

(2018) 08 KAR CK 0015
In the Karnataka High Court
Case No : Regular First Appeal No.654 of 2017

Smt.Rathnamma and Anr @APPELLANT@Hash Smt.Shanthamma and Ors

Date of Decision : 13-08-2018

Acts Referred:

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

Citation : (2018) 08 KAR CK 0015

Hon'ble Judges : P.S. Dinesh Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

1. This second appeal by the plaintiffs is filed challenging concurrent findings of fact recorded by Courts below, assailing the judgment and decree

dated 01.02.2017 passed in R.A.No.8/2015 on the file of I Additional Senior Civil Judge, Bengaluru Rural District, dismissing the appeal and thereby

confirming the judgment and decree dated 28.11.2014 passed in O.S.No.216/2006, on the file of Additional Civil Judge, Hosakote.

2. For the sake of convenience, parties shall be referred to as per their status before the Trial Court.

3. Heard Shri S.Subramanya, learned advocate for the appellants and Shri Suresh S.Lokre, learned advocate for the respondents.

4. Plaintiffs brought the instant suit for specific performance inter alia for a judgment and decree to direct the defendant to execute a sale deed in their

favour in respect of the suit schedule property as per the condition prescribed in the sale deed dated 6.5.1978 executed by plaintiffs's father in

favour of the defendant.

5. Plaintiffs' case before the trial Court is, their father Motappa was in need of money and executed a conditional sale deed dated 06.05.1978

conveying the suit schedule property. The conditions stipulated gave an opinion to the plaintiffs to approach defendant with money and get a re-

conveyance deed in their favour. Plaintiffs's father died on 17.10.1992 and their mother died on 16.08.1996. Plaintiffs approached and requested

the defendant to execute a sale deed in their favour. Defendant did not accede to their request. They got a legal notice issued to the defendant on

10.12.2005. Defendant gave an untenable reply compelling them to file the instant suit.

6. Defendant resisted the suit by filing a written statement contending inter alia;

â?¢ that the sale was absolute;

â?¢ that there was no condition stipulated in the sale deed and the alleged condition was fraudulently incorporated in the bottom of the document, in

collusion with the scribe;

â?¢ that re-conveyance recital has no value in the eye of law;

â?¢ that on 25.01.1984, plaintiffs's parents have executed a confirmation deed and received Rs.30,000/- in addition to the sale consideration paid at

the time of execution of sale deed in presence of witnesses;

â?¢ that in the sale deed dated 06.06.1984 executed by plaintiffs's father in favour of one Muninagappa in respect of the property situated on the

northern side of the suit schedule property, the southern boundary of that property is shown as â?¢Shanthamma's landâ?¢ (defendant's land);

â?¢ that plaintiffs's parents have handed over original sale deed and other documents pertaining to the suit schedule property on the date of sale;

and

â?¢ that the revenue entries have been mutated in the name of defendant and she continues to be in possession of the suit property.

7. Based on the pleadings, trial Court initially framed six issues and subsequently framed two additional issues and they read as follows:

â?¢1. Whether the plaintiffs prove that their father had executed sale deed dated 6-5-1978 for a sum of Rs.2,500-00 in favour of the defendant?

2. Whether the plaintiffs prove that the defendant had agreed to execute a reconveyance deed in favour of the plaintiffs?

3. Whether the plaintiffs prove that they are ready and willing to perform their part of the contract?

4. Whether the defendant proves that the sale deed dated 06-05-1978 is an absolute sale deed?

5. Whether the plaintiffs are entitled to the reliefs claimed?

6. What order or decree?

Addition Issues:

1. Whether the suit filed by the plaintiff comes within the legal parameter of specific performance of contract?

2. Whether the plaintiff further proves that they are entitled for the reconveyance deed as per sale deed dated 06-05-1978, executed by Motappa, the

father of the plaintiff in favour of the defendant?

8. Parties went to trial with aforesaid pleadings and issues. Second plaintiff got examined herself as P.W.1. On behalf of plaintiffs, exhibits P1 to P10

were marked. Defendant's son got examined himself as D.W.1. On behalf of defendant, exhibits D1 to D21 were marked.

9. Answering issues No.1 and 4 in the affirmative, issues No.2, 5, additional issues No.1 and 2 in the negative and holding that issue No.3 did not arise

for consideration, the trial Court dismissed the suit with costs.

10. On appeal, the lower appellate Court framed following points for its consideration:

1. Whether the appellants have made out sufficient grounds to set aside the impugned judgment and Decree and calls for any interference by this

court?

2. What Order?

11. Answering point No.1 in the negative, lower appellate Court dismissed the appeal with costs.

12. Feeling aggrieved by the concurrent findings of courts below, resulting in dismissal of the suit, plaintiffs are before this Court in this second appeal.

13. Shri S.Subramanya, learned advocate for the plaintiffs urged following grounds in support of this appeal:

that sale is always absolute, but, if a sale deed contains a clause with regard to repurchase, then the transaction must be construed as

mortgage;

that the document must be read in its entirety to ascertain intention of parties;

that provision to Section 58(c) of the Transfer of Property Act (â??T.P.Actâ?? for short) does not prescribe any particular mode of inscription of

condition. Therefore, the condition mentioned in the bottom of the document is in compliance with Section 58(c) of the T.P.Act;

â?¢ that though defendant was alive, she did not enter the witness box; and

â?¢ that Courts below erred in holding that attesting witnesses were not examined.

14. Shri Suresh S.Lokre, learned advocate for the defendant, supporting the impugned judgments argued that there is a classic difference between a

mortgage and a conditional sale. Parties had understood the transaction as â??saleâ?? and not as â??mortgageâ??. There is not a whisper about the

loan transaction and the mortgage in the plaint. In support of his contentions, he placed reliance on the following authorities:

(i) (2013) 7 SCC 173 : AIR 2013 SC 2924: (Vanchalabai Raghunath Ithape (D) by Lr Vs. Shankarrao Baburao Bhilare (D) by LRs. And others

(ii) ILR 2016 KAR 1446 (Smt.Rajamma and Others Vs. Sri B.Renuka Murthy)

15. I have carefully considered the submissions made by learned Advocates appearing for the parties and perused the records.

16. Shri Subramanya pressed the following question of law raised by him as a substantial question:

â?? Whether the Ex.Pl styled as Sale Deed which contains recital to reconvey the property within certain time on repayment of the consideration

amount to the Vendor would amount to mortgage in terms of Section 58(c) of T.P.Act?

17. He endeavoured to canvass that the condition found in the sale deed governs the description of the document. Once the condition provided an

option to the plaintiffs to seek reconveyance, the document must be construed as a mortgage deed.

18. The Honâ??ble Supreme Court in the case of Vanchalabai supra, has held as follows:

â??13. From a perusal of the aforesaid provisions especially, Section 58(c), it is evidently clear that for the purpose of bringing a transaction within the

meaning of â??mortgage by conditional saleâ?, the first condition is that the mortgagor ostensibly sells the mortgaged property on the condition that on

such payment being made, the buyer shall transfer the property to the seller.

Although there is a presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage transaction.

14. In *Williams v. Owen* [(1840) 5 My & Cr 303 : 41 ER 386] , a similar question arose for consideration as to whether a conveyance by the plaintiff's

father to the defendant was to be considered as having been a mortgage as contended by the plaintiff, or as having been a sale, with a right of

repurchase at a given date? It was held that in a mortgage the debt subsists and a right to redeem remains with the debtor, but a sale with a condition

of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a personal right

to purchase. This personal right can only be enforced strictly according to the terms of the deed and at the time agreed upon.â??

19. Further, the Honâ??ble Supreme Court in the said judgment has also quoted the following passage in paragraph 18 in the case of *Tamboli Raman*

Lal Motilal (Dead) by LRs. Vs. Ghanchi Chimanlal Keshavlal (Dead) by LRs. and another, reported in AIR 1992 SC 1236 :

â??16. In order to appreciate the respective contentions, it is necessary for us to analyse Ext. 26 dated 11-12-1950. Before that, it is necessary to

utter a word of caution. Having regard to the nice distinctions 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. Then again, 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. It is from this angle we

propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not

conclusive of the matter.â??

20. In the case on hand, as rightly submitted by Shri Lokre, plaintiffs have not whispered anything about loan transaction or mortgage of the property.

A careful perusal of the sale deed dated 06.05.1978 shows that it contains all

ingredients of a sale deed. It ends with a sentence, "you shall execute a sale deed when we pay sale consideration".

21. On the factual matrix, the sale deed in question was executed on 06.05.1978. Plaintiffs' father and mother died in the years 1992 and 1996 respectively. Plaintiffs have got issued a legal notice to the defendant in the year 2005 and filed the suit in the year 2006. Plaintiffs' parents did not enforce the condition upon which plaintiffs strongly rely for at least 14 years during their life time.

22. Both Courts, on appreciation of evidence, have concurrently held that the plaintiffs failed to prove that defendant had agreed to execute a re-conveyance deed.

23. In view of above discussion, the contention urged on behalf of the plaintiffs that the condition contained in the sale deed would amount to mortgage in terms of Section 58(c) of the T.P. Act is too fragile to countenance.

24. Resultantly, this appeal must fail and it is accordingly dismissed. No costs.