok Kumar, J

Bench : Single Bench

Advocate : T.R. Rajaraman, S.C, for the Appellant; M.V. Krishnan, for the Respondent

Final Decision : Dismissed

Judgement

S. Ashok Kumar, J.—The defendant who could not succeed before the courts below has preferred this second appeal. During the

pendency of this appeal the sole appellant died and his legal representatives have been impleaded to get along with the appeal.

2. The plaintiffs filed the suit for declaring the mortgage by conditional sale deed as wholly been discharged as per the provisions of the of the

Tamilnadu Act 31 of 1976 and 40 of 1978, for delivery of possession and for mesne profits. The gist of the plaintiffs' case is that they have

mortgaged the suit properties to the defendant and borrowed a sum of Rs. 2000/= on 24.8.1955 for discharging the mortgage debt due to one

Thakkala Venkatasamy and other sundry debts and for family expenses and executed a registered deed of mortgage by conditional sale on that

date. As per the terms of the deed of mortgage by conditional sale, the plaintiffs

should repay the sum of Rs. 2000/= to the defendant in six years and to get back the properties. The defendant was given possession of the suit properties and he should pay the kist for the suit lands. The suit properties were more than Rs. 15,000/= even at the time of execution of the mortgage by conditional sale. The suit properties are 4.25 acres in extent and there are money yielding trees for worth about Rs. 7,000/= per year. The patta stands in the name of the plaintiffs even though the properties were delivered to the possession of the defendant on 24.8.1955. The mortgage by conditional sale is covered by Section 58(c) of the Transfer of Property Act and the intention of the parties is not to create an outright sale. The plaintiffs are entitled to redeem the properties within a period of 30 years after the time allowed for paying the amount namely 6 years had elapsed. The plaintiffs are agriculturists and are entitled to the benefits of the Tamil Nadu Act IV of 1938, Tamil Nadu Act 40 of 1979 and thus they are entitled to redeem the whole of the properties mortgaged without paying any amount as per the provisions of Section 9 of the said Act. As per Section 4 of Tamilnadu Act 31 of 1976 the debt is deemed to have been wholly discharged by the plaintiffs. The plaintiffs sent a notice on 19.1.1985 to which the defendant also sent a reply dated 19.2.1985 containing false allegations. The condition to repay the amount within a period of 6 years and to get back the suit properties incorporated in the document itself makes the said deed only a mortgage by conditional sale as defined in Section 58(c) of the T.P.Act. The defendant's continued possession of the suit properties is unlawful and hence he is bound to pay mesne profits for the continued enjoyment of the sit properties.

3. The defendant's case in short is that the suit document dated 24.8.1955 is not a mortgage by conditional sale, the plaintiffs have earlier incurred and borrowed Rs. 500/= and Rs. 300/= under two mortgage deeds dated 3.1.1948 and 25.10.,1948 from one Venkataswamy and as they could not discharge the said mortgage debts, the mortgagor filed suit against the plaintiffs to recover the amounts due. The plaintiffs in order to discharge the mortgage debts due to the said Venkataswamy, approached the defendant offering to sell the suit properties except suit item No. 6.

Accordingly, the sale price was fixed taking into consideration the market value

of the properties at Rs. 2000/=. The defendant stipulated that the debts due under the said mortgage deeds will be deducted from the sale price and the balance alone will be paid to the plaintiffs. At the time of the sale deed dated 24.8.1955 in favour of the defendant by the plaintiffs the plaintiffs requested that they shall be allowed to repurchase the properties from the defendant for a sale consideration of Rs. 2000/= if the plaintiffs were ready and willing to purchase the same at their costs within a period of 6 years from the date of sale deed dated 24.8.1955. At the time of the sale deed, there was no intention to create any relationship of mortgagor and mortgagee between the plaintiffs and the defendant. The suit document in question is an outright sale in favour of the defendant validly supported by consideration. The defendant also discharged the mortgagee debts by paying Rs. 875/= to Venkataswamy personally and the original mortgage deeds were duly returned to the defendant as no suits were filed by the said Venkataswamy as threatened by him earlier.

According to the defendant as the plaintiffs had raised crops already on the lands sold to the defendant at the time of sale, the plaintiffs requested the defendant to lease the lands sold for a period of 5 years and accordingly the defendant and the plaintiffs entered into registered lease deed dated 24.8.1955 for a period of five years on the plaintiffs agreeing to pay the lease amount as stipulated in the lease deed. Accordingly the the lands were leased back to the plaintiffs by the defendant and in pursuance of the same, patta was also transferred in the name of the defendant and the defendant continued to pay kist as true owner. It is not true that the defendant entered into possession of the properties as a mortgagee and that the period of 6 years mentioned in the document is the period of redemption as alleged in the plaint. The period of 6 years stipulated in the document is only a period fixed only to enable the plaintiffs to repurchase the properties sold. If there were income yielding trees standing in the suit properties, the plaintiffs could have very well cleared the mortgage debts due to the said Venkataswamy and it was not at all necessary for the plaintiffs to execute the document in question in favour of the defendant. It is the defendant who developed and improved the land and he even dug a well. As the document is an outright sale and not a mortgage as contended, there is no question of any redemption of the same. Since the period

of six years given to the plaintiffs to repurchase has long been expired, they have come forward with the present suit describing the suit document

as a mortgage by conditional sale seeing the value of the properties very much enhanced. The plaintiffs are not small farmers nor rural artisans and

they are not entitled to claim any benefits under any of the Debt Relief Acts as alleged as there is no debtor and creditor relationship between the

plaintiffs and the defendants. The defendant has sent a reply to the notice issued by the plaintiffs and only after that the suit has been filed.

4. On the above pleadings and on hearing the learned Counsel appeared on either side and on a perusal of the evidence both oral and

documentary, the trial court decreed the suit. On appeal preferred by the defendant the first appellate court concurred with the judgment and

decree of the trial court. As against the same, the defendant has preferred this Second Appeal.

5. At the time of admission, this Court framed the following substantial questions of law in this Second Appeal:-

(i) Whether the document Ex.A.1 is a mortgage by conditional sale or an outright sale as contended by the appellant? and if so,

(ii) Whether the concurrent findings given by both the courts below can be sustained in law?

6. Learned senior counsel appearing for the appellant contended that time is the essence of the contract and a party who comes to the court after

the stipulated period loses his right to redeem. But no step was taken to redeem the properties. The conduct and the evidence of the parties itself

show that it is a sale and not a mortgage because for 30 long years the defendant has been in possession and he dug up the well and made

improvements on the lands and for all these years the plaintiffs have kept silent and due to the increase in the value of the lands by many fold, they

have come forward with the suit. In any event, the plaintiffs have to compensate for the same and law of equity should be applied. Exs.B.3 to B.16

are the documents produced to show the value of the adjacent lands and from those documents it could be seen that the sale consideration for the

suit properties are adequate. Learned counsel also submitted that the intention of the parties is only to sell the properties and a reading of the

recitals in the document itself would show that it is an absolute sale. The parent document of the suit properties has also been given to the

defendant. The plaintiffs have also not offered the balance money within the stipulated period. The defendant has produced documents to prove

that Rs. 2000/= was the market value of the suit properties.

7. Learned counsel appearing for the respondents/plaintiffs contended that the suit has been filed within the period of limitation as it is coming under

Proviso to Section 58(c) if it is conditional sale for which 30 years is prescribed as limitation. He also contended that as regards the 6th item the

issue has already been settled and 84 cents is in dispute.

8. The relevant provision, namely Section 58(c) of the Transfer of Property Act is extracted below for immediate reference:

(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)

9. A mortgage by conditional sale takes the form of an ostensible sale of the property with the condition superadded that it shall become an

absolute sale on default of payment on a certain date or subject to the proviso that the sale shall be treated as void and the property retransferred

on payment being made. Ex.B.7 is the suit document. According to the plaintiffs it is a mortgage by conditional sale and according to the defendant

is is only an absolute sale. The first appellate court after referring to the provisions in Section 58(c) of the Transfer of Property Act rightly held that

the recitals appearing in the suit document certainly attracts Section 58(c) of the Act and it is only a mortgage by conditional sale. Admittedly even

in Ex.B.7 it is recited that ""if the plaintiffs have not redeemed the property by paying the said amount, they have no right over the mortgaged

properties"". The first appellate court rightly referred to the decision of the

Supreme Court reported in Ramachandrayya Vs. Laxminarayana Rao, wherein it has been held that ""wherein a deed of ostensible sale, there is a condition that a payment by the vendor to the vendee the amount of the sale price by a certain date, the vendee should transfer the property back to the vendor with absolute permanent rights and the condition as to repurchase is embodied in the document itself, the document cannot be construed otherwise than as a mortgage by conditional sale as defined in Section 58(c) of the Transfer of Property Act as amended in 1929"".

10. The first appellate court rightly held that the intention of the parties has also to be taken into account in such transactions. It is also held that as held in the proviso to Section 58(c) if there are recitals as to sale and condition stipulating for repurchase of the same property, then it has to be treated as only a mortgage by conditional sale. In the present case both the recitals are written in one and the same document, namely Ex.B.7. It is also rightly observed by the first appellate court that only in cases where ambiguity exists as to whether it is an absolute sale or mortgage by conditional sale, the intention of the parties and the surrounding circumstances and the evidence of the parties have to be taken into account. But in the present case there is no ambiguity in the recitals found in the suit document and in such a case the recitals should be given effect to in letter and spirit. It is also rightly held that when the parties know the difference between the term ""sale"" and ""mortgage"" and purposely used the word ""sale"" in the mortgage deed, it will not alter the character of the document when it attracts the provision of Section 58(c) of the Act.

11. As regards the contention that the suit document reflects the true market value, the plaintiffs have produced Exs.B.12 to B.16. But the plaintiffs filed Ex.A.4, dated 10.9.1948, which is a sale deed, as per which the sale consideration for 5 cents is Rs. 100/=. Thus on a consideration of Exs.B.12 to B.16 and Ex.A.4, the first appellate court rightly arrived at the conclusion that sale consideration of Rs. 2000/= does not reflect the correct market value of the suit properties. The first appellate court also referred to the judgment of the Supreme Court in AIR 1966 SC 902 to hold that if the sale consideration is lesser than the true market value of the property then it has to be taken as one of the circumstances to hold that it is a mortgage by conditional sale. Moreover the stipulation that the property

should be reconveyed for the same price is also a circumstance to hold that it is a mortgage by conditional sale.

12. Apart from the above, there is not mutation of revenue records namely transfer of patta in the name of the defendant after the immediately after the expiry of 6 years. Ex.B.10, patta does not bear any date and it has been produced in the court only on 24.4.1991. Moreover, the stamp papers used in Ex.B.7, suit document have been purchased by the plaintiffs themselves which is also a circumstance to be taken in support of the plaintiffs' case. The first appellate court also held that even if the nomenclature is given as a sale deed, the court has to look into the clauses or contents of the document to arrive at the correct interpretation and intention of the parties as laid down by the Supreme Court in 1992 SC 1236.

So also the attendant circumstances could be looked into only to gather the intention of the parties and such an intention if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. The judgments cited by the learned Counsel for the respondents in

Kantilal M. Kadia Vs. Somabhai Dahyabhai Kadia, , and Chennammal Vs. Munimalaiyan and Others, are supporting the said legal propositions.

Concededly in this case there are sufficient clauses to the effect that the property should be repurchased by the plaintiffs on the return of the money

by them to the defendant. Thus viewed from in any angle, Ex.B.7 is a mortgage by conditional sale and not an absolute sale in favour of the

defendant. As it is decided by the first appellate court, rightly too, that the plaintiffs are entitled to the benefit of Section 9(5) of The Debt Relief

Act 1970 and since the mortgagee had been in possession of the mortgaged property for over 10 years, it has to be presumed that the plaintiffs

have discharged the mortgage debt. In the circumstances, both the substantial questions of law are answered against the appellants.

13. In the result, the Second Appeal is dismissed confirming the judgment and decree of the first appellate court. No costs.