

(2000) 06 KAR CK 0001

In the Karnataka High Court

Case No : Regular First Appeal No. 342 of 1994

S. Jyothi

APPELLANT

Vs

Smt. N. Mariyamma (Deceased) By L.rs And Others

RESPONDENT

Date of Decision : 01-06-2000

Acts Referred:

Citation : (2000) 3 CivCC 629 : (2000) ILR (Kar) 2912 : (2000) 5 KarLJ 603 :
(2000) 4 KCCR 261 SN

Hon'ble Judges : K. Sreedhar Rao, J

Bench : Single Bench

Advocate : Sri B.S. Patil, for the Appellant; Sri G.B. Raju, for the Respondent

Judgement

K. Sreedhar Rao, J.—The appeal is filed against the judgment and decree of the XIX Additional City Civil Judge, Bangalore City in O.S. No. 1409 of 1998. The third defendant in the suit is the appellant, the first respondent is the plaintiff in the Trial Court, and the second and third respondents are the defendants 1 and 2 in the suit.

2. The brief facts leading to the appeal are stated thus.-

The second respondent had executed a conditional sale in favour of the appellant on 20-6-1984 for a sum of Rs. 30,000/- in respect of the suit property. Under the said agreement, it was stipulated that within a period of three to five years from the date of the said deed, if the amount received under the deed is repaid to the first respondent, the appellant undertook to reconvey the property. Subsequent to the said agreement, the second respondent executed an agreement of sale in favour of the first respondent on 19-12-1984 wherein the conditional sale deed executed in respect of appellant is also mentioned and the other transactions entered into by the second respondent with others, not connected with the suit property are also mentioned.

3. The suit transactions in the agreement is described as conditional sale amounting to a mortgage and all the rights and liabilities of the second

respondent in respect of the suit property is conveyed in favour of the first respondent and the sale consideration of Rs. 2,00,000/- was agreed.

An advance of Rs. 57,881/- was received under the said document, the balance of Rs. 1,42,119/- was agreed to be paid within two months and on such payment, it was agreed that the second respondent shall pay the liabilities whatever incurred under the conditional sale deed executed in favour of the appellant and get the liability discharged and undertook to execute a registered sale deed in favour of first respondent along with the appellant.

4. The first respondent filed the suit alleging that he has been always ready and willing to perform his part of the contract under the agreement of sale and the second respondent herein has breached the terms of contract. It is also stated that a sum of Rs. 7,250/- has been paid towards the costs of agreement on 5-1-1985 and that the second respondent herein has breached the terms of agreement and not willing to perform his part of the contract. Therefore he filed the suit seeking specific performance of contract under the agreement of sale entered into by the second respondent herein with the first respondent. The appellant is also impleaded as the third defendant in the suit as she holds the ostensible title in respect of the suit schedule property.

5. It appears from the pleadings on record that the third respondent also executed an agreement of sale and that under the agreement of sale executed, Item 1 of the suit property was also agreed to be conveyed in favour of the first respondent by defendants 2 and 3. In respect of both the properties, the suit has been filed. Defendants 1 and 2 although appeared and filed written statement, they did not participate in further proceedings. Hence the suit is decree against them also. However, there is no appeal preferred by them against the decree. The appellant alone has contested the suit effectively and has come up in appeal.

6. On the controversial facts in issue, the Trial Court framed as many as eight issues. Among them, the relevant issues pertain to the proof of agreement of sale executed by defendants 2 and 3 in favour of respondent 1, the readiness and willingness of respondent 1 to perform his part of contract. An issue is also framed with reference to the pleadings of the appellant that the agreement between 1st and 2nd respondents is void and that the second respondent had no right to execute agreement of sale in favour of the first respondent. Besides that, the plea of limitation is also taken.

7. The Trial Court, on the basis of oral and documentary evidence adduced, upheld the contention of the plaintiff and decreed the suit directing the defendants to execute the sale deed in respect of suit schedule properties. Being aggrieved by the judgment and decree, the third defendant in the suit has filed the present appeal in respect of Item 2 of the suit schedule property.

8. In the grounds of appeal, it is contended that the Trial Court has grossly erred in decreeing the suit and that the sale agreement entered into between the second respondent and the first respondent is bad in law and that there was no

right vested in the second respondent to have conveyed any rights in favour of the first respondent.

9. Heard the Counsel for the appellant and the respondents. The first question that requires determination would be the legal character of the conditional sale executed in favour of the appellant by the second respondent, that whether it is a mortgage by conditional sale or a sale with an agreement of right to repurchase. In this regard, the Counsel for the appellant extensively referred to the recitals in the document Ex. D. 1 wherein the appellant has been endowed with all the rights of ownership and permitted to exercise the rights of ownership in respect of the property including the right to get the khatha in the Corporation records mutated and right to deal with the property in the manner she likes without any hinderance and relied on the ruling of the Hon"ble Supreme Court in Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, , wherein it is held:

"Having regard to the nice distinction between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. It is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered, In the instant case the document was styled as a deed of conditional sale, but that is not conclusive of the matter. The executant under the document took a sum of Rs. 5,000 in cash. The purpose was to repay miscellaneous debts and domestic expenses and business. This amount of Rs. 5,000/- was not taken as a loan at all. By executing this document the executant discharged all the prior debts and outstandings. Where, therefore for a consideration of a sum of Rs. 5,000/- with the conditional sale is executed no relationship of the debtor and the creditor can be forged in.

The property is sold conditionally by said document for a period of five years and possession is handed over. At the same time, the document proceeds to state "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right". The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. The last important clause is after the period of five years the transferee will have a right to get the municipal records mutated in his name and pay tax. Thereafter, the transferee will have an absolute right to mortgage, sell, or gift the suit property. Neither executant nor any one else could dispute the title. All the above clauses clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. Thus the finding by the High Court that the said document was not a mortgage by conditional sale; on the contrary a sale with an option to repurchase, cannot be interfered with".

10. The facts in reported case are similar with the facts and material in the case on hand. In the given situation, it has been laid down that the document executed is not a mortgage and it is only a gale with an option of right to repurchase by the vendor. In view of the said ratio laid down by the Hon''ble Supreme Court, the view taken by the Trial Court that Ex, D. 1 is a mortgage, appears to be erroneous.

11. The other contention raised by the Counsel for the appellant is that as on the date of agreement of sale, the rights in the property were already conveyed in favour of the appellant and it is only after the lapse of three years the second respondent had equitable right of repurchase and before the accrual of right of repurchase, the second respondent had no right to deal with the property. Therefore, the agreement of sale is void in law since he had no transferable interest.

12. The terms of the agreement clearly indicate the existing liability in respect of the disputed property incurred with the appellant. It is also mentioned that whatever the rights and liabilities which the second respondent had in respect of the disputed property is made over under the agreement in favour of the first respondent. It is further stipulated that within two months the balance of consideration is to be payable by the first respondent and on such payment, the second respondent undertook to clear the liabilities payable to the appellant and after getting the cloud on the title removed, undertook to execute the sale deed in favour of the first respondent along with the appellant.

13. The reading of the terms and conditions of the documents clearly disclose that there is also no assignment of right of repurchase in favour of the first respondent under Ex. D. 1. What is undertaken by the second respondent is to see that the liabilities in respect of the disputed property incurred with the appellant would be cleared on payment of the balance of consideration and that he would see that a registered sale deed is executed in respect of the property by himself along with the appellant. Therefore, by looking to the terms of the document, it become clear that whatever the rights which the second respondent had in respect of the suit property has been made over with an undertaking that the second respondent himself would clear off the debts payable to the appellant and get the deed registered. This contract does not appear to suffer from any legal infirmities.

14. The contention that the second respondent had no right to assign anything under the agreement of sale does not appear to be a tenable contention. The right of repurchase which the second respondent has under Ex. D. 1 could very well be a valid subject-matter of agreement of sale with the first respondent and the same has been done so. Within the period of limitation prescribed under Ex. D. 1, the suit has been filed. Respondents 2 and 3 who have entered into an agreement with the first respondent, are made parties. So also, the appellant who has ostensible title over the property has been validly made a party. Under the circumstances, I do not find any infirmity in the legal right of the first

respondent to enforce by way of specific performance.

15. The Counsel also referred to Exs. D. 2 and 3, dated 29-8-1993 and 16-9-1994 respectively, whereunder the second respondent had made the appellant to pay off his debts in a sum of Rs. 15,000/- each under the said documents to the creditors of the second respondent and he had undertaken to repay the said amounts while repaying the amount of Rs. 30,000/- under Ex. D. 1. The Counsel also referred to another document namely agreement dated 27-7-1984 entered into between the appellant and the second respondent whereunder an amount of Rs. 10,000/- payable to one Nageshwara Rao by the second respondent was discharged by the appellant and the second respondent undertook to repay the said amount also while repaying the amount payable under Ex. D. 1. Marking of this document was objected for want of registration. The recitals of the document does not appear to assign or transfer any right in respect of immovable property nor creates any obligation in respect of immovable property. Under the said agreement, the second respondent undertakes to repay the loan liability at the time when he pays the amount under Ex. D. 1. The objection to making of the said documents for want of registration is an untenable objection and the said documents ought to have been marked.

16. From the aforesaid objected documents, it appears that the appellant appears to have paid Rs. 40,000/- to the second respondent besides Rs. 30,000/- in Ex. D. 1. The reading of the three agreements disclose that the second respondent undertakes to discharge the financial liabilities incurred under the said agreement without creating any right in respect of Item 2 of the suit schedule property nor creating any encumbrance on Item 2 of the suit schedule property.

17. The Counsel for the appellant, however, contended that in view of the subsequent loans, the equities lie in favour of the appellant which the Trial Court has overlooked while considering the evidence. However, the said contention cannot be countenanced in view of the fact that the loan transactions evidenced in the said documents are distinct from the suit transaction under Ex. D. 1. May be that, time for repayment of loan liabilities may coincide with the time agreed for enforcing the right to purchase. By the said fact alone, it cannot be held that, the appellant gains any sort of equities in her favour, when the said loan transactions does not create any right or encumbrance in respect of Item 2 of the suit schedule property.

For the foregoing reasons and discussions made above, the plaintiff has fully established her rights in respect of the suit property for a specific performance of the suit property in question. In that view of the matter, the appeal lacks merit and the same is dismissed with costs. The judgment and decree of the Trial Court is confirmed.