

(1915) 07 BOM CK 0014
In the Bombay High Court
Case No : Second Appeal No. 988 of 1914

Kasturchand Lakhmaji

APPELLANT

Vs

Jakhia Padia Patil

RESPONDENT

Date of Decision : 26-07-1915

Acts Referred:

Transfer of Property Act, 1882 — Section 58(c)

Citation : AIR 1915 Bom 229 : (1915) 17 BOMLR 928

Hon'ble Judges : Hayward, J;Batchelor, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Batchelor, J.—The suit out of which this appeal arises was brought for a declaration that a certain apparent sale dated the 14th August 1902 was in reality a mortgage and for an order allowing the plaintiffs to redeem the property on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act.

2. The question, which has divided the learned Judges below, was whether the transaction of the 14th August 1902 was an out and out sale or a mortgage by conditional sale. The learned trial Judge was of opinion that it was a sale, while the learned District Judge held that it was a mortgage by conditional sale.

3. It may be observed that whether the transaction be regarded as a sale or a mortgage, the plaintiffs are still within time to recover their land. For, on the footing that the transaction was a sale with a right of repurchase in the plaintiffs, the plaintiffs are still entitled to repurchase. The object of the suit, therefore, seems to be on the plaintiffs' part to obtain a decree for redemption under the Dekkhan Agriculturists' Relief Act which would enable them to open their accounts with their creditors from the beginning, and it is this reopening of the accounts which the defendants resist.

4. The question of the true character of this transaction must be answered by

reference to the three contemporaneous documents, Exhibits 55, 32 and 56, in which the transaction is embodied. Exhibit 55 is the sale deed by the plaintiffs to the defendants. Exhibit 32 is the defendants' agreement to reconvey to the plaintiffs, and Exhibit 56 is the rent note passed by the plaintiffs to the defendants. All three documents were admittedly executed on the same day at the same sitting. The important recital in the sale deed, Exhibit 55, is couched in the following words:—"After making up accounts of the above bonds (mortgage bonds) and after giving credit for the receipt given to you by us, the amount due to-day is Rs. 2,125, and the amount received to-day for making payments to other people and for house expenses is Rs. 375. Thus the total amount due to you is Rs. 2,500. In lieu of this we give to you by a sale deed" property, which the instrument thereafter specifies. In the agreement, Exhibit 32, it is provided as follows :—" This property (described) we have purchased from you for a sum of Rs. 2,500. The property purchased will be sold to you on the following terms only. The terms are: (1) If at any time between Shake 1824 and Shake 1833 in the month of Margashirsha you pay us the sum of Rs. 2,500, we shall receive it and pass a sale deed of the property in your favour at your cost. (2) The above property you have taken from us on a lease of ten years and have agreed to pay us every year Rs. 287. A separate lease has been taken for that. This sum you must pay to us from year to year in the month of Margashirsha from Shake 1824 to Shake 1833. (3) The right which you have obtained from us in virtue of this writing of purchasing the above property is given by us to yourselves alone. You are not to transfer it to anybody. In case you do transfer it, the transfer will not be valid and we shall not acknowledge it. (4) With respect to the above property if we are obliged by any means to spend any sum upon it, or if you hereafter borrow moneys from us, we shall receive all these amounts with interest first, and then only shall we pass to you a sale deed of the above property. "The rent note, Exhibit 56, provides that annually for the ten years mentioned the plaintiffs shall pay to the defendants rent of Rs. 287.

5. It remains to determine what is the true contract to be collected from these documents. Was it a contract of sale or a contract of mortgage by conditional sale ? In the course of the argument numerous cases were cited to us, but they were, we think, all decided on their own particular facts. The only case where the facts were substantially similar to those now before us is *Maruti v. Balaji* (1900) 2 Bom. L.R. 1058 where the Court pronounced in favour of a mortgage. The principle which governs the cases seems to be clear enough. The Court has to decide between an outright sale for an agreed price and a mere transfer of the property, the subject of the sale deed, as security for a loan. Thus the principal point to be cleared up is, whether the apparent price, in this case Rs. 2,500, was the real price of a sale or was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt. The three documents must of course be read as a whole, and the intentions of the parties must be gathered from the provisions of the documents. We begin with this that the mere agreement to reconvey does not necessarily

signify that the transaction is a mortgage. It seems to us, however, that two things must be remembered in this context. One of them is the notorious reluctance of Indian peasants to sell their land, a reluctance which is judicially noticed and historically explained by Sir Michael Westropp in *Bapuji Apaji v. Senavaraji Marwadi* ILR (1877) 2 Bom. 231. And the second thing to be remembered is that, in the case now before us, on the assumption that the parties intended an out and out sale, there is no assignable reason why the defendants should have promised the plaintiffs to reconvey the property to them if they repaid the purchase money. That is a point which, we think, is not without importance, and it was, we observe, allowed to weigh with the Court in *Patel Ranchod v. Bhikhabhai* ILR (1896) Bom. 704.

6. As is said there by Mr. Justice Ranade, so we may say here, that on the case made by the defendants there was no occasion for the covenant to reconvey on the repayment of the money within a given time. It may also be remarked that though the parties must of course be held to the contract which they have made, and the Court cannot make a new contract for them, yet in ascertaining the true nature of the contract the Court must follow the injunction so frequently laid down by the Privy Council that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses"; *Hunoomanpersdud Panday v. Mussumat Babooee Munraj Koonweree* (1856) 6 M.I.A. 898.

7. Now from the documents which we have read it is clear, in the first instance, that although the sale deed recites that the property was sold in lieu of the payment of the debt due, the sum of Rs. 2,500, which formed the purchase price, was in its origin a debt; and that it continued as a debt seems to us to be indicated by Clause 4 of Exhibit 32 which we have quoted" For, that clause, as we understand it, shows that the repayment of the Rs. 2,500 and the repayment of any fresh advances "which the plaintiffs might take from the defendants were to be on one and the same footing; in other words, the old relation of debtor and creditor was continued, and the Rs. 2, 500 was regarded as an outstanding loan to be reckoned with any other new loans which might thereafter be made to the plaintiffs. It is also, we think, material to note that by the terms of the agreement it was provided that, within the stipulated period of ten years, whensoever the plaintiffs might elect to make to the defendants the payment due to them, the defendants would reconvey to the plaintiffs. That provision seems to us to suggest the inference that the defendant, creditors were looking only to the recovery of their money not to the ownership of the land. It was sufficient to provide for the recovery of the principal sum, Rs. 2,500, without interest, because the interest due on that sum was already provided for under the guise of rent reserved by Exhibit 56. That rent was in the aggregate Rs. 287. It is found by the lower Court, and the finding has not been challenged, that this aggregate was made up of Rs. 62 on account of the Government Assessment and Rs. 225 net rent. Now, the Rs. 225 reserved as rent work out to exactly nine per

cent on the principal sum of Rs. 2,500, and it was not contested before us that that was the principle upon which the sum of Rs. 225 was fixed. That circumstance seems to us to furnish yet another indication that the transaction with which we are dealing was a transaction of mortgage in which the mortgagee was interested only in securing a sufficient interest on his investment. And strong corroboration of that conclusion is supplied by the fact that the assessment due to Government on the land continued to be paid by the plaintiffs as well after, as before, this transaction of apparent sale.

8. The learned Judge of the lower appellate Court thus had good reason for his finding that the Rs. 2,500 was and continued to be a debt. We have given our reasons for adopting the same conclusion, because it seems to us that the question, depending as it does on the construction of documents, is open in second appeal, though we notice that in *Maruti v. Balaji* (1900) 2 Bom. L.R. 1058 it was said that "a finding on such a point would ordinarily be a finding of fact which would be binding on this Court in Second Appeal."

9. Two other circumstances may be alluded to as strengthening the conclusion which we have reached. One of them is that, in spite of the terms of the deed of sale, the possession remained with the plaintiffs, the vendors, and was not made over to the defendants. And the second circumstance is that the lower appellate Court finds as a matter of fact that the value of the mortgaged properties was Rs. 5,000, that is, exactly double the sum fixed as the consideration of the apparent sale.

10. In view of all these indicia of a mortgage we do not think that the learned Judge's conclusion is displaced by the argument that the documents, which we have before us, do not disclose any such mutuality of remedies as the Courts have held to be ordinarily characteristic of the relation between mortgagor and mortgagee. This requirement was considered by a Full Bench of this Court in *Tuharam v. Ramchand* (1901) 3 Bom. L.R. 778, ILR 26 Bom. 252. and it was there observed that "the dictum is often cited in our Courts without precise appreciation of its meaning, and in any case it has a very limited application to the ordinary mortgages with which we are familiar in the mofussil in India." These words are, we think, apt to the circumstances of the present appeal where the mortgage, if we are right in regarding it as a mortgage, falls u/s 58(c) of the Transfer of Property Act, being a mortgage by conditional sale. In other words, the transaction was *ex facie* a sale, and a deed of sale would clearly be an inappropriate place in which to embody the reciprocal remedies of a mortgagee as mortgagee.

11. Lastly, it was contended that the transaction could not be regarded as a mortgage, because there was no provision for accountability. There is, however, provision for accountability by the mortgagor as we have already noticed, and the circumstances of the case leave no room for accountability by the mortgagee, inasmuch as the mortgagee never went into possession of the mortgaged property, but received an annual rent in lieu of the rents and profits.

12. These are all the considerations which have been advanced to us on the one side and the other, and on a review of all of them we are satisfied that the weight of evidence is in favour of the view which commended itself to the learned Judge of the lower appellate Court. His decree must therefore be affirmed and this appeal dismissed with costs.