(1963) 05 P&H CK 0018

In the Punjab And Haryana At Chandigarh

Case No : Letters Patent Appeal No. 492 of 1958

Sita Ram APPELLANT

Vs

Basheshar Dayal and Others RESPONDENT

Date of Decision : 31-05-1963

Acts Referred:
Registration Act, 1908 — Section 17
Transfer of Property Act, 1882 — Section 58(C)

Citation : AIR 1964 P&H 81 : (1963) 65 PLR 1064

Hon'ble Judges : Grover, J;Dulat, J

Bench : Division Bench

Advocate : D.N. Aggarwal and R.N. Aggarwal, for the Appellant; K.N. Tewari, for the Respondent

Final Decision : Dismissed

Judgement

Grover, J.—This is an appeal under Clause 10 of the Letters Patent against the judgment of a learned Single Judge who affirmed the decisions of the Courts below decreeing the suit. In order to determine the points that have been raised, the facts may be shortly stated.

2. On 5th September 1948 Lachmi Narain executed a registered sale deed, Exhibit P. 3, in respect of his share in the property in dispute which consists of a haveli in Rewari town in favour of Amar Chand for a consideration of Rs. 300/-. On the same day he executed a registered rent deed. Exhibit D. 2, taking on rent the same property from Amar. Chand. Yet a third document was executed on that very day between Lachmi Narain and Amar Chand, according to which the latter agreed to reconvey the property to the former, if he paid back the consideration of sale as well as the amount of rent due within two years from the date of the agreement. Before the expiry of that period, however, on 6th April 1950 Sita Ram Defendant obtained from Lachmi Narain whatever rights the latter had in the property. Out of the sale consideration a sum of Rs. 300/- was left with the vendee for payment of what was stated to be the pre-existing mortgage in

favour of Amar Chand. Sita Ram did not exercise his right to repurchase the property from Amar Chand within a period of two years from 5th September 1948. On 30th September 1950 Amar Chand executed a registered sale deed, Exhibit P. 4, conveying the title in that property to Sita Ram for Rs. 400/-. In this sale deed, Amar Chand described himself as a complete owner of the property. In October 1951 Basheshar Dayal and Rajinder Kumar, the two sons of Amar Chand, and his wife Rukmani Devi instituted the usual suit for possession of the property on the ground that they formed a joint Hindu family with Amar Chand who was impleaded as Defendant No. 3 in the suit and that he had purchased the property with the funds of the joint Hindu family and that he was not entitled to alienate the same without the consent of the other members of the family. It was pleaded that Amar Chand was given to drinking and immoral habits and that the sale had been effected without any necessity or benefit to the family. Sita Ram contested the suit.

3. On the issues which had been framed, the Subordinate Judge as also the Additional District Judge decided that the property in suit was joint Hindu family property and Amar Chand had no right to alienate the same. It was found that the alienation was not for illegal or immoral purposes, nor was it an act of good management. As the sale was without any necessity, the suit was decreed.

4. Before the learned Single Judge, two questions were principally raised, the first being whether the alienation made on 5th September, 1948 amounted to a mortgage by conditional sale or was an outright sale and the second being whether the property in suit belonged to the joint Hindu family consisting of Amar Chand and his sons. The learned Single Judge held that the agreement for reconveyance made on 5th September 1948, required registration and, therefore, could not be looked at for the purpose of deciding the nature of the transaction evidenced by the sale deed. Exhibit P. 3 For that reason he felt that there was hardly anything in the plea raised by Sita Ram that the transaction in reality was one of mortgage by way of conditional sale. The finding with regard to the property having been acquired from the assets of the joint Hindu family being one of fact, was not disturbed. The present appeal against the judgment of the learned Single Judge was at first heard by a Bench consisting of my learned brother Dulat J. and Capoor J. and by means of a judgment dated 1st May 1961 the appeal was allowed and the suit of the Plaintiff-Respondents was ordered to be dismissed. Basheshar Dayal, one of the Plaintiff-Respondents, later on filed an application for setting aside the decree of the dismissal of the suit, the ground being that he was not represented1 at the hearing of the appeal and that the matter had been decided ex-parte against him. On 28th March 1963 the Bench made an order that the aforesaid party should be allowed to have his full say, with the result that the ex-parte decree was set aside and it was directed that the appeal be reheard in the presence of the parties subject to payment of Rs. 100/- as costs to Sita Ram. That having been done, the appeal has been fixed for hearing before us.

5. The main question which has been argued before us relates to the true nature of the transaction embodied in the sale deed, Exhibit P. 3, executed on 5th September, 1948 by Lachhmi Narain in favour of Amar Chand. It is common ground that if it embodied a transaction of a mortgage by way of conditional sale, then the suit must fail. There can be little doubt that if the sale deed, Exhibit P. 3, is to be considered by itself, the transaction would amount to an outright sale. There is no such recital, term or condition in the document itself, which would show that Lachhmi Narain, the vendor was reserving any right in the property for himself. The definition of mortgage by conditional sale is given in Section 58 (c) of the Transfer of Property Act, 1882, which contains a proviso that no such transaction shall be deemed to be a mortgage unless a condition is embodied in the document which effects or purports to effect the sale. That proviso, however, would admittedly not apply to the present case vide Raghubar Dial v. Ch. Zahur Ahmad (1946)48 P.L.R. 317. In Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, , it has been laid down that the question whether by the incorporation of a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. In a sale coupled with an agreement to recovery there is no relationship of debtor and creditor nor is the price charged upon the property conveyed but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor, the transfer being a security for the debt. The form in which the deed is clothed is not decisive. If the words are plain and unambiguous, they must in the light of the evidence and the surrounding circumstances be given their true legal effect. Oral evidence of intention is not admissible in interpreting the convenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible. In that case it was found that the circumstances surrounding the deed at the date of its execution supported the view that the transaction was intended to be a mortgage. The agreement for reconveyance as also the sale deed were executed on the same day. The agreement strongly indicated that the parties regarded the arrangement in the deed as a mortgage. It was also found that the price paid was not adequate. In the matter of determining the market value apart from the other evidence their Lordships capitalised the rent at Rs. 5 per cent in order to test what the market value amounted to.

6. Now, in the present case all the Courts have ruled out the admissibility of the agreement which was made on the same day when the sale deed, Exhibit P. 3, was executed and which was one for reconveyance of the property which had been sold by Lachhmi Narain to Amar Chand. Mr. Aggarwal who appears for the Appellant, maintains that the agreement in question was admissible as an

agreement to sell and it was not compulsorily registerable under the provisions contained in Section 17 of the Indian Registration Act, 1908, as it did not purport to vary or modify the terms of the registered sale deed, Exhibit P. 3, or to limit the right of Amar Chand in the immovable property, the value of which was over Rs. 100. On the other hand, Mr. Tewari, who appears for Basheshar Dayal Respondent, has relied on certain decisions namely, Basappa Gurubasappa Kittur Vs. Tayawa Virupaxappa, , AIR 1934 453 (Lahore) and Soshil Kumar v. Seth Madan Gopal AIR 1953 P&H: (1953)55 P. L. R. 41 for the purpose of showing that such an agreement has always been held to be compulsorily registrable and it is submitted that since in the present case the agreement was not registered, it could not be looked at for the purpose of determining whether the transaction embodied in Exhibit P. 3 was one of mortgage by way of conditional sale. The last decision is of a Bench of this Court in which it was observed at page 293 as follows: -

Further, the sale deed undoubtedly required registration u/s 17, Registration Act, and if it was sought to modify the terms of the sale deed by later agreement the document embodying those terms would also require registration ; of course it was possible for Biri-Mal or his sons to rely upon the unregistered agreement of 10-1-1942 as what it purported to be an agreement to sell which of itself did not require registration but they are not attempting to do this, and the five-year period in which they could see for its enforcement expired before the present suit was filed.

It is clear from paragraph 6 of the judgment itself that these observations were made obiter but there seems to be force in the argument that when a party seeks to use an unregistered agreement for showing that the registered sale deed, though ostensibly embodying a transaction of sale, merely created a mortgage by way of conditional sale, it seeks to modify or limit the terms and conditions of the registered document which is not permissible under the law of Registration. It is, however, unnecessary to decide this matter finally in the present case as even if the unregistered agreement is to be excluded from consideration, the circumstances surrounding the execution of the sale deed dated 5th September 1948 establish that the transaction was one of mortgage by way of conditional sale. One of the most important tests which has been adverted to even by their Lordships in Bhaskar Waman Joshi''s case(2) (supra) is whether the price which was paid was adequate. The whole basis of this test essentially is that if comparatively much less consideration had been paid than the actual value of the property, the intention must be not to sell the property outright. There is hardly any cogent evidence about the market value of the property in September 1.48 but it is known and not disputed that the rent which was agreed to be paid by the transferor to the transferee was Rs. 440 per month and capitalised at 5 per cent in the way it was done in the Bhaskar Waman Joshi''s case(2), the value of the property in dispute would come to Rs. 800. It is noteworthy that when later on Lachbmi Narain sold his rights to Sita Ram on 6th April 1950, that was also for a sum of Rs. 800. It may be, as has been suggested by Mr. Tewari, that between 5th September 1948 and 6th April 1950 there had been some rise in price but even if a conservative figure is to be taken, the price could not be less than Rs. 600 at the time when the transaction embodied by the sale deed. Exhibit P. 3, took place* The consideration which was paid, therefore, was only half of the price of the property. The other circumstance which is of material importance is that the possession remained with the transferor though it was stated to be by I virtue of the rent note executed in favour of the transferee. In Mulla''s Transfer of Property Act, 4th Edition, the tests which have generally been applied for determining the nature of such transactions and which are based on a passage in Butler''s Preface to Coke on Littleton are set out at page 339 and are as follows: -

(1) the existence of a debt ;

(2) the period of repayment, a short period being indicative of a sale and a long period of a mortgage ;

(3) the continuance of the grantor in possession indicates a mortgage ;

(4) a stipulation for interest on repayment indicates a mortgage ;

(5) a price below the true value indicates a mortgage ;

(6) a contemporaneous deed stipulating for reconveyance indicates a mortgage.

In applying those tests the Courts put the onus on the party alleging that an ostensible sale deed was a mortgage and in case of ambiguity leant to the construction of a mortgage. In this connection our attention has also been invited to a decision of the Bombay High Court in In the matter of Neem Chand Daga 134 I. C. 931 in which these tests have been discussed Mr. Tewari has relied on a Bench decision of this Court in Lal Chand v. Atma Ram (1980)62 P. L. R. 586 from which it is sought to be established that the transaction in the present case was one of outright sale. It is needless to point out that cases of this nature cannot be decided except by reference to their own facts, the tests being well known. Lal Chand''s case (1980)62 P. L. R. 586 is distinguishable on facts and it is unnecessary to discuss it in detail. Similarly the other cases which Mr. Tewari pressed into support, e.g., Sayyad Ahmed Ali Vs. Bhageerathi Ammal and Others, and Abdul Majeed (Meera Sahib) Vs. Bhargavan (Krishnan) Member, Legislative Assembly and Others, can hardly afford much assistance in deciding whether on the facts which have been proved the transaction embodied in Exhibit P. 3 was one of outright sale or mortgage by way of conditional sale. In view of the fact that the price paid was wholly inadequate and that possession remained with the transferor, we are satisfied that the transaction was not one of complete sale but what was intended was to create a mortgage by way of conditional sale.

7. In this view of the matter the appeal must be allowed and the decision of the learned Single Judge as also of the Courts below set aside. The suit filed by the Plaintiffs shall stand dismissed.

8. Owing to the nature of the points involved, there will be no order as to costs.

Dulat, J.

9. I agree.

