(1957) 02 MP CK 0001

In the Madhya Pradesh High Court

Case No : G.S.A. No. 496 of 1951

Madhoprasad APPELLANT

Vs

Hariram RESPONDENT

Date of Decision : 15-02-1957

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

Citation : (1957) JLJ 403

Hon'ble Judges : Bhutt, J

Bench : Single Bench

Advocate : M.L. Shrivastava, for the Appellant; R.K. Pandey, for the Respondent

Final Decision : Allowed

Judgement

Bhutt, J.—This is plaintiff''s appeal from the decree dismissing their suit for redemption.

2. Nilkanth, since deceased, owned 3 pies share in patti No. I of mouza Nirtoo, together with sir field No. 167.3, area 5.37 acres. He executed a deed of transfer of the said property, dated 26-8-1944, in favour of defendants-respondents Nos. 1 and 2. He died on 4-3-1946. Plaintiffs-appellants Nos. 1 and 2 are his son and widow. Defendant-respondent No. 3, his other sun, had separated from him during his life-time. He transferred half share of the property on 23-5-1946 to plaintiffs-appellants Nos. 3 to 5. The plaintiffs thus claim to represent the entire estate.

3. The ostensible consideration of the deed of transfer, dated 26-8-1944, is Rs. 500, out of which Rs. 50 were said to have been paid privately and the balance was paid before the Sub-Registrar. The plaintiffs contended that the transfer was a mortgage by conditional sale, whereas, according to the contesting defendants, it was a sale with a condition of repurchase. The Courts below accepted the defence-contention and dismissed the suit, Hence this appeal.

4. The law on the subject has recently been stated by their Lordships of the

Supreme Court in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, So far as the interpretation of a document is concerned, it is well settled that 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. If, however, there Es ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. Adverting to section 58(c) of the Transfer of Property Act, as amended by Act XX of 1929, their Lordships observe?

The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgagee, 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 if the conditions of section 58 (c) are fulfilled, then we are of opinion that the deed should be construed 88 a mortgage.

Explaining the above proposition further, their Lordships observe?

Now, as we have already said, once a transaction Is embodied In one document and not two and once its terms are covered by section 58 (c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant circumstances necessarily lead to opposite conclusion.

5. These observations make it clear that if the conditions of section 58 (c) of the Transfer of Property Act are fulfilled, there is a presumption that the transfer is a mortgage by conditional sale, which cannot be dispelled except by clear and unambiguous words in the deed, or by attendant circumstances necessarily leading to the opposite conclusion. This is also the interpretation that has been placed on the pronouncement of their Lordships in AIR 1955 272 (Nagpur) as appears from the following observations:?

In all such cases, the rule is that one should be guided in the first instance by the document itself. If the document is clear, there is no need for any further enquiry. If ambiguous, it can be interpreted either as a mortgage or as a sale, with a presumption in favour of a mortgage. For this purpose of course, as their Lordships have indicated, to take the document out of the category of mortgages some express words excluding the mortgage have to be shown, or some surrounding circumstances have to be proved which go to show that the transaction was not to operate as a mortgage but as a sale with a mere option of repurchase.

In this clear state of the law, it is not necessary to refer to other decisions either of this Court or other High Courts, It may, however, be stressed that the words of the deed or the circumstances which surround the transaction must be clearly incompatible with a mortgage and must necessarily lead to the conclusion of a sale before they can be held to rebut the presumption.

6. The terms contained in the deed of transfer are the following?

(1) "I have to pay off entire debt and I am in need of money for cultivation (also),

(2) Hence I have sold my share only of 0-0-3, three pies of patti No. 1 mouza Nirtoo, Tahsil and district Bilaspur, together with entire rights to the things pertaining to water......and field sir No. 167.3-D, area 5.37 decimal, together with cultivation rights in favour of........for a sum of Rs. 500 five hundred rupees.

(3) On condition that the aforesaid purchasers may take Into their possession and occupation the aforesaid share and land (field) and that.

(4) I shall have a right and power to take back the possession of my share and the fields which have been sold by the aforesaid sale deed after repaying to the aforesaid purchasers the said entire principal amount of Rs. 500, five hundred rupees before Jeth Punai, Samvat 2002 (25-6-1945).

(5) If I do not make the payment of the entire amount within the stipulated period, then the entire sold share and the field sold shall be treated as sold by this very sale-deed. Then after the stipulated period I shall have no right and claim of any kind whatsoever to the aforesaid share and the field, and neither I shall have a right to pay the amount.

(6) The purchasers after making their possession and occupation, shall get their names mutated in their favour.

(7) In future, if any one files a claim, it shall stand illegal. The aforesaid share and field is not transferred in any manner whatsoever to any one. If myself or my heirs file any claim and cause loss or damage to the purchasers, then I shall be liable along with my other property to the purchasers to the extent of the entire loss.

(8) Out of the sum of Rs. 500, five hundred rupees, I have already received Rs. 50, and shall receive the remaining amount of Rs. 450, in the presence of the registering officer.

(9) Hence, I have executed this conditional sale-deed so that it may remain on record and be of use when required.

7. The above terms indicate that the transfer of title or mutation of names was not contemplated until the expiry of the time fixed for payment of the money, Clauses 5 and 6. This means that the property was not to pass to the transferees until the transferor committed default in payment of the amount within the stipulated period, although they were permitted to take possession of the property on the date of the execution of the document it appears from the other terms also that the deed contemplated the title to remain with the transferor during the period fixed for payment of the amount. This is clear from the fact that under the document, what is called "a right and power" was reserved to the transferor to take back the property on payment of the money without the need of execution of a document of reconveyance. These factors were considered in

the case of Chunchun Jha to indicate a mortgage. The need of the transferor in entering into the transaction was mainly the payment of a debt due by him. Read with the other terms, this further indicates that his primary purpose was to take a loan for repayment of the debt and not to transfer the property. The description of the transaction as a conditional sale (clause 9) is also significant in this connection, as observed by their Lordships in the case of Chunchun Jha All these terms clearly indicate a mortgage and not a sale.

8. On a comparison of the terms of the document in the case of Chunchun Jha, it would appear that some of them clearly postulated vesting of title in presenti in the transferees but even then their Lordships held that they were compatible with an ostensible and not a real sale. No such stringent conditions are present in the present case. Accordingly the fact that the transferees are described as "purchasers" and the demised property as "sold", which expression would equally be found in the case of an ostensible sale, has no special implications It is true that the value of the property his not been found to be appreciably higher than the stipulated prise, and that the time fixed for payment was short and there was no agreement to pay interest. These factors were also present in the case of Chunchun Jha, which were held not sufficient to rebut the presumption of a mortgage. According to the arrangement, the transferees were to remain in possession of the property, and as there was no liability to account for the income, the understanding apparently was that they were to enjoy the profits in lieu of interest. In this context, the short term for payment of the money appears to have been fixed for the reason that the transferor did not like the profits to be lost for a considerable time, or as the case may be, the transferees did not anticipate sufficient income to cover the amount of interest. The terms of the deed, therefore, cannot be held to have been rebutted successfully by the transferees and consequently the transaction must be held to be a mortgage by conditional sale.

9. It was, however, contended that the remedy of the plaintiffs was to apply to the Claims Officer u/s 19 of the M.P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, and consequently the suit is not maintainable. The matters, however, which are barred from the jurisdiction of the civil Courts are enumerated in section 33 of the Act, and does not cover a case of enforcement of a mortgage which is not pending before a Claims Officer. This contention has, therefore, no force.

10. A plea was raised by the contesting defendants that they had improved the property at considerable cost. The Courts below have not estimated the value of the improvement although they have agreed that the property was improved. However, this does not entitle the contesting defendants to charge the cost of improvement on the property. It cannot, therefore, be added to the price for redemption.

11. The appeal accordingly succeeds. The decrees of the Courts below are set aside and it is directed that a preliminary decree for redemption for the principal

amount of Rs. 500 payable on or before 30-8-1957 shall be drawn up. In the circumstances of the case, however, parties shall bear their own thoughout.

