

**Padmanabha Aiyar and anr. Vs. Sitarama Aiyar and ors.**

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**Court :** Chennai

**Decided On :** Aug-10-1927

**Reported in :** (1928)54MLJ96

**Appellant :** Padmanabha Aiyar and anr.

**Respondent :** Sitarama Aiyar and ors.

**Judgement :**

Srinivasa Aiyangar, J.

1. My learned brother and myself have recently had quite a number of cases in which the question that arose for determination was the same as in this second appeal, namely, whether on a proper construction of certain documents, read in the light of surrounding circumstances, the transaction between the parties should be held to be mortgage by conditional sale or merely a sale with an agreement to resell. We may observe with regret in passing that, in spite of the differences and variety of judicial opinion with regard to such cases, the legislature, which is clearly in a position to set at rest such questions being raised, has not yet thought fit to do so. Though the question that has arisen in this case is the same as in several other cases, there is at least one distinguishing feature in this case and that is that the transaction has been brought about not as in nearly all other cases by two documents, one of sale and the other an agreement of resale, but that the whole of the contract between the parties is contained in one and the same document.

2. The facts necessary for appreciating the bearing of the questions that arise may be briefly set out. The document in question was executed by the father of the plaintiffs and the 5th defendant in favour of the father of defendants 2, 3 and 4, one Kamakshi Aiyar. The property however was sometime afterwards sold by defendants 2, 3 and 4 to the 1st defendant. The 1st defendant therefore is the person at present in possession of the property and claiming title thereto. The suit was for redemption on the ground that the document in question was one that effected a mortgage by conditional sale. The defence set up was that on a proper construction the transaction was not a mortgage by conditional sale but was merely a sale with an agreement for a resale, that the condition for resale was not specifically performed and further that the claim for specific performance is barred by the law of limitation. Both the lower courts have found on a construction of the document against the plaintiffs' claim and dismissed their action. Reference may in this connection also be made to an application for amendment of the plaint that was made on behalf of the plaintiffs even in the Court of first instance, when probably it was perceived that the chances were little of the plaintiffs succeeding in their contention on the footing of the transaction having been a mortgage by conditional sale. It was sought by that application to amend the plaint by setting up in the alternative the agreement to resell and praying

on that footing for specific performance of such agreement. The application for amendment was refused not only by the Court of first instance, but, when it was repeated, also by the lower appellate Court. Curiously enough, Mr. Alladi Krishnaswami Aiyar, the learned Vakil for the appellants in this second appeal, wished to argue mainly the question of leave to amend the plaint, though he also indicated the other question with regard to the nature of the transaction on a proper construction of the document. If it should have become necessary for us to deal with and dispose of this question of the amendment of the plaint, we might have had a great deal of difficulty in the matter. Without discussing the question whether the amendment was in substance within the scope of the cause of action laid in the plaint or not, it is clear that, if such an amendment should be allowed, the Defendant should be accorded another opportunity of pleading to the amended claim or cause of action and the result would practically be allowing the plaintiff to begin a fresh suit de novo. But in the view we have taken of the case on the construction of the document, it seems to us unnecessary to discuss this question with regard to the application for amendment.

3. It is no doubt true that all such questions which have to be solved on a reading of the document, considering the language employed in the light of surrounding circumstances, and so forth, are generally fraught with great difficulty and we have, after giving the matter our earnest and serious consideration, come to the conclusion that, on a proper construction of the document before us, it is a mortgage by conditional sale. We have already adverted to the fact that this is not a case in which the transaction was brought about, as in most cases it is, by two documents either contemporaneous or, though not contemporaneous, as really parts of the same transaction. When parties to a transaction deliberately choose to conclude the transaction and embody it in writing not in one document but in two separate documents, there is always considerable room for the contention that the intention of the parties as disclosed by the fact that they required two documents to embody the transaction is indicated to be that they wished the sale and the resale to be separate legal transactions. Such consideration however is not available in the present case, because the parties have deliberately put in all the terms of the contract in the same document. It is unfortunate that there has been no satisfactory evidence of the surrounding circumstances, including the value of the property at the time of the transaction, which might be looked at for the purpose of helping the court in coming to a conclusion as to the real intention of the parties as disclosed in the language employed. We therefore begin this case with the fact that the parties really regarded it as not only a single transaction but as one that was fit and proper to be concluded by the instrument. The clause relating to the agreement for resale comes after the clauses effecting the conveyance and that clause begins with the Tamil word (Anal). The expression (Anal) clearly indicates that what follows is or should be regarded as a detraction or subtraction from the absoluteness of the sale previously in the document stated to have been made and effected. It may in this connection be noticed that, in form and apart from any personal covenants to pay, a mortgage by conditional sale is effected in all well-established English precedents of conveyancing first by what is purported to be an absolute conveyance of the property with a habendum that the purchasers should have and hold the premises absolutely for himself and his heirs, executors, administrators and assigns, subject however to the equity of redemption. The clause relating to the equity of redemption always begins with some such expression as 'provided however that' or 'provided always'. Now in the Tamil language in which this document is drawn up it is impossible to conceive of a word more apt for the purpose of conveying the connotation and significance of a proviso of

that character than the word (Anal). No doubt it might at first sight shock certain susceptibilities that the decision of such question should be made to depend upon the use of a single word like that. But after all the expression itself must be regarded as clearly indicating the intention and meaning of the parties, and if they did not contemplate by the use of that word to delimit in some manner the absoluteness of the sale therein before in the document stated to have been effected, there is no purpose in the use of the word. The whole of the document must be regarded in construing documents and no single word should be left out of consideration. Giving therefore its true and proper weight to the expression, the only conclusion that is possible to arrive at is that the estate granted by the previous clause, namely an absolute sale, is qualified by the conditions of provisos in this clause. The result then is that this Tamil document has somehow or other come to be framed and worded exactly in the same manner as a document of mortgage by Conditional sale in English precedents of conveyancing. I shall later on have occasion to refer to the definition in the Transfer of Property Act of a mortgage by conditional sale with special reference to this document, and also deal with the contention of Mr. B. Somayya for the respondents with regard thereto.

4. The next point to be considered in determining the question whether it was a mortgage or an absolute sale, is the fact that in the document the consideration for the resale is stated to be the same amount that is specified as the sale price in the document. If the sale and the resale should be two different legal transactions, the consideration for the resale is not the amount originally advanced on the sale but some amount which the parties agree to as the consideration for the resale. But when the document states that what has to be repaid is not the consideration agreed to for the resale but the amount originally advanced on the sale, the reference to such amount makes the transaction more consistent with its being a mortgage than an agreement of resale. There is in this document one other somewhat curious provision and that is as follows:

This sum you should pay to the said A. Subba Chettiar out of the same amount, get the payments endorsed on the bonds, get them back with his signature and keep them in support of the sale-deed.

5. The direction and the requirement that the purchaser under this document should obtain these debt bonds with an endorsement of discharge on them and that he should further keep them with him as vouchers in support of the sale-deed would seem rather to indicate that what was intended by the parties was not an outright sale but only a security and the language employed is certainly more consistent with a mortgagee paying the amount of the mortgage for the purpose of discharging the debts of the mortgagor and being required to retain them as vouchers in his hands. If it was an outright sale, it seems difficult to understand why the transferor should have required that the transferee should obtain those bonds and keep them in support of the deed. Reference may also be made to another provision in the document providing for the return of all the connected documents on payment of the money. That clause is also calculated to throw some light on the true meaning and the intention of the parties and is certainly more consistent with the transaction being a mortgage than any other. There is however one other and, to my mind, a very conclusive indication in the document that what the parties really intended must have been only a mortgage and not a resale. Though the Law Reports are full of cases of this kind and we have had also occasion to come across numerous documents of this nature, still in a proper agreement of resale we have not come across a single case in

which there was not some time fixed on or before which date it was required that the other party should complete the transaction. The provision in this case is as follows:

But whenever the first individual among us pays you the sum of Ks. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on stamp paper with regard to these lands in favour of the individual No. 1, give it registered, give possession of the lands, etc., and return all the documents relating thereto.

6. If it was a mortgage, one can easily understand the clause being so worded and leaving it to the option of the mortgagor to pay up the amount at any time and require conveyance of the property. Till that is done, the property is in the possession and enjoyment of the mortgagee in lieu of interest. There is nothing more to be done. But if it should be an outright sale, then, according to this clause, whenever the other party chose to offer this Rs. 500, the purchaser would be under an obligation to reconvey the property. To begin with, it is difficult to understand that parties to an outright sale should have really contemplated entering into such a contract. It is conceivable that, between the date of the sale and the time when the seller or his legal representatives may elect to exercise the option and demand reconveyance of the property on payment of the money, considerable time might have elapsed and the price of the property might have become doubled or trebled. If the conveyance was not regarded merely as security for the money, it would be very strange to suppose that, without any regard whatever to the possible and probable changes in the price of property, the parties agreed to grant a resale and effect reconveyance whenever the other party might wish to demand the same. This provision therefore which fixes no time whatever for the purpose of the resale seems to me almost conclusive on the question now under consideration. For all these reasons and others which it is unnecessary to refer to in detail I have come to the conclusion that on a proper construction of the language employed in Ex. A the transaction embodied in Ex. A was really a mortgage by conditional sale.

7. Mr. Somayya for the respondents strenuously contended that, even if we should on a construction of the document itself come to the conclusion that it was a mortgage by conditional sale, it was not a valid mortgage having regard to the definition of a mortgage by conditional sale as set out in the Transfer of Property Act. Section 58 of the Transfer of Property Act, at first defines a mortgage and then proceeds in the other clauses to define what a simple mortgage is, what a mortgage by conditional sale is, and so on. A mortgage is denned as:

The transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

8. Therefore with regard to this definition the essential element in a mortgage is the transfer of property by way of security, and that is the question we have been considering with reference to the language employed, and that has already been dealt with. The definition of a mortgage by conditional sale, however, is contained in Clause (c) and is 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 shall 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. Taking the terms as they are, the necessary element in a mortgage by conditional sale is that there should be an ostensible sale of the mortgaged property. We have it here. Then having reference to the third sub-clause in this clause which is the sub-clause which applies to this case, there should be a condition that

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

10. Here undoubtedly there is a condition, and it is truly a condition because it is introduced by the word (Anal). There is the condition that on payment being made, the buyer shall transfer the property to the seller. Now what Mr. Somayya contended was that the expression 'on such payment' in this sub-clause must be read as referring to the payment referred to in the first sub-clause and on such reference must be construed as a payment of the mortgage money on a certain date. The first sub-clause no doubt refers to the condition being that on default of payment of the money on a certain date the sale shall become absolute. It will be convenient, before referring to or dealing with the cases cited by Mr. Somayya in support of his contention, to examine this contention on its own merits. The contention comes to this, that there can be no mortgage by conditional sale at all, unless, whichever may be the sub-clause, there is a certain date fixed as the date on which the payment of the mortgage money should be made. The expression 'on a certain date' should be taken in terms as merely pointing to the certain date as the date on which the payment should be made, not any date either before or after and no doubt Mr. Somayya had, as Holmwood, J., in a case which I shall presently refer to, when pressed by this consideration, was forced, to construe the expression 'on a certain date' as meaning 'on or before a certain date'. What warrant is there in the language of the statute for importing words into it which are not there and construing it in the manner suggested, I really fail to see. It is the reductio ad absurdum to which a reading of the statute in that manner leads that has induced Mr. Somayya to contend for the construction, that 'on a certain date' should be taken to mean 'on or before a certain date'. It seems to me that such a construction of the clear terms of the section cannot possibly be accepted. Now-going back to the first sub-clause in Clause (c), what the clause speaks of is:

on default of payment of the mortgage money on a certain date.

11. No doubt grammatically 'a certain date' may be related either to the payment or to the default and, having regard perhaps to the genius of the English language either grammatical construction may possibly be accepted. But if we take it to mean that the condition that should happen on a certain date is not the payment but the default in payment, then it is clear that if payment of the mortgage money should come to be made on or before the date fixed there is no default on the certain date which has been fixed and the absurd result which was sought to be avoided by practically importing into the statute words which were not there is steered clear of. Further, if the legislature intended to attach to the expression 'such payment' the requisite, namely that the payment should be on or before a certain date, it is likely that much clearer terms would have been employed to indicate it. It may also be observed that if the contention put forward by Mr. Somayya with regard to the construction of the

expression 'such payment' should be accepted, it follows that most documents which have been regarded and adjudicated by Courts of law to be proper deeds of conditional mortgage could not be so regarded at all or could not have been properly so adjudged. The expression 'such payment' clearly refers only to the payment of the mortgage amount and if the expression 'on a certain date' is construed as referring to the default and not to the payment there is no difficulty whatever in construing the section or any of the clauses there.

12. Mr. Somayya however has been able by his industry to produce before us two decisions of the Calcutta High Court in which the view contended for by him has found considerable support. The first case cited by him was *Kinuram Mandal v. Nitye Chunder Sirdar* (1907) 6 CriLJ 208. In his judgment in that case no doubt Maclean, C.J., says this:

It is not necessary to decide it finally, but I do not think there was any 'certain date' of payment within the meaning of Sub-section (c) of Section 58 of the Transfer of Property Act, and that is an essential element of a mortgage by conditional sale.

13. This observation was not necessary for the decision of the case and must be regarded merely as an obiter dictum. No doubt in that sentence the learned Chief Justice considers that the provision with regard to the certain date must be taken to be present not only in the sub-clause where the words occur but also in the other sub-clauses by the use of the expression 'such payment'. For the reasons already given it seems difficult to accept this expression of opinion of the learned Chief Justice in the case. In a later case reported in *Haji Mahomed Mozaffer Ali v. Asraf Ali* (1914) IndCas 93. Holmwood and Chapman, JJ., held that a certain date of payment within the meaning of Sub-section (c) of Section 58 of the Transfer of Property Act is an essential element of a mortgage by conditional sale. Then the learned Judges go on to observe as follows regarding the Calcutta case already cited:

The Chief Justice says in that case that in the particular case before the Court he did not think there was any certain date of payment within the meaning of the section, but he does not lay down that 'on a certain date' means that the tender cannot be made before that date. The certain date which is laid down must according to all rules of interpretation be the last date and it would be both inequitable and impossible to hold that in this country of long distances and poor means of communication a man must go travelling all over the country on the particular day on the chance of finding his creditor and tendering the money to him, and that he could not go on any previous day.

14. The difficulty, nay the absurdity, of construing the expression 'on a certain date' according to the language employed was really felt by the learned Judges and that seems to be the reason why they were at pains to explain it away by stating that according to all rules of interpretation 'on a certain date' means 'on or before a certain date'. But apparently it was overlooked by the learned Judges that if the first sub-clause in that sub-section should be construed as referring 'the certain date' not to the payment but to the default, the whole of this difficulty which they were obsessed with might be avoided altogether. Thus it is clear that there is nothing in the terms of this mortgage which has the effect of not bringing it under the terms of a conditional mortgage as defined by Section 58 of the Transfer of Property Act.

15. If on a proper construction the transaction was a mortgage no other question

really arises.

16. Mr. Somayya no doubt took the alternative case of the clause being regarded as a mere agreement to resell the property and launched on a learned disquisition with regard to such a clause offending against the rule against perpetuity. But in the view we have taken that the transaction was a mortgage, no question at all arises because the rule against perpetuity can apply only to cases where there is a new interest in immovable property contemplated to be created after the expiry of the time prescribed by the rule, namely the lifetime of a person living and the minority of one who may be in existence then. In the case of a mortgage, however, there is no such future interest in property contemplated to be created because it is of the very essence of the mortgage that the equity of redemption is a present interest in property in exercise of which alone the property is sought to be redeemed. There is also no question of the clause being regarded as a mere personal contract and for that reason held to be invalid, as also of its being void for remoteness. No question arises in this case on the plaint as laid and on the cases of any personal covenant and the enforcement thereof. It seems to me therefore unnecessary to discuss the cases, both English and Indian, that have been cited by Mr. Somayya for this purpose. He has frankly conceded that if the correct view should be that it is a mortgage, no such question can possibly arise.

17. Both the lower courts therefore were wrong in the view taken by them of Ex. A. I have come to the conclusion that, on a proper construction, it is a deed of mortgage by conditional sale and that the plaintiffs as the mortgagors are entitled to redeem the property within the time prescribed by the law of limitation, namely sixty years from the date on which they are entitled to redeem. In this case the clause is:

whenever the party likes he has the right to redeem

and therefore the right to redeem accrued to him from the very date of the execution of the mortgage because there is no other term fixed within which the mortgagor is prevented from claiming redemption. No question of limitation therefore can possibly arise. The appeal is allowed and the decrees of both the lower courts are set aside. Instead there will be an ordinary preliminary decree for redemption by the plaintiffs of the suit property. But the case, however, cannot be finally disposed of here, because Mr. Somayya states that issue 7 in the case which relates to the improvements, if any, made by the defendants in respect of the suit property and their right to claim the same from the plaintiffs would have to be gone into and decided before a final decree for redemption is made. The case will have therefore to be sent to the Court of first instance for the determination of that issue both on the facts and on the law. It is stated by the learned vakil for the appellants that at some stage of this litigation the 1st defendant had given a statement to the effect that he did not wish to let in any evidence with regard to that issue. If the Court of first instance should find that there was any such statement given, effect will be given by the Court to such statement in coming to a conclusion with regard to this issue. The Court of first instance will after determining that issue make a final decree for redemption for the proper amount. Except as to the costs which are awarded to the 1st defendant during the trial in the Court of first instance that he should have the costs up to such stage irrespective of the result of the suit, the appellant will be entitled to all the other costs in all the Courts from the 1st defendant. The costs hereafter to be incurred will be provided for by the Court of first instance. The court-fee paid by the appellants in this Court will be refunded to them.

Reilly, J.

18. I agree that on the face of Ex. A. the transaction represented by it was a mortgage by conditional sale. Here we have a document which for the greater part of its length is an out and out sale-deed, and then at the end comes a provision:

Anal (provided that) whenever the first individual among us pays to you the sum of Rs. 500 which is the sale price mentioned herein, you should receive it then, execute duly a sale-deed on a stamp-paper with regard to these lands in favour of the individual No. 1, give it registered, give possession of the lands, etc., and return all the documents relating hereto.

19. That, in the language of Section 58 (c) of the Transfer of Property Act, appears to me to be clearly an ostensible sale on condition that on payment being made the buyer shall transfer the property to the seller. But Mr. Somayya has contended that there can be no valid mortgage here because no date for payment has been fixed. There is nothing in the idea of a mortgage generally which makes the fixing of a date for payment or a date before which there can be no redemption essential. In usufructuary mortgages it is not unusual that no time for payment should be fixed; and I believe that in equitable mortgages by deposit of title-deeds it is generally the case that no time for payment is fixed. And Section 60 of the Transfer of Property Act itself recognises that no fixed time for payment is an essential characteristic of a mortgage. But Mr. Somayya has contended that a mortgage by conditional sale is of one of the kinds of mortgage for which a fixed time for payment is essential, and he bases that contention primarily on the wording of Section 58 (c). In Section 58 (c) three conditions are set out which when attached to an ostensible sale make the transaction a mortgage by conditional sale. In Sub-clause 1, which deals with the first condition, we find the words:

payment of the mortgage money on a certain date.

20. In Sub-clauses 2 and 3 we find only the words 'such payment.' Mr. Somayya contends that we must read the words 'such payment' in Sub-clauses 2 and 3 as equivalent to payment of the mortgage money on a certain date, the words used in Sub-clause 1. Grammatically in my opinion the words 'such payment' in Sub-clauses 2 and 3 refer to the payment of the mortgage money in Sub-clause 1 without the addition of the words 'on a certain date.' Such means 'of the like kind'; but in statutes the word is often used as equivalent to 'of that kind' or even loosely as equivalent to 'that'. If we take it that in Sub-clauses 2 and 3 'such payment' means 'payment of that kind' or even 'that payment', we shall be giving full meaning to the expression by reading it as equivalent to 'payment of the mortgage money' without bringing in the additional words 'on a certain date' which convey an additional idea not really connected with 'payment of that kind'. But even if it were possible to read the words 'such payment' in Sub-clauses 2 and 3 in two alternative senses, either as equivalent to payment of the mortgage money on a certain date or to payment of the mortgage Padmanabha money alone, I think we should be Bound to adopt the latter construction. We are considering a condition set out In a statute, and we must be careful not to widen the scope of that condition further than the words compel us to go. If two interpretations are possible, we ought to accept the less onerous one. And, if we look at the sense of these sub-clauses, it is clear that in Sub-clause 1 the words 'on a certain date' are necessary to the meaning. That is a default clause, and for the purpose of a default clause, it is necessary that a date should be fixed or fixable, as



otherwise no one will know when the default has occurred. But there is no such necessity in the meaning of Sub-clauses 2 and 3 to mention any date. On the mere interpretation of Section 58 (c) as it stands, speaking for myself, I should think it is clear that we have no right to introduce into Sub-clauses 2 and 3 the words 'on a certain date.' Mr. Somayya has drawn our attention to *Kinuram Mandal v. Nitye Chunder Sirdar* (1907)6 CriLJ 208 in which Maclean, C.J., clearly stated that a certain date was an essential feature of a mortgage by conditional sale. But that was only an obiter dictum and there is no discussion of the matter in the judgment. In *Haji Mahomed Mozaffer Ali v. Asraf Ali* 25 IndCas 93 two learned Judges of the same Court assumed that that dictum was correct. But again they did not discuss it, though used it as the basis of their discussion on a further point. With great respect I do not think that we can take either of those cases as an authority for the position that the fixing of a certain date for payment is an essential feature of a mortgage by conditional sale.

21. Mr. Somayya spent a good deal of time in his argument on a contention that anyhow the proviso to Ex. A offended against the rule against perpetuities, or more specifically against the provisions of Section 14 of the Transfer of Property Act. I certainly understood him to be using the contention as an attack upon the theory that Ex. A represented a mortgage by conditional sale; and if that was not his intention at the time, I hardly think he was justified in occupying us for so long on the point at that stage of the case. However, eventually, he has admitted that, if Ex. A represents a mortgage by conditional sale, then the proviso does not offend against the provisions of Section 14 of the Transfer of Property Act. And it is clear that that is so. The proviso does not create any interest after a life or at any future time at all. It merely reserves the right to redeem from the very moment of the document.

22. I agree that this appeal must be allowed and that the suit should go back to the District Munsif for him to make a decree for redemption subject to the directions indicated by my learned brother.

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