

Duddu Koteswara Rao Vs. Motumarru Sambiah and ors.

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Court : Andhra Pradesh

Decided On : Jan-21-1964

Reported in : AIR1966AP252

Judge : P. Chandra Reddy, C.J. and ;Kumarayya, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58

Appeal No. : Letters Patent Appeal No. 122 of 1960

Appellant : Duddu Koteswara Rao

Respondent : Motumarru Sambiah and ors.

Advocate for Def. : P. Ramachandra Reddy and M. Venkata Rao, Advs.

Advocate for Pet/Ap. : K.V. Rangachari, Adv.

Disposition : Appeal dismissed

Judgement :

Chandra Reddy, C.J.

1. The proper interpretation of Exs A. 1 and B. 1 is the subject matter of this appeal. The question that poses for consideration is whether the transaction evidenced by these two documents is a mortgage by conditional sale or an outright purchase.

2. The property in dispute is a house site and terraced rooms situate therein. The agreement to sell this property appears to have been entered into on 16-7-1923 for a sum of Rupees 8,400 and the whole of the consideration paid at about the time; but the document of sale was not executed till 2-8-1925, on the same day, the transferees executed an instrument agreeing to reconvey the property if the sum of Rupees 8,400 paid to the transferor was repaid to him with interest at 1 per cent per mensem. Under this document the option to repurchase was to be exercised between 2-2-1926 and 30-7-1927. The transferor did not avail himself of this right within the stipulated period. Nothing was done by him in this behalf till 7-2-1950 when he called upon the transferees to retransfer the property to him on receipt of such amounts as might be found due on taking of accounts. The transferees refused to comply with this demand and sold the property in their turn on 12-7-1950 for a sum of Rs. 20,000 to a firm of which Chebrolu Audinarayana, Chebrolu Chenchu Subbiah, Vura Venkateswarlu and Kurapati Raghavulu, were the partners. Notwithstanding this, no action was taken by him till 29-1-1953 when the present action was initiated by him.

3. The basis of the suit is that under Ex B. 1 only a mortgage by conditional sale was created and that he was, therefore, entitled to redeem the mortgage. This suit was opposed by the transferees and their alienees, D.1 to D. 7, on the plea that the transaction in question was not a mortgage by conditional sale, but if was an ordinary sale with an option to repurchase it within the specified time and this option not having been exercised within that time, the plaintiff could not get any relief. This defence did not prevail with the Subordinate Judge Tenali, who was of the opinion that Exs. A-1 and B-1 read together established that the transaction amounted to a mortgage by conditional sale and hence the plaintiff could redeem it.

4. On appeal by the aggrieved defendant Justice Bhimasankaram came to a different conclusion and directed the dismissal of the suit This view of the learned Judge is impugned by Shri K. V. Rangachari, learned counsel for the appellant. It is argued by him that this is not a case of an outright sale, as there are indicia of a mortgage in these two documents. To appreciate this submission, it is necessary to advert to the relevant terms and conditions of Ex. B. 1, the sale deed.

5. The document begins with a recital that the property was sold to the transferees for a sum of Rs. 3,400 on 16-7-1923 and the price was received by the transferor in the following manner: The transferees undertook to discharge a debt of Rs. 1900 due to a Marwari called Tharaji Chandu Siremal, who was having a shop at Tenali and another debt of Rs. 996 due by the transferor to another Marwari Hiraji Silemal In addition, a sum of Rs. 500 was paid into the hands of the transferor to enable him to discharge other debts. Only Rs. 4 was given to the transferor by way of cash on the date of the sale. The fact that has to be emphasised here is that barring Rs. 4 the other items of consideration were received on 16-7-1923 on which date it was settled that the property should be sold.

6. This property at the time of the execution of Ex. B. 1 was in the possession and enjoyment of one Mahommed Jaffer Baig Saheb under a lease for two years (1-3-1925 to 1-3-1927) on a rental of Rs. 20 per mensem. It was recited in the document that the vendors had delivered possession of the property to the vendees that very day and the vendees could take physical possession of the property on the expiry of the lease. Then followed the usual recitals that the vendees had acquired absolute right in the property and that they should pay the municipal taxes from the date of the deed.

7. On the same date, the vendees executed Ex. A. 1, the agreement of reconveyance. Having regard to the role it plays in the context of this enquiry, it is useful to extract in extenso the contents of Ex. A. 1:

'If you pay within the period extending from 2-2-1926 to 30-7-1927 the amount of Rupees 3400 (Three thousand and four hundred rupees) being the consideration mentioned in the sale deed executed on this day in my favour by you together with compound interest accrued thereon at the rate of Rs. 1-00 per cent per mensem with annual rests from this day. I shall receive the said amount and reconvey the property mentioned in the sale deed executed this day in my Favour by you, under a sale deed executed and registered at your expense either in your favour or in favour of the person of your choice. As regards the payment to be made towards this (document) you shall pay an amount of not less than Rs. 1000 (One thousand rupees) for each installment and obtain a receipt therefore. You shall not ask for credit of the payment unsupported by a receipt. If you as per the aforesaid terms, pay before 30-7-1927 the said amount, i.e., the principal sum, without interest, remaining after deducting the

municipal taxes etc., from out of the rent amount that may be collected by me within the period extending from 1-3-1926 to 30-7-1927 on the property mentioned in the schedule given in the sale deed, I shall endorse the payment of the said rent amount also. If you fail to pay the principal sum together with interest thereon payable in full before 30-7-1927, I shall enjoy the property mentioned in the schedule given in the sale deed as per the terms recited in the sale deed without reference to the aforesaid terms. You shall have no right to question me with regard to the same in any manner. If the aforesaid amount is not paid fully in time, I shall pay back such amounts together with compound interest accrued thereon at the rate of Re. 1 (one rupee) per cent per mensem with annual rests from the respective dates.'

On the basis of the two documents having been written by the same scribe and attested by the same attestors and both of them coming into being simultaneously and provision in Ex. A-1 that interest was to be paid to the vendee under Ex. A-1 from 2-8-1925, Shri Rangachari urges that the transaction in question was only a mortgage by conditional sale. He further argues there are no circumstances appearing from Ex. A. 1 and Ex. B. 1 which are consistent with it being an outright sale.

8. Before we discuss the various elements constituting the present transaction, we will profitably extract the terms of Section 58 of the Transfer of Property Act in so far as it has a bearing on this enquiry. The principle of a mortgage by conditional sale is contained in Section 58(c) and it runs as follows:

'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 sale become void, 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 a mortgagee by conditional sale.'

9. We are unconcerned with the proviso as the sale took place long before the amendment of the section adding the proviso.

10. It is due, that through out Ex. B. 1, the expression used is sale, vendor and vendee, but that is of no consequence as the transaction is ostensibly a sale. So, if there are other indications in the documents which would bring the sale within the mischief of Clause (c), the Fact that this transaction is described as a sale and the transferor and the transferee as vendor and vendee, would not stand in the way of our describing it as mortgage by conditional sale. We have, therefore, to proceed to notice the terms and conditions of these two documents to judge the real nature of the transaction.

11. Indisputably, the transaction is not attracted by the first two conditions, for, the transaction in dispute does not become absolute on default of the payment within a particular time, nor is it stated there that the sale becomes void on the option to repurchase being exercised within a particular time. But it falls within the protection

of the third condition if the other conditions are satisfied.

12. At the outset, it must be noted that the sale was completed more than two years before a formal document was executed. On 2-8-1925, on which date the sale deed came into being, a payment of Rs. 1 only was paid. Secondly Ex B-1 was not taken in renewal of an earlier mortgage, or for a debt due by the vendor to the vendee. The recitals as to consideration mentioned above bear out this statement. What is contemplated under EX. A-1 is the payment of consideration for the resale and the amounts to be paid in instalments by the vendee are to be adjusted towards the repurchase money and not towards any debt due to the vendor. It is further worthy of note that the relationship that was created under Ex. B-1 was that of vendor and vendee.

13. Apart from these, there are other weighty considerations in support of the theory that Ex B-1 conveyed an absolute interest in the property and the vendee agreed to resell the property to the vendor on certain conditions, the most important of them being that the option given to the transferor was to be exercised within a period of one year and five months, i.e., between 2-2-1926 and 30-7-1927. Thus that the time allowed to the transferor was very short. It is also to be noted that the right of repurchase could not be exercised before 2-2-1926. This condition makes it clear that time was made the essence of the contract between the parties.

14. It is now settled that the fixation of a short period for the exercise of the right of reconveyance is indicative of a sale rather than a mortgage. The fact of making time essential for the exercise of the right is also a pointer in the same direction. It is provided in this document that if the consideration for repurchase was not paid in full before 30-7-1927 the vendor under Ex. B. 1 was to enjoy the property without any let or hindrance from the vendee, that the latter had no right to insist upon reconveyance and that the vendee was entitled only to get back the amounts paid by him to the vendor. There was nothing in the document obliging the vendor to adjust the amounts paid by the vendee towards the sale consideration received under Ex. B-1. The liability of the seller under Ex. A.1 was only to repay the sums paid to him with interest at the same rate at which the vendee under Ex. A-1 had to pay on the price agreed between the parties. It is thus clear that the parties did not contemplate the relationship of debtor and creditor or mortgagor and mortgagee.

15. Another circumstance to be borne in mind in this context is that the purchaser under Ex. B. 1 obtained immediate possession of the property, which would not have been the case if a mortgage by conditional sale was within the contemplation of the parties. In cases of mortgage, it would be stipulated that possession would follow on sale becoming absolute on default of payment of the money. Again, the transferee had no right to recall the sale price from the transferee. While he had no right to insist upon the repayment of the money, the seller alone was given the option to repurchase the property. The absence of such a provision is also suggestive of the transaction being a sale and not a mortgage by conditional sale.

16. Shri Rangachari laid great stress in support of his case, that Ex. B-1 read with Ex. A-1 created only a mortgage by conditional sale, on the circumstance that Exs. B-1 and A-1 are part and parcel of the same transaction. We do not think that the contemporaneousness of the documents would in any way advance the case. All that can be said is that if they were not contemporaneous, then there would be no scope for invoking the doctrine underlying Section 58(c). It was laid down in Muthuvelu

Mudaliar v. Vythilinga Mudaliar, ILR 42 Mad 107: (AIR 1919 Mad 1) (FB) that where in one and the same transaction land is sold absolutely but with a right of repurchase to be exercised before a certain date, the transaction does not necessarily become, by virtue of Section 58 of the Transfer of Property Act, a mortgage by conditional sale, whatever the intention of the parties might have been.

17. It is also important to note in this connection that the sale, though not embodied in a formal document, had actually taken place in 1923. We are not here concerned with the question whether an oral sale of property whose value is more than Rs. 100 is effective or not. But the real transaction taking place two years prior to the execution of A-1. militates against the theory that the transaction in question was only a mortgage by conditional sale. Therefore, the circumstance that both Exs. A-1 and B-1 came into existence simultaneously is of no avail to the appellant.

18. On the other hand the facts narrated above have clinchingly established that the parties did not intend to have a mortgage by conditional sale, and they are only consistent with an outright sale with right of repurchase. The circumstance, that there was an agreement to pay Interest due by the plaintiffs father is not decisive of the nature of the transaction. At the inception it is to be borne in mind that the interest was to be paid on the purchase money and not on any amount said to be due to the vendor as a creditor or mortgagee.

19. The proposition that an agreement to pay interest by the transferor is not indicative of the transaction being a mortgage by conditional sale is vouched by decided case.

20. We may first refer to Venkata Krishna Bao v. Venkatachalam (1897) 7 Mad LJ 299. It was laid down there that the mere circumstance that interest is stipulated for by the parties does not by itself indicate that a document which apparently is a sale was intended to be a mortgage. In the same trend of thought is Modhu Sudan Das v. Rhidoy Mont (1902) 6 Cal WN 192, To a similar effect is Jaggarnath v. B. K. Ray, ILR 25 Pat 666: (AIR 1947 Pat 345).

21. It was contended by Shri Hangachari that the principle enunciated in (1897) 7 Mad LJ 299 (supra) was inapplicable to the instant case, since the decision was rendered before the passing of the Transfer of Property Act. We are not disposed to give effect to this argument. It should be noted that there was law of Transfer of Property in vogue even prior to 1882. In this context, it cannot be overlooked that the very preamble indicates that the object of Act IV of 1882 was only to define and amend certain parts of the law relating to the transfer of property by act of parties. Mortgages by conditional sale were being created even prior to the coming into force of the Transfer of Property Act (IV of 1882). Even assuming that there is some semblance of a force in the argument bearing upon the date of this enactment, we have still the two latter decisions, (viz. VI C. W. N. 192 and XXV Pat. 66(5)). That apart, no decision has been brought to our notice which contains the principle that the agreement to pay interest on the amount due to one of the parties is decisive of the question whether a transaction is an outright sale or a mortgage by conditional sale.

22. The pronouncement of the Judicial Committee of the Privy Council in Narasingerji Gyanagerji v. Parthasaradhy, ILR 47 Mad 729; (AIR 1924 PC 226) does not come to the rescue of the appellant There, the price named and settled was 'absurdly low much less even than what the property would have realised upon a public sale. There

was a clause in the document which established that time was not of the essence of the contract for repurchase, and the transferor reserved certain rights to himself in the property conveyed, which went to show that the intention of the parties was not to create a sale, but a mortgage. The vendor was to be entitled solely to the possession and enjoyment of the village till the amount mentioned in the conveyance was paid. The vendor reserved to himself the right of minerals which was a restriction on the transferee's usufructuary privileges. Another note-worthy feature of the transaction that fell to be considered by their Lordships was that the transferor had not only option to repurchase, but he was under an obligation to buy if the transferee thought fit to sell and the latter could recover six lakhs if he should choose to sue upon the Raja's contract to repurchase, and that he could remain in possession and enjoyment of the rent and profits of the properties until that price was paid. In the circumstances set out above, their Lordships thought that the two deeds of the same date were so phrased as to be ostensibly a sale with an agreement for a resale and repurchase at the same price at a certain date, while the intention of the parties was that it was to operate only as a mortgage by conditional sale.

23. *Muhammad Yakub Sahib v. Mahaboo Bi Bi*, (1926) 23 Mad LW 151 does not also render any assistance to the appellant. That was a case where there was a provision empowering the vendee to recover the sum named as the price of the reconveyance, which could not have been the case if the intention of the parties was that the transaction was to be an ordinary sale. The price fixed was also too low (Rs. 3,500 for properties which were worth Rs. 6,500). There was also a provision for accounting for certain items at the time of reconveyance. The features that distinguished the present case from this have already been set out. That being so, the doctrine of (1926) 25 Mad TAV 151 (*supra*) does not govern the case on hand.

24. Nor does *Mathra Kurmi v. Jagdeo Singh*, ILR 19 All 105: (AIR 1927 All 321) help the appellant, since no time was fixed there for the exercise of the option for repurchase. It was also stated there that the price, mentioned was not adequate and was too low.

25. *Singram Chettiar v. Kalyanasundaram Pillai*, 26 Ind Cas I: (AIR 1915 Mad 656) is not also of much assistance to the appellant, since that was a case where the parties contemplated further advances and the property conveyed was to be treated as security therefore. Further, the document was in renewal of an earlier mortgage in favour of the same mortgagee. Thus, there are several distinguishing features in that case.

26. There is thus nothing in these documents which affirmed the transaction to be a mortgage by conditional sale and not an outright sale. The indications unmistakably are that the parties intended the transaction to be an outright sale with a right given to the vendor to repurchase it.

27. It is now well settled that the test in cases of this kind is the intention of the parties to be gathered from the language of the documents themselves. The meaning of the instrument has to be collected from a fair reading of the two documents constituting a single transaction.

28. The rule of construction governing such cases was enunciated by their Lordships of the Privy Council in *Bhagwan Sahai v. Bhagwan Din*, (1890) ILR 12 All 387. The Judicial Committee adopted the dictum of Lord Chancellor Granworth in the case of

Alderson v. White, (1858) 44 ER 924. Sir Barnes Peacock, who delivered the opinion of the Judicial Committee

'The rule of law on this subject is one dictated by common sense; that prima facie an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that e shall have a right to repurchase,'

It was stated there, that the vendee as a matter of grace and kindness' stipulated that the vendor should have right to repurchase. They extract ed with approval the observations of Lord Chancellor in (1858) 44 ER 924:

'In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment not of what should be due but of the full amount of the purchase money of Rs. 4,739 - exactly corresponding to the terms of the two documents in the present case, where the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, namely. Rs 4,000 Was that if taken according to its terms, a lawful contract? Clearly so. What then, is there to show that it was intended to be a mere mortgage? I think that the court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be: and I set but little evidence to that effect here.'

29. This proposition is also vouched by a decision in Jhanda Singh v. Wahid-ud-din. 31 Mad LJ 750: (AIR 1916 PC 49) another pronouncement of the Indicial Committee of the Privy Council.

30. The principle contained in the above passage applies with full force to the transaction in question. It is important to note that the original agreement of sale was in 1923 and the documents that calls for interpretation came into being in 1925 and it was only twenty-eight years thereafter that is, in 1953, that the appellant sought to treat them as mortgages by conditional sale. In such a situation, the transferor has to establish by unimpeachable evidence that the instrument is not what it purports to be.

31. Now, what is the cogent evidence he has adduced to hold that the instrument is not what it purported to be. There is absolutely no evidence of the consideration being inadequate Apart from the lack of any evidence of inadequacy of consideration, the indications are that it is quite adequate The property was purchased in 1928 for a sum of Rs. 2,800 under Ex. B. 3. Five years thereafter it was agreed to be sold for Rs 3,400 The fact that 25 years after the transaction covered by Ex. B-1. It was sold for Rs 20,000 does not furnish any criterion in judging the consideration of 1925. It is well known that subsequent to 1942 there has been a steep rise in prices. As already observed, while the agreement of sale was originally entered into in 1923 and almost whole of the consideration was received then, though the formal deed of conveyance was executed in 1925, the agreement of repurchase came into existence only in 1925. All the factors recited above are inconsistent with the transaction being a mortgage by conditional sale; on the other hand, they are in consonance with its being an outright sale.

32. It is also pertinent to note that in the notice issued by the plaintiff in 1950 requiring the transferees to reconvey the property to him, it was not suggested that the transaction was a mortgage by conditional sale. All that was asserted was that the document was nominally executed and without any consideration. It really the original intention of the parties was to have a mortgage by conditional sale rather than a sale, it is hard to believe that the transferor have put forward a different case altogether. Moreover, even in the plaint it is recited that, the transaction was a usufructuary mortgage and not a mortgage by conditional sale.

33. Another circumstance which could not be ignored is that while Ex B-1 was executed by the father and his four sons. Ex. A-1 is in favour of the father only. Thus, the parties to both the instruments could not be said to be the same. It is true that this is not conclusive, but is one of the several circumstances which constitute the indicia of the transaction being an outright sale. Thus, far from there being any basis for holding that the document is not what it purports to be, the material on record establishes beyond doubt that the document is what it purports to be

34. In these circumstances, we are in entire agreement with our learned brother that the two instruments read together establish that the transaction was an out-right sale and not a mortgage by conditional sale and that the plaintiff is not entitled to redeem it.

35 Accordingly, the appeal is dismissed with costs. The appellant will pay to the Government the court-fee payable on the memorandum of L. P. A.

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