

**Satyanarayan Shah and ors. Vs. Star Company Ltd. and anr.**

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**Court :** Kolkata

**Decided On :** Apr-13-1983

**Reported in :** AIR1984Cal399

**Judge :** Pradyot Kumar Banerjee and ;Amitabha Dutta, JJ.

**Acts :** [Transfer of Property Act, 1882](#) - Sections 54, 58, 105 and 111; ;Bengal Money Lenders Act, 1940 - Section 2(12); ;Calcutta Improvement Trust Act, 1911 - Section 81; ;[Evidence Act, 1872](#) - Section 92; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Section 107 - Order 41, Rule 33

**Appeal No. :** A.F.O.D. No. 17 of 1968

**Appellant :** Satyanarayan Shah and ors.

**Respondent :** Star Company Ltd. and anr.

**Advocate for Def. :** B.C. Dutt, ;Sudhis Dasgupta, ;A.K. Sengupta, ;Sumit Ghose and ;Jaya Bose, Advs.

**Advocate for Pet/Ap. :** Hirendra Chandra Ghose and ;M.M. Saha, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

F.K. Banerjee, J.

1. This appeal by the defendants arises out of a suit for recovery of arrears of rent and mesne profit. About 21 cottahas 6 chatachs of land in premises No. 8, Circular Garden Reach Road with structures thereon as described in Part I and about 15 cottahas 14 chataks and 8 sq. ft. land in premises No. 5, Circular Garden Reach Road with structures thereon as described in part 2 of the schedule of the plaint formed the

subject matter of the suit.

2. The plaintiff's case was that he was the owner of the suit premises Nos. 5 and 8 Circular Garden Reach Road by means of purchase from the trustees of the Calcutta Improvement Trust on 15-1-47 in which defendants' predecessor-in-interest Dindayal Shah was a confirming party. The defendants by a lease dated 15-1-47 took the lease of the property in question for 20 years commencing from 15-1-47 at a monthly rental of Rs. 1620/-. It was alleged that the rent should be paid within first week of the month for which rent is due. It is also alleged that in the said document the defendant-tenant is to pay the owner's and occupier's share of municipal taxes. It is

further agreed that on determination of the tenancy, defendant would surrender to the company the disputed land and building. It is also stipulated that if the rent is not paid for 9 months, the plaintiff-company would have the right to re-enter the premises. It is alleged that the defendant failed to pay the rent for the period commencing from 15th July, 1949 to 14th Jan. 1951. Hence this suit has been filed.

3. Two sets of written statement have been filed by the defendants, one, by defendant No. 1 and other by defendants Nos. 2, 3 and 4. Subsequently, additional written statements were also filed by the said defendants. The defendants' plea was that the company is the ostensible lessor but the real legal relationship between the parties is not that of lessor and lessee but one of creditor and debtor. It was alleged in the written statement that the real intention of the parties was that there should be a relationship of creditor and debtor and the lease rent is only for the interest of the money advanced. It is alleged that the suit property was acquired by the trustees of the Calcutta Improvement Trust and under Section 81 of the Calcutta Improvement Act, 1911, if there is a surplus land, the Improvement Trust must first offer the same to the person from whom the land was acquired before it is sold to any other person or in other words, the defendant had the first right of purchase in respect of the surplus land.

Admittedly, the land which is the subject matter of the rent suit was one which was the surplus land and to which the original defendant Dindayal had the first right of purchase. In 1928, Dindayal was asked to exercise his option and by resolution dt. 22-2-28, the Improvement Trust offered the land to be purchased by Dindayal for Rs. 2,23,689/- by two resolutions being ext. D and D1. It appears that from 1926 to 1947, Dindayal. could not procure the money for accepting the offer made by the Calcutta Improvement Trust. It appears further that Dindayal approached different persons and ultimately he approached Gobinda Bangur, the Managing Director of M/s, Mugniram Bangur and Co. Ltd. for financial help. Gobinda Lal allegedly agreed to advance the loan of Rs. 3,25,000/- at an interest of 6% and the transaction should be so effected as not to attract the provision of the Bengal Money Lender's Act. Accordingly a draft agreement between Mugniram Bangur Co. Ltd. and the defendant was prepared by M/s. Khaitan & Co., Solicitor of M/s. Mugniram Bangur. The draft was sent to P. D. Himatsingka Co. After the Solicitors of the parties agreed, the agreement was signed between the parties and subsequently by a deed of conveyance on 15-1-47, the property was sold to Star Company Ltd. the present plaintiff, as the nominee of M/s. Mugniram Bangur Co. Ltd. It further appears that on 15-1-47 a lease for 20 years was executed by the plaintiff company in favour of the defendant wherein the plaintiff company agreed that the lessee will have an option of repurchasing on repayment of the purchase price and such amount as stipulated in the deed of lease. It is further agreed by the lessor and the lessee that the right of purchase will not be enforced within 5 years from the date of lease and that within that 5 years, the lessee will have to spend for the improvement of the lease-hold property by spending Rs. 60,000/- and on payment of the monthly rent of Rs. 1620/-. It appears from the plaint that the lessee did not pay the money and hence this suit was filed for recovery of the arrears of rent.

4. Number of issues were framed of which issues Nos. 4, 5 and 6 are relevant on which arguments were advanced by the parties. Issues Nos. 4, 5 and 6 are as follows :

'4. Is any Receiver appointed by the 5th, court of the Subordinate Judge in Title Suit No. 176 of 1939 in respect of the suit property, if so, is the suit maintainable without

impleading the Receiver?

5. Did the three documents that the agreement dt. 3-9-45 and the conveyance dated 15-1-47 and the lease of the same date constituted one transaction Was the same a loan transaction in substance ?

6. Was there any mortgage created by the aforesaid documents in respect of the suit property ?'

5. Learned Subordinate Judge, 3rd Court, Alipore, however, decreed the suit. Hence the present appeal.

6. The first argument advanced by Mr. Ghose appearing for the appellant is that the three documents namely, exhibits 1, 2 and 3 constitute one and the same transaction of sale in form but in substance it was a loan. Mr. Dutt, appearing for the respondents, however, contended that it is clear from the deed itself that this is a sale deed and lease deed simpliciter and no question of loan arises.

7. While elaborating this contention, Mr. Ghose relied upon different decisions of the Allahabad High Court and this Court. In support of his argument, he first cited a case reported in AIR 1927 All 137. It is a case under Section 58 of the T. P. Act. The vendor in that case executed a deed of sale in favour of the vendee for certain consideration. Contemporaneously the vendee executed an agreement in favour of the vendors whereby he undertook to reconvey the property to the vendors, if they repaid the sale price. There was a third deed, a lease granted by the vendee to the vendors for a period of three years, reserving a certain rental per mensem equivalent to interest on the purchase money at 12% per mensem. This case, in our opinion, does not apply in the facts of the case. It is clear from the agreement that the rent which was reserved was specifically stated to be the interest on the purchase money at 12% per mensem. In the present case, the question of interest is conspicuously absent from any of the deeds between the parties. In the present case also the trustee of the Calcutta Improvement Trust is the vendor and the purchaser is the Star Company Ltd. directly from Calcutta Improvement Trust. The defendant had a lease-hold interest of the property under the Calcutta Improvement Trust for Rs. 521/- per month. After the purchase, the lease was granted by the vendor as a lessor to the lessee who was a confirming party in the deed of sale and the lease rent was Rs. 1620/- per month. It is clear that no question of interest is involved in the payment of rent though Mr. Ghose wanted to say that if we calculate interest at the rate of 6% per annum, it comes to Rs. 1625/- per month and in order to conceal the real intention the rent was fixed at Rs. 1620/- per month. In our opinion, this argument in the facts of the present case is not at all sustainable.

8. Mr. Ghose next cited a case reported in AIR 1927 All 321. It is also a case under Section 58 of the T. P. Act where it has been held that if an owner of land and an intending purchaser enter into a contract which constitutes between them the relationship of vendor and purchaser and there is a stipulation in the contract that the purchase money shall be paid and the contract completed on a certain date, the principle is that time is not of the essence of the contract and the circumstance of the day fixed for payment of the money and completion of the purchase being passed does not entitle either party to refuse to complete. But, on the other hand, where there is a contract between the owner and another person and if such person shall do a specified act, then the owner will reconvey the land to him. The relation of vendor

and purchaser does not exist between the parties unless and until the act has been done as specified. The condition for repurchase must be performed strictly and therefore in all agreements by which an option to repurchase is given, time is of the essence of the contract. It appears to us in the facts of the present case, there was no relationship between the parties as vendor and purchaser. On the other hand, there was a relationship of lessor and lessee and the right of repurchase by the lessee was not before five years after its execution according to the lease deed.

9. Mr. Ghose also relied on a decision reported in AIR 1931 All 196. It is a case under Section 58(c) of the T. P. Act unamended. In this case, the mortgagor executed sale deed in favour of simple mortgagee in consideration of loan due on mortgage with reservation to obtain release of property within limited period of time. The transaction was held to be mortgage under Section 58(c) of the Act. In this case, there was no prior mortgage before the deed of sale and execution of deed of sale was made not by the defendant as vendor but by the Calcutta Improvement Trust as a vendor to the vendee, the Star Company Ltd.

10. Mr. Ghose next cited a case reported in AIR 1931 All 548. It is also a case under Section 58(c) of the T. P. Act where a deed was ostensibly a sale deed with a condition for retransfer on payment of the amount and the condition was embodied in the document itself. It was held that the case was covered by the definition of a mortgage by conditional sale and hence the deed was a mortgage by conditional sale and not an out and out sale.

11. In the case reported in : AIR1952All716 (FB) as cited by Mr. Ghose is also a case under Section 58(c) of the T. P. Act where it has been held that the transaction necessarily amounts to a mortgage by conditional sale in all cases irrespective of intention of parties.

12. The case reported in AIR 1938 Oudh 57 on which Mr. Ghose relied where a deed of ostensible sale contained a condition for retransfer and thereafter followed by another which was a mortgage by conditional sale and not a sale with condition of repurchase under Section 58(c) of the T. P. Act.

13. The case reported in : AIR1967Cal351 does not help Mr. Ghose. The case arose out of a suit brought under Section 36 of the Bengal Money Lender's Act where it has been held that even though invalid as a mortgage, the transaction may still be a 'loan in substance' so as to be a 'loan within the meaning of Section 2(12) of the Bengal Money Lenders Act. To this portion of the judgment we respectfully agree. If in the facts and circumstances of the case, the documents in consideration of this case constitute to be a loan, it can be held that this is a loan in substance and, therefore, though it may not be a mortgage under Section 58(c) of the Act. still Bengal Money Lender's Act may be applicable but the view we hold, as hereinbefore stated, we are of the opinion that the Bengal Money Lenders Act has no application and the transaction is neither a loan nor a mortgage as sought to be argued by Mr. Ghose, on behalf of the appellants.

14. Mr. Dutt on behalf of the respondents have relied upon the cases as considered by this Court reported in : AIR1967Cal351 and as such it is not necessary for us to refer to them in detail. The cases (were) decided by the Supreme Court on the point under Section 58(c) of the T. P. Act. Suffice it to say that the Supreme Court held that if it is not a mortgage under Section 58(c) of the Act it can still be a loan under the Bengal

Money Lenders Act and the surrounding circumstances taking into consideration for coming to a decision in the matter.

15. Coming to the next point it has been argued by Mr. Ghose in elaborating his first point that oral evidence to the contrary is not admissible when there is a written instrument. Mr. Ghose on this point, has relied upon a case reported in (1899) 27 Tnd App 58. It is a case where the deed of sale was repurchased and the right to redeem the mortgage, oral evidence of intention is inadmissible for the purpose either of construing the deeds or of proving the intention of the parties in view of Section 92 of the Evidence Act. In the Privy Council written instrument itself projected the intention of the parties and, therefore, the question of oral evidence on that score is not admissible. In that view of the matter, in our opinion, the Privy Council decision does not support Mr. Ghose's contention in the facts and circumstances of the case. We now refer to the document in order to see whether the judgment as hereinbefore discussed has any application to the facts of this case.

16. The first document is Exhibit 1, the deed of agreement between the parties entered into on Sep. 3, 1945. The deed of agreement only shows that Dindayal agreed with one M/s. Mugniram Bangur & Co., a partnership firm in 1948 by which the alleged vendor, that is, the defendant's predecessor sought to sell the property being 5 and 8, Circular Garden Reach Road. In the said agreement it was provided that the lease property to be purchased from the Calcutta Improvement Trust is to be paid by the M/s. Mugniram Bangur & Co. Ltd. On purchase, they will lease out the property to the defendant's predecessor-in-interest for 20 years and that they will have a right of repurchase within certain time but not beyond the time of 20 years. It is also said that the defendant's predecessor must give consent to the Calcutta Improvement Trust for the transfer of the property free from all encumbrances to M/s. Mugniram Bangur & Co. Ltd. It appears from the deed itself as also the deed of sale that between the Calcutta Improvement Trust and the defendant's predecessor-in-interest, there was quite a few number of cases pending including for recovery of possession as also default in payment rent fixed by the Improvement Trust after 1928 till 1947. It appears further that with the execution of the deed of agreement, M/s. Mugniram Bangur & Co. Ltd. has paid a cheque of Rs. 3,10,000/- in favour of the trustees of the Calcutta Improvement Trust for the payment of all the dues as also the purchase price which was to be paid by the defendant in order that he could have the option to purchase the property under Section 81 of the Calcutta Improvement Trust Act, 1911. Soon after the deed of purchase and execution of the deed of lease it appears from the Exhibit 7(b), a letter written from M/s. P. D. Himatsingka & Co. to Sri H. N. Gupta, Estates Officer, Calcutta Improvement Trust dt. April 16, 1947 as follows : --

'As you are aware our clients are holding the above premises as lessees under M/s. Star Co. Ltd. with option to our clients to purchase the same from the said Company and as such they are interested in having possession of the above property from you in due form and they are to arrange for a fencing as soon as the Trust fencing is removed so as to prevent hawkers and other people trespassing upon the land. Our clients are just informed that a portion of the Trust fencing has been removed to day. Our clients do not think it safe to attend at the above site during these days of riots for having possession of the land'.

17. This letter was written on 16th April, 1947 after the execution of the document of sale in favour of Star Co. Ltd. by the Trustees of the Calcutta Improvement Trust in

which the defendants were the confirming parties, inasmuch as, by the said deed of purchase. the plaintiff had paid off all the arrears to the extent of Rs. 86,000/- to the Calcutta Improvement Trust before the execution of the deed of sale in their favour. All the documentary evidence taken together, neither the lease deed nor the agreement for lease nor sale deed can be construed to be one of mortgage or loan within the meaning of Section 58(c) of the T. P. Act or Section 2(12) of the Bengal Money Lenders Act.

18. Adverting to the evidence adduced by the parties on the nature of transaction, it is clear from the evidence of Gobindalal Bangur that he was approached for the purchase of loan but he had categorically stated in his deposition that they were not interested to give any loan or there was any talk about the mortgage but there was a talk of sale. There was no talk of interest @ 6% and there was no talk about the mortgage.

19. Sakhanath Roy, D. W. 5 has stated in his deposition that this lease deed and the sale taken together, it was a loan transaction and this discussion was held between S. C. Bose and P. D. Himatsingka and that he was present in the discussion between them. As we have said, P. D. Himatsingka wrote a letter subsequent to the deed of lease in April 1947 that their clients are holding the premises as lessees under Star Company Ltd. who are the purchasers from the Trustees of the Calcutta Improvement Trust. But unfortunately, the evidence of P. D. Himatsingka who was available was not produced and he could have thrown light if at all necessary. So the very relevant and vital evidence has not been produced. Therefore, an inference must be drawn against the defendant for the non-production of the said evidence. But in view of the document of sale as also the agreement by which it was clear that there was a lease in favour of the defendant after purchase by Star Company Ltd. for 20 years. It appears again from the lease itself that the defendant must have to spend about Rs. 60,000/- for the improvement of the property and lease out to the plaintiff within 5 years from the date of the lease deed. Further evidence is that the amount to be paid by the lessee for exercising his option will vary and in case, he will have to pay a sum of Rs. 60,000/- within 5 years from the date of lease. It was agreed also that the lessee will have a right of purchase of the lease-hold after the expiry of the five years from the date of the lease the amount however varied with the length of time when the lessee exercises the option of purchase. From all these accounts it is quite clear to us that the deeds taken together and the evidence on the point goes to show that this is not a loan under the Bengal Money Lenders Act nor mortgage under Section 58 of the T. P. Act. Mr. Ghose contended that the purchase price of Rs. 3,25,000/- was a very nominal price. It must be said that this purchase price was settled by the Calcutta Improvement Trust in 1928. A sum of Rs. 2,23,000/- was the purchase price which was to be paid by the defendant's predecessor to the Calcutta Improvement Trust for his right of repurchase under Section 81 of the Calcutta Improvement Trust Act, 1911. Unfortunately for the defendant, he could not procure the price and went on litigating with the Calcutta Improvement Trust between 1928 to 1945 when the agreement was entered into by the defendant along with M/s. Mugniram Bangur & Co. Ltd. In the meantime, Calcutta Improvement Trust got a decree against the defendant for ejection from the premises as also for a sum of Rs. 86,000/- as arrears of rent. It appears from the evidence of D. W. 5 that the defendant filed a suit against the Calcutta Improvement Trust when it wanted to sell the property to some other person as the defendant failed to pay the amount as offered by the Calcutta Improvement Trust to the defendant's predecessor and got an injunction. It appears from the D. W. 5's evidence that the defendant tried all corners to get the money but

unfortunately failed to get accommodation till M/s. Mugniram Bangur & Co. Ltd. wanted to purchase the property in question from the Calcutta Improvement Trust and they were not interested in giving a loan to Dindayal for the payment of the offer. Regarding the nominal valuation of the property which was purchased by the Star Company Ltd. Mr. Ghose relied upon the evidence adduced by the valuer Mr. B. B. Ghose. The valuer made a report being Ext, 'K'. It appears to us that the report is based on no evidence at all but are conjectures and surmises. In fact the valuation of the property in 1933 is stated to be fixed at Rs. 6,000/- per cottah without any evidence as to how this property can be valued at Rs. 6,000/- per cottah in 1933. The report regarding the valuation has no basis whatsoever and we have no hesitation in rejecting the report of the valuer.

20. Next argument advanced by Mr. Ghose is that the suit must fail on the ground that the Receiver who was appointed by the learned Sub-Judge Alipore in Title Suit No. 176 of 1934, was not made a party in the present suit. By an order dt. May 29, 1961, the said issue was disposed of against the defendant in favour of the plaintiff. The learned Judge considered the cases sought to be relied upon by Mr. Ghose reported in (1910) 14 Cal WN 653, (1911) 15 Cal WN 925 and (1955) 59 Cal WN 481 and held that the Receiver is not a necessary party in this suit as it stands and so the Receiver of the previous partition suit between the defendants should not be brought to the record only to make a simple matter more complicated, when the properties of the defendants in the hand and possession of the Receiver are not likely to be affected.

21. At the time of the hearing of the suit it appears that this issue was not pressed. Mr. Ghose contended that it was not pressed as the decision on issue No. 4 has already been made by the learned Sub-judge on May 29, 1961. But in the ground of appeal, this point has not been taken. More so, we have disallowed to raise this question for the first time before us. It appears to us that the learned Judge's decision on the point is right. There are other decisions which are relied upon by Mr. Ghose reported in : AIR1972Cal541 where it has been held that Section 37(a) of the Bengal Money Lenders Act is retrospectively in operation. In our opinion, as we have held that the transaction is not either loan under the Bengal Money Lenders Act or mortgage by conditional sale under Section 58(c) of the T. P. Act, it is not necessary for us to refer to those cases at all.

22. Mr. Ghose has also relied upon a case reported in (1947) 51 Cal WN 202 : (AIR 1946 PC 178) which does not find support to his contention. In view of our findings hereinbefore stated, this case has no application in this case as we hold that the transaction is a sale and not a loan in substance.

23. It is stated by Mr. Sengupta that the appellant No. 5 is dead. Mr. Ghose said that the heirs of the deceased being appellants Nos. 1 to 3 and respondents Nos. 4 to 5 are already on record. In that view of the matter, objection raised by Mr. Sengupta is rejected.

24. In the circumstances, therefore, this appeal must fail and the same is dismissed.

25. There will be no order as to costs.

26. In view of the appeal being dismissed, no order need be made on the application.

27. All interim orders made in this appeal are vacated.

Amitabha Dutta, J.

28. I agree.

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