

(1996) 12 MAD CK 0055

In the Madras High Court

Case No : Second Appeal No. 1671 of 1996 and C.M.P. No. 16398 of 1996

Smt. Sokkuthai Ammal and Another

APPELLANT

Vs

Pandiaraj and Others

RESPONDENT

Date of Decision : 19-12-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Transfer of Property Act, 1882 — Section 58

Citation : (1997) 1 CTC 200 : (1997) 1 LW 733 : (1997) 2 MLJ 136

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : V.R. Gopalan, for the Appellant;

Final Decision : Dismissed

Judgement

M. Karpagavinayagam, J.—This Second Appeal is against the Judgment and decree dated 2-8-1996, in A.S.No. 2 of 1993, on the file of Principal Sub-Judge, Srivilliputhur, confirming the Judgment and decree dated 30-7-1983, made on O.S.No. 64 of 1993, on the file of District Munsif, Aruppukottai.

2. The appellants are the defendants 2 and 3 in the suit in O.S.No. 64 of 1983, for a final decree for redemption by directing the defendants to receive a sum of Rs. 800 deposited in Court and execute reconveyance. The respondents 1 to 3 are the 2nd plaintiff, 1st defendant and the legal representative of the deceased 1st plaintiff respectively. The plaintiffs, executed a deed of mortgage by conditional sale on 27.7.1978 in favour of the defendants 2 and 3 for Rs. 800. The period fixed for repayment of money is three years. The defendants were put in possession of suit property, on the date of the execution of the document. Even before the expiry of the period of three years, i.e., in July 1981, the plaintiffs requested the defendants to receive Rs. 800 and execute the document of reconveyance. Since the defendants were not amenable for the same, on 1-8-1981, plaintiffs issued a lawyer's notice. The defendants sent a reply on 8-8-1981, stating that the period of three years has already expired. Hence the

plaintiffs filed a suit against the defendants.

3. The case of the appellants is that the document dated 27.7.1978 - Ex.B-1, is not a mortgage by conditional sale, but is an absolute sale with a condition to reconvey the same, on making the repayment within three years, pursuant on which they are enjoying the suit property, and that since the plaintiffs have not paid the same within the stipulated time, they have lost their right of reconveyance. So, the main issue before the trial Court was whether Ex.B-1 is a mortgage by conditional sale or is an out right sale with a condition to reconvey in the event of repayment.

4. On consideration of the entire materials produced by the plaintiffs and the defendants, the trial Court, in the light of the provisions in Section 58(c) of the Transfer of Property Act, found that Ex.B-1 is a mortgage deed by conditional sale, and as such, the suit is not barred by limitation. In the First Appeal filed by the appellants, the lower appellate Court confirmed the Judgment and decree of the trial Court, accepting the views of the trial Court, apart from adding its own reasonings. To arrive at such a conclusion, the trial Court, as also the lower appellate Court, have given the following reasons:-

(i) The recitals of Ex.B-1 would reveal that it is only a mortgage by conditional sale fixing the period for repayment of the amount as three years. So the right of the vendee is a conditional right and if the re-payment is not done within three years, only then the conditional sale would become absolute.

(ii) The stamp papers for the execution of Ex.B-1 deed was purchased in the name of the plaintiffs. Normally stamp papers will be purchased for execution of sale deed, only in the name of the purchaser of the property. In this case, sellers have incurred the expenditure for the purchase of the stamp papers, which would imply that the amounts paid have to be repaid. This would show that the relationship is that of Debtor and Creditor, and not Seller and Purchaser.

(iii) If it is a sale deed, there will be a reference in the deed, to transfer the patta from the date of the sale. There is no such wordings in the deed.

(iv) The case of the defendants is that after they were put in possession of the suit property, they spent Rs. 1,000 for effecting improvements therein. The 1st defendant herself would admit in her cross-examination, that she has no document in support of the said expenditure. So the claim of improvements cannot be accepted.

(v) A reading of the recitals in Ex.B-1 would clearly show that on the date of execution of the said deed, no absolute right was given with reference to the enjoyment of the property. It has been clearly mentioned that the defendants would have absolute right only after three years, that too in the event of default in repayment within the specified time.

5. On these reasonings, both the Courts below came to the conclusion that Ex.B-1 is a deed of mortgage by conditional sale. In order to arrive at such a

conclusion, both the courts below followed the various decisions of this Court, and other High Courts as well as the Apex Court, which are referred to below:-

1) Srinivasaraghavan @ Srinivasa Chakravarthi and Ors. v. Kalianna Goundan, 59 L.W. 392 ;) Bimala Charan Rudra Vs. Abdul Rahaman Dalal and Others, ; Ramachandrayya Vs. Laxminarayana Rao, Murugan v. Jayaram Pillai, 1974 (1) M.L.J. 371; 5) Thoppaiyan v. Samuvel 1978 T.N.L.J. 265; 6) Padmashree S.N. Swamy Vs. Smt. Gowramma, ; 7) Venkatarama Iyer Janakiammal Estate Founder v. K. Renganathan Pillai and Ors., 1965 (2) M.L.J. 480.

6. Challenging this concurrent finding, the defendants 2 and 3 have now presented this second appeal, contending that both the Courts below have not properly interpreted the recitals of Ex.B-1, especially when the conditions laid down u/s 58(c) of the Transfer of Property Act have not been fulfilled.

7. Mr. V.R. Gopalan, learned counsel appearing for the appellants cited various authorities and vehemently contended that both the courts below had made erroneous assumptions and wrongly held that the document is only a mortgage by conditional sale, by going beyond the document and inferring certain conditions, which were not found in the document. Learned counsel also contended that the stamps for the sale deed, though purchased in name of the plaintiffs, there was no evidence on either side to show as to who had borne the expenses for the sale transaction, and that the non-obtaining of patta for the suit property by the defendants within the said period cannot be held against them. He would further argue that there is no specific clause in the said document for payment of interest and that there is no such relationship of Debtor and Creditor between the parties and the properties have not been shown as security for any loan. Learned counsel also submitted that there is no evidence to show that the suit property had been under-valued at the time of conveyance, and the provisions of Section 58(c) of the Transfer of Property Act, have not been properly considered by both the Courts below.

8. I have considered the submissions made by learned counsel for the appellants and gone through the Judgments of both the Courts below and other records.

9. Section 58(c) of the Transfer of Property Act reads thus:-

"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 buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee is 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."

Both the courts below while construing this document have taken into consideration all these recitals and interpreted this deed as a mortgage by

conditional sale, in the light of the oral evidence adduced by the 1st plaintiff. In construing a document the fundamental rule is to ascertain the intention from the words used therein. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts.

11. The plaintiffs in this case have contended that the transaction in question was a mortgage by conditional sale, whereas the appellants had contended that it was an out-right sale, subject to the condition of reconveyance of the property in favour of the vendors. Such a question is undoubtedly a question of fact, which has got to be decided on its own facts. Learned counsel for the appellants would contend that since this involves the interpretation of a document, which gives rise to the substantial question of law, this Second Appeal deserves to be admitted. I am unable to agree with this submission. In this case, both the Courts below have considered the facts and ascertained the intention of the party through the words of the subject deed.

12. It is clear from Ex.B-1, that the appellants will have the absolute right as purchasers of the suit property, only after the expiry of the period of three years from its execution in the event of default. Both the evidence adduced by the 1st plaintiff and the recitals of Ex.B-1 would make it apparent, that the intention of the plaintiffs was only to execute a deed of mortgage by conditional sale, and not a conditional sale.

13. As observed by the Apex Court in many of the cases of this nature, and as has been referred to in the Judgment of the lower Appellate Court, in order to decide the question whether the deed is a mortgage by conditional sale or conditional sale, the following four factors have to be taken into consideration:-

- (i) Whether the condition for re-purchase has been embodied in the document?
- (ii) Whether the consideration for the transaction was less than the real value of the property?
- (iii) Whether patta was not transferred to the vendee after the execution of the document and the kist for the land was also continued to be paid by the vendor; and
- (iv) Whether the consideration for the reconveyance was the same amount of the original transaction?

14. In the light of this decision, the lower Appellate Court correctly considered that since patta was not transferred in the same of vendees, after the execution of the document and there was no evidence to show that kist has been paid by the defendants, Ex.B-1 is a deed of mortgage by conditional sale. Moreover, the trial Court disbelieved the evidence of D.W.1, the 1st appellant herein, that she

spent Rs. 1,000 for effecting improvements in the suit property. So, the oral evidence as well as the other attended circumstances available in the case have been taken into consideration by both the Courts below to come to a conclusion, that Ex.B-1 is a mortgage by conditional sale.

15. Learned counsel for the appellants cited a decision in Hans Raj Vs. Mat Ram and Others, to substantiate his submission, that the question whether the transaction is a mortgage by conditional sale or sale with a condition to repurchase can be gone into in Second Appeal. This is a case, where the plaintiff filed an appeal, against the Judgment and Decree of District Court, which allowed the appeal and remanded the case for fresh trial, in order to decide the issue, whether the transaction in dispute amounts to a mortgage by way of conditional sale, or an out and out sale. This decision would not be applicable to the present case, because both the Courts below on facts held, by giving elaborate reasonings, that the deed in question is a mortgage by conditional sale. Moreover as per the provisions of Section 100 C.P.C., after the amendment Act 1976, the High Court can entertain the second appeal, only when there is a substantial question of law. As such, the decision referred to above, would not be of any use to the appellants.

16. Reliance has been placed on the decision reported in Shyam Lal Vs. Shyam Narain and Others, , in the case of wherein the Lucknow Bench of the Allahabad High Court held as follows:

"Where by a document the executant conveyed certain property absolutely to the purchaser and the document did not impose any obligation on the part of the vendor but gave him only an option to recover the property on payment of the price but the document did not create any relationship of debtor and creditor and neither was there any stipulation of payment of interest nor that the property was given by way of security for any loan, the transaction evidenced by the document was not a mortgage by conditional sale but an outright sale."

Of course, in the case on hand, there is no mentioning about the payment of interest. But it should be borne in mind, that the possession was handed over to the defendants for their enjoyment for three years. But the question is as to whether the executant conveyed the property absolutely to the purchaser, on the date of the execution itself. The answer has already been given in the above discussion, that on the date of execution, the property has not been conveyed absolutely, but the condition imposed was that only in the event of failure to make payment within three years, they could have the absolute right of enjoyment. Therefore, this decision also would not be applicable to the facts of the present case.

17. Learned counsel has also relied upon the decision of the Supreme Court in Habeeb Mohammad Vs. The State of Hyderabad, , which relates to the criminal proceedings u/s 252 Cr.P.C., and the decision of the Bombay High Court in the case of Bandra Green Park Co-operative Housing Society Ltd. and Another Vs.

Dayadasi Kalia and Others, which relates to Section 91 of the Maharashtra Co-operative Societies Act. Both the decisions referred to above have no application to the facts of the present case.

18. Therefore, the Court of First Appeal is competent to entertain a question of fact and decide whether the findings of fact by the trial Court are or are not erroneous. The Court of Second Appeal is not competent to entertain the question, as to the soundness of the finding of fact by the Courts below.

19. In Sundra Naicka Vadiyar (dead) by LRs. and another Vs. Ramaswami Ayyar (dead) by his LRs., and in Vrindavanibai Sambhaji Mane Vs. Ramachandra Vithal Ganeshkar and others, , the Apex Court would clearly held that the High Court has no jurisdiction to interfere in Second Appeal, with the finding of fact given by the First Appellate Court based upon the appreciation of relevant evidence.

20. In these circumstances, I do not find any valid ground to admit this second appeal, since there is no substantial question of law involved, on these facts in this second appeal. In the result, the second appeal is dismissed. Consequently, the C.M.P. is also dismissed.