
(1937) 04 AHC CK 0002
In the Allahabad High Court

Munshi Bishen Lal

APPELLANT

Vs

Lala Banwari Lal and Others

RESPONDENT

Date of Decision : 22-04-1937

Acts Referred:

Citation : (1937) 04 AHC CK 0002

Final Decision : Dismissed

Judgement

Harries, J.—This is a plaintiff's appeal against a decree of the lower Appellate Court allowing an appeal from a decree of the Court of first instance which was passed in favour of the plaintiff. The suit out of which this appeal arises was brought by the plaintiff for redemption of certain property. The Court of first instance decreed the plaintiff's claim for redemption of the property in suit on payment of Rs. 573 to defendants Nos. 1 and 2 within three months of the order. On appeal, the learned Civil Judge reversed the decision of the learned Munsif and dismissed the plaintiff's claim in its entirety. It is against this decree that the present second appeal has been preferred.

2. On November 10, 1932, Musammat Kishen Piari executed a deed in favour of Mathura Prasad and others. Ostensibly the deed is a sale-deed of a house for which the consideration is stated to be Rs. 550. There is, in this sale-deed, a term that if the consideration is paid by the executant or her heirs and representatives within a year to the vendees, the latter shall re-convey to the vendor the house sold under the terms of the sale-deed.

3. After this ostensible sale-deed was executed, the vendees took possession of the house. On June 18, 1933, Musammat Kishen Piari and her son Shimbhu Sahai executed a sale-deed of this house in favour of the plaintiff for a consideration of Rs. 765. Shortly afterwards and within a year of November 10, 1932, the plaintiff served a notice upon the vendees under the deed of November 10, 1932, claiming to redeem the property on payment of Rs. 550. The vendees who were made defendants in the suit denied the plaintiff's right to redeem the property and consequently the plaintiff instituted the suit out of which this appeal

arises in the Court of the learned Munsif.

4. The plaintiff's case was that the deed of November 10, 1932, though ostensibly a sale-deed, was in fact and in law a mortgage by conditional sale. That being so, the plaintiff contended that the defendants were nothing more than mortgagees and that he could redeem the mortgage as he had purchased the rights of the mortgagor Musammat Kishen Piari. The defence was a denial that this document amounted to a mortgage by conditional sale. On the contrary the defendants contended that it was an out and out sale by Musammat Kishen Piari to them though the sale-deed contained a covenant whereby they agreed to re-sell the property to Musammat Piari in certain circumstances.

5. The learned Munsif was of opinion that the document did not constitute an out and out sale but was a mortgage by conditional sale, but on the other band the learned Civil Judge came to the conclusion that the terms of this deed were inconsistent with the conception of a mortgage and he held that it amounted to an out and out sale with a condition for re-purchase. Section 58(c), Transfer of Property Act provides that:

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 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.

6. The whole of the terms of this transaction between Musammat Kishen Piari and the defendants are contained in one document and therefore the transaction would amount to a mortgage by conditional sale if the provisions of Section 58(c) are complied with.

7. It has been argued in the first place before me that where it is shown that property is sold and in the sale-deed it is provided that if the sale consideration is paid by the vendor to the vendee within a certain time, the vendee will transfer the property to the vendor, such transaction must be a mortgage by conditional sale. Reliance is placed by the appellant upon the case in Mathura Kurmi Vs. Jagdeo Singh and Others In that case Maiman, J. (as he then was) expressed the view that a transaction cannot amount to a mortgage by conditional sale unless it fulfilled the conditions of Section 58 (c), Transfer of Property Act, but on the other hand a transaction will be a mortgage by conditional sale if it comes within that section. At p. 326 Page of AIR 1927 All.--[Ed.] he observed:

It seems to me that if a document is in the form of an ordinary conveyance usually found in India and executed by the transferor only, and it contains a

covenant for re-purchase on payment of the consideration, the transaction, would come exactly within the definition of a mortgage by conditional sale. In such cases I would have the utmost difficulty in trying to take it out of the scope of Section 58.

8. On the other hand Lindsay, J., who constituted the Bench hearing the case with Sulaiman, J. expressed the view that in order to determine whether the transaction is a sale with a right to repurchase or a mortgage by conditional sale, what had to be determined was the intention of the parties at the time the transaction was entered into and in order to ascertain this intention regard must be had to the surrounding circumstances. In my judgment this case does not compel me to decide that this is a mortgage by conditional sale merely because there is in terms a sale and in the same document a covenant that upon payment being made by the seller to the buyer the latter shall transfer the property back to the seller. In *Bishambhar Nath Vs. Muhammad Ubaid-Ullah Khan and Others*, a Bench of this Court held that in deciding whether a given transaction is an out and out sale with a condition for re-purchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded. Sulaiman, J. referred to this case and offered certain criticisms of it, but in my view this case being a Bench decision binds me and is in accordance with the view of Lindsay, J. to which I have referred. In my judgment though there is only one document in this case, that does not conclude the matter, it appears to me that according to the authorities, the Court has, in a case such as the present one, to examine the terms of the document in the light of the surrounding circumstances and to ascertain what was the true intention of the parties. If the Court comes to the conclusion that the parties intended an out and out sale, then the document cannot be construed as a mortgage by conditional sale. But on the other hand if the Court is satisfied that there was never any intention that the property should be anything other than a security for an advance, then the transaction amounts to a mortgage, though on the face of it, it is a sale with a condition to re-purchase.

9. The deed of November 10, 1932, in the opening paragraph mentions that the executant is being pressed to repay certain moneys and consequently she is executing his deed to raise the necessary money to my off these debts. This, it is argued, suggests that the transaction was really intended as a mortgage and not as a sale. Had these debts been owing to the defendant, here would be considerable force in the argument, but the debts were owing to third parties. A debtor frequently has to sell property to pay debts and the fact that the consideration for this sale went to pay certain debts does not determine the question either way.

10. After a recital of the purpose for which the money was required, it is stated in the deed that the house is sold. There can be no question that the words used show an intention to sell the house absolutely and it is then provided that the vendees are to be put in possession and that they should be able to deal with the

property in any manner they desire. Had the deed stopped there, there could have been no question that it was an out and out sale, there, however, follows this clause:

If I, the executant or my heirs and representatives, pay within a year in a lump sum the entire sale consideration to the vendees, they shall re-convey the house sold to me, the executant or my heirs and representatives and shall execute a sale-deed and deliver possession, but I, the executant and my heirs and representatives, shall be liable for the expenses relating to the said re-conveyance of the property. I, the executant or my heirs and representatives, shall not pay the amount by transferring or hypothecating the said house sold to any one for this purpose nor shall they (meaning the executant, her heirs and administrators) transfer or hypothecate the property sold to any one else for five years after taking it back on payment of the amount of consideration. If it is so done, the vendees shall hereunder be the permanent owners of the house sold and the transfer, hypothecation and all other proceedings which shall be made or taken contrary to the conditions for the reconveyance of the property shall be invalid in face of this sale-deed.

11. The effect of this term is that within a year the vendees agree to re convey the property to the vendor if the latter re pays them the consideration in a lump sum, but it is provided that the vendor is not to transfer or hypothecate the house in order to raise money to re-pay to the vendees the consideration for the original sale. Further it is provided that even if the house is re-conveyed by the vendees to the vendor, the latter's right to deal with it is to be limited. In short, even after repayment and taking a re-conveyance the original vendor is not to transfer or hypothecate the property for a period of live years and in the event of her doing so the original vendees are to be deemed the absolute owners of the property. These conditions are somewhat strange and are difficult to understand at first sight, but similar conditions have been subject to judicial construction in other cases.

12. In *Jhanda Singh v. Wahid-ud-Din* 38 A. 570 : 36 Ind. Cas. 38 : AIR 1916 P.C. 49 : 43 I.A. 284 : 31 M.L.J. 750 : 21 C.W.N. 66 : 20 M.L.T. 529 : 14 A.L.J. 1159 : (1916) M.W.N. 570 : 19 Bom. L.R. 1 : 5 L.W. 189 : 25 Cri .L.J. 524 : 10. L.T. 131 their Lordships of the Privy Council considered the effect of a term in a document very similar to one of the terms to which I have referred. In that case there had been a document purporting to be a deed of absolute sale and a later agreement in which that deed was recited. There was then a covenant whereby the vendees agreed that if the vendor after the lapse of from nine to ten years from the date of the execution of the deed paid to the executants the purchase money mentioned in the sale-deed out of his own pocket without mortgaging or selling the property to other persons, the executants should forthwith execute a fresh re-sale-deed on receipt of the consideration and get mutation of names in the revenue papers. It was argued before their Lordships that the provision as to the payment of the purchase price out of the pocket of the vendor was mere

consistent with the transaction being a mortgage than an agreement for re-sale entered into from kindly feelings. Upon this aspect their Lordships remarked at p. 576 Page of 38 A.--[Ed.]:

Their Lordships cannot accept that contention. The stipulation is wholly inconsistent with the relation of mortgagor and mortgagee. It is very-doubtful indeed, if it would not be illegal, as amounting to an encroachment on a mortgagor's right to redeem the mortgaged property from whatever source, he might procure the funds to do so. But if the executants though bona fide, and absolute purchasers for value of these lands were, yet; from kindly feelings to the vendors themselves, willing to restore the vendors to the possession and enjoyment of their property it was quite natural that they should provide against a sale or mortgage which would result in merely putting some persons other than these former owners into the possession and enjoyment of property purchased substituting practically the new mortgagees or purchasers for the executant themselves.

13. The terms in this case were in very similar terms to the term in the present case. The vendor was given a right to re-purchase the property but only out of money from her own pocket. That is, he was not allowed to raise the money to repurchase by mortgaging or transferring the property. That term, according to their Lordships of the Privy Council, is wholly inconsistent with the relationship of mortgagor and mortgagee but is consistent with the relationship of vendor and vendee when the vendee from friendly feelings is prepared to allow the vendor to re purchase the property for himself or herself.

14. In my view, the term in. the present case restricting the vendor from parting with the property for five years after repurchasing is also wholly inconsistent with the relationship of mortgagor and mortgagee. What does it matter to a mortgagee what the mortgagor does with the property after redeeming it? On the other hand, a kindly vendee who is prepared to re-sell the property to the vendor might only be prepared to do so if he was satisfied that the vendor would keep it for himself or herself and not part with it to a mortgagee or transferee immediately after the re-sale. In my view the observation of their Lordships of the Privy Council in *Jhanda Singh v. Wahid-ud-Din* 38 A. 570 : 36 Ind. Cas. 38 : AIR 1916 P.C. 49 : 43 I.A. 284 : 31 M.L.J. 750 : 21 C.W.N. 66 : 20 M.L.T. 529 : 14 A.L.J. 1159 : (1916) 2 M.W.N. 570 : 19 Bom. L.R. 1 : 5 L.W. 189 : 25 Cri .L.J. 524 : 10 . L.T. 131 applies with equal, force to this second condition restricting the vendor's right to deal with the property after repurchase by her.

15. It has been contended, however, that there is authority of this Court which compels me to hold that terms such as these to which I have referred are consistent with the transaction being a mortgage. In *Kirpal Singh Vs. Sheoambar Singh and Others* there was a term in the document whereby the vendees agreed, to re-transfer the property for payment of the total amount in any jeth within 15 years of the deed provided the seller procured the money out of his own pocket and not by sale or mortgage of property transferred. The learned

Judges who decided that case state in terms that the condition that the seller could re-purchase the property only with money out of his own pocket and not by sale or mortgage of the property transferred, was more consistent with an out and out sale than a mortgage by conditional sale. However, the Bench did hold that in that particular case" the transaction was not an out and out sale but a mortgage by conditional sale. It is to be observed that the Privy Council case in *Jhanda Singh v. Wahid-ud-Din* 38 A. 570 : 36 Ind. Cas. 38 : AIR 1916 P.C. 49 : 43 I.A. 284 : 31 M.L.J. 750 : 21 C.W.N. 66 : 20 M.L.T. 529 : 14 A.L.J. 1159 : (1916) 2 M.W.N. 570 : 19 Bom. L.R. 1 : 5 L.W. 189 : 25 Cri .L.J. 524 : 10 . L.T. 131 to which I have referred was not noticed in *Kirpal Singh Vs. Sheoambar Singh and Others* Each of these cases must, be decided upon the particular terms of the document. In *Kirpal Singh Vs. Sheoambar Singh and Others* all that the Bench decided was that a term which was inconsistent with the relationship of mortgagor and mortgagee did not outweigh other terms which were inconsistent with the relationship of the vendor and vendee.

16. In my view the terms imposed on the vendor restricting her right to raise money to re-purchase the property and restricting her rights in the property after re-purchase are wholly inconsistent with the relationship of mortgagor and mortgagee but are consistent with the relationship existing between a vendee and a vendor whom the former wished to assist.

17. Another term in the deed which suggests that the parties intended a sale and not a mortgage is the term restricting the right to re-purchase to a period of one year. The period during which the property may be re-purchased has always been regarded as a test as to whether the transaction is a sale or a mortgage. If the period of time given to the vendor during which he can re-purchase is a short one, it does suggest that it is an out and out sale with a right to re-purchase, but on the other hand where a long period of time is given to the vendor to re-purchase, it does suggest that there is no out and out sale at all but merely a transfer of the property as a security. In the present case the vendor is only given one year to re-purchase and in my view that strongly suggests that the parties intended not a - mortgage but an out and out sale. Further the vendor has to pay all the costs incurred in the re-conveyance which also to my mind suggests that the transaction is not a mortgage.

18. The learned Judge has also found that the consideration for the sale-deed was adequate and represented the full value of the property. This aspect of the case is, however, not clear. The plaintiff certainly paid more than the consideration of the sale-deed to Musammam Kishan Puri when he purchased her rights on June 16, 1933, yet on the other hand, there was an earlier transaction by the plaintiff which would suggest that Rs. 500 was the full value of this property. Where the consideration of a sale-deed is wholly inadequate and falls far short of the real value of the property, the transaction can rightly be regarded not as a sale but a mortgage; but on the other hand where the consideration represents the full value of the property, then the transaction is more consistent

with a sale than a mortgage. The learned Judge has found in this case that the consideration represented the full value of this property and that is a point in favour of treating this transaction not as a mortgage but as an out and out sale.

19. Upon a full consideration of all the terms of this deed, I am satisfied that the transaction was an out and out sale with a right given to the vendor to re-purchase. That being so, the plaintiff who is the successor-in-title of the original vendor has no right whatsoever, to claim redemption of this property. In my view the claim was rightly dismissed by the lower Appellate Court and consequently this appeal is dismissed with costs. Leave to appeal under Letters Patent is granted.