
(1946) 01 MAD CK 0014
In the Madras High Court

Kasturi Venkata Subbarao and Another APPELLANT
Vs
Bikkina Veeraswami and Others RESPONDENT

Date of Decision : 31-01-1946

Acts Referred:

Citation : (1946) 59 LW 244 : (1946) 1 MLJ 342

Hon'ble Judges : Patanjali Sastri, J

Bench : Division Bench

Judgement

Patanjali Sastri, J.—This is an appeal from an order refusing to scale down what is claimed to be a mortgage at the instance of the appellant

who applied for relief under Madras Act IV of 1938. The application was dismissed on the ground that the transaction in question was not a

mortgage at all but an absolute conveyance with a condition of retransfer and there was no debt which could be scaled down under the Act.

2. The transaction was embodied in two documents, Exs. D-1 and P-1, both dated the 22nd December, 1931. Ex. D-1 purports to be an out-

and-out sale of the properties referred to therein to the respondent for Rs. 6,500 and Ex. P-1 provides that the properties shall be re-conveyed to

the appellant on re-payment of the price within ten years. The appellant contended that the two documents taken together evidenced a mortgage

by conditional sale and attempted to show by reference to the surrounding circumstances the real nature of the transaction according to the

intention of the parties. The Court below refused to go into that question in view of the new proviso to Section 58 (c) of the Transfer of Property

Act added by the Amending Act of 1929. The proviso runs thus:

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 language of the proviso is perfectly clear and unambiguous and its effect is that an ostensible sale with a stipulation for repurchase shall not be

regarded as a mortgage unless the stipulation is contained in the same document which effects the sale. The appellant's learned Counsel argues

that, as the new provision has been introduced as a proviso to Clause (c) which defines a mortgage by conditional sale, it should not be understood

as having a wider scope than the clause itself and should not be taken to limit or qualify in any way Clause (a) which defines a mortgage : in other

words, that the proviso should be read as providing only that such a transaction shall not be deemed to be a mortgage by conditional sale, with the

consequence that it can still be regarded as a mortgage falling under Clause 58 (g) if it is established that the intention of the parties was that the

transaction should operate as a mortgage and not an outright sale with a condition of re-transfer. This argument cannot be accepted. The

construction suggested would involve reading into the proviso words which are not there and it would, moreover, stultify the new enactment as it

would leave the previous state of the law practically unchanged. For it would not make much difference in the legal effect of a sale accompanied by

a separate agreement for repurchase to provide that it shall not be deemed to be a mortgage by conditional sale but may be regarded as an

anomalous mortgage. We do not think that the proviso was intended to have that effect. Its object evidently was to shut out an inquiry whether a

sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document. This is the view taken of the effect

of the proviso in *Ma Sein Nyo v. Maung San Pe* AIR 1935 Rang. 212 and we agree with it.

3. The appeal fails and is dismissed with costs, two sets, one for respondent 1 and one for the other respondents.