

(1916) 01 BOM CK 0011
In the Bombay High Court

Narayan Ramkrishna Pandit and Others	APPELLANT
Vs	
Vighneshwar Ganap Hegde and Others	RESPONDENT

Date of Decision : 06-01-1916

Acts Referred:

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

Citation : (1916) ILR (Bom) 378

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

Bench : Division Bench

Judgement

Batchelor, J.—The only question involved in this appeal is, whether the document, Exhibit 25, executed by the plaintiffs in favour of the defendants, is, as on its face it purports to be, a sale, or is in reality a mortgage in the guise of a sale. The plaintiffs' suit was brought to redeem the mortgage which, as the plaintiffs alleged, was effected by this Exhibit 25, so that admittedly the suit must fail if it should be held that no mortgage is created by this document.

2. The learned Judge below was of opinion that Exhibit 25 was in reality a mortgage, and the grounds of this opinion are stated by him in the following words: after referring to the terms providing for the condition to repurchase the property after the lapse of twenty years, the Judge says:

But for the addition of these terms the deed (Exhibit 25) would have been a sale. But with the addition of the terms the deed becomes a mortgage by conditional sale, because there is a condition in Exhibit 25 that the sale should become void on payment of Rs. 13,000 by instalments or in a lump sum within twenty years [vide Clause (c), Section 58 of the Transfer of Property Act]. Under the circumstances it is not necessary to find out the indications which determine any transaction to be a mortgage.

3. But it seems to me clear that the question, whether Exhibit 25 effects a mortgage or a sale, is not to be answered by mere reference to Clause (c) of Section 58 of the Transfer of Property Act. And, if I am not mistaken, to decide

the point upon this view is to assume what is really in dispute. For, Section 58 of the Transfer of Property Act defines what a mortgage is, and Clause (c) of the section describes one method of effecting a mortgage, viz., the method of mortgaging by conditional sale. But the words of Clause (c) are to be read not in an isolated manner, but in reference to the first paragraph of the section, and when they are so read, it will be manifest that Clause (c) comes into play only when there is a mortgage as that term has been defined. Now from the definition itself there is no mortgage except where there is a transfer of an interest in specific Immovable property for the purpose of securing the payment of a debt, and the whole question involved in this debate is, whether the Rs. 13,000, paid for the lands transferred by Exhibit 25, was an out and out price paid for land sold or was a continuing debt secured by a transfer of the Immovable property. To decide between these two theories we must look at the intentions of the parties as those intentions have been disclosed in the documents executed. As was said by Lord Chancellor Cranworth in *Alderson v. White* (1858) 2 Deg. and J. 97 :

4. In every such case the question is, what, upon a fair construction, is the meaning of the instruments?" Now the material passage in the principal instrument, Exhibit 25, after referring to the execution of prior mortgages, recites that in all Rs. 13,000 are found due to the defendants by the plaintiffs at the date of the document. Then the instrument continues:

It was not convenient to pay you this amount for the reasons mentioned above. Moreover excessive interest is to be paid for the said debt, and if, by reason of the inconvenience to pay it from the income of the family lands, the amount remains unpaid, it appeared that great loss might be caused to the family. So all of us who are members of the family considered this matter and decided that we should sell some lands to you and redeem the remaining lands from the mortgage encumbrance and should include in this sale-deed all the debts incurred by our family up to this time, in full satisfaction of our debts.

5. Now pausing there, it seems to me difficult to imagine language more clearly and unequivocally expressive of a sale as opposed to a mortgage. There is no ambiguity in the minds of the parties who themselves refer to the pre-existing mortgage and in contrast with it declare that they now effect a sale for the precise purpose of extinguishing the debt which had been secured by this mortgage. That is the contract which the parties in the plainest possible language have set their hands to. Is there anything in the rest of the case to indicate that this, the plain meaning of Exhibit 25, is not the meaning which the parties intended and which the Court should now enforce? The sole circumstance to which the respondents-plaintiffs were able to point is the last passage occurring in Exhibit 34, the permanent lease which the defendants gave to the plaintiffs on the 6th August 1904. By these words it is provided that "if we (the plaintiffs) pay any amount out of the amount in respect of the said sale-deed, we shall deduct rent in proportion to the amount paid thus and go on paying the remaining rent."

It may be that if there were in the case any substantial consideration in plaintiffs' favour, the Court might see its way to draw an inference in their favour from this provision. But when all the circumstances are considered, it appears to me that this provision carries the case no further than it is carried by the condition that it shall be open to the plaintiffs at any time within twenty years to repurchase the land by payment of the price either in a lump sum or in instalments. Clearly, however, the mere giving of an option to the plaintiffs to repurchase the land does not of itself operate to create a mortgage. And when attention is paid to other circumstances appearing on the record, the theory of a mortgage must be set aside. Admittedly when Exhibit 25 was executed, the defendants already had a mortgage on the lands transferred by Exhibit 25. Since that mortgage the debt due to them had increased from Rs. 8,000 to Rs. 13,000. And yet if the plaintiffs' case is right, the creditor is content to take only a further mortgage on the 20 lands transferred by Exhibit 25 and give up the security which under the pre-existing mortgage he already had on seventy-two other lands belonging to the debtors.

6. Moreover, the documents make no provision for the payment of interest. It is said that the Rs. 412 reserved as annual rent under Exhibit 34 may properly be regarded as interest running on the Rs. 13,000. But even that theory does not assist the plaintiffs. For, upon that footing the creditor is content to receive only interest at the unusual and unusually low rate of $3\frac{1}{8}$ per cent, whereas his earlier mortgage gave him interest at 8 per cent. There is no provision in the documents for the taking of any accounts, although, the documents provide that the purchasers may spend any sum they like on improving the property. The documents lay down that in the event of repurchase by the plaintiffs, the costs of this repurchase are to be borne half and half between the plaintiffs and the defendants, and it seems to me extremely unlikely that if this transaction were in truth a mortgage, the mortgagee would consent to bear half the expenses of the reconveyance.

7. I notice, lastly, that it is not suggested that the Rs. 13,000, the consideration of Exhibit 25, is not a fair price for the lands conveyed by that instrument.

8. On the whole, therefore, though I have not overlooked the general considerations to which I referred in *Kasturchand Lakhmaji v. Jakhia Padia* (1915) 40 Bom. 74 I am of opinion that in this particular case upon these particular documents it is impossible to avoid the conclusion that the transaction must be accepted as being in reality that which in the plainest language both parties declared it to be, viz., a transaction of sale with an option to the plaintiffs to repurchase.

9. On these grounds, in my opinion, the appeal must be allowed and the plaintiffs' suit must be dismissed with costs throughout.

Shah, J.

10. I am of the same opinion.