

PETITIONER:
SHRI BHASKAR WAMAN JOSHI (deceased) AND OTHERS

Vs.

RESPONDENT:
SHRI NARAYAN RAMBILAS AGARWAL (deceased) AND OTHERS

DATE OF JUDGMENT:
03/11/1959

BENCH:
SHAH, J.C.
BENCH:
SHAH, J.C.
GAJENDRAGADKAR, P.B.
SUBBARAO, K.

CITATION:
1960 AIR 301 1960 SCR (2) 117

ACT:

Mortgage-Deed-Construction--Mortgage by conditional sale
-Sale with a clause for repurchase-Distinction between-
Intention of the parties- Contemporaneous conduct-
-Surrounding circumstances-Time fixed for reconveyance-
Whether essence of the contract.

HEADNOTE:

A deed dated September 10, 1931, described as a sale deed, recited that the transferors were indebted and that to discharge the liability three items of immovable properties, described in the deed and separately valued, were conveyed in full ownership and that possession was delivered to the transferees. The deed further provided, inter alia (1) that if the transferors demanded reconveyance of any or all of the items of the properties within 5 years, the transferees shall reconvey to them at their expense for the price mentioned in the deed, (2) that if within four years and six months the transferees did not exercise the right of reconveyance as aforesaid and the transferees did not desire to retain all or any of the properties, they had a right to get back the amount of consideration of the deed and return all the three or any of the properties in the condition in which by vis major, Government action or any reason whatsoever they may be, and

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(3) that if the transferors failed to comply with the transferees' request to take back the properties a breach of agreement of reconveyance rendering the transferors liable to pay damages shall be committed. There was also a clause that the transferors shall lose the right of getting a reconveyance after the expiry of the period of 5 years. On the same date as the deed of sale the transferors executed an agreement by which they undertook to pay the difference between the net rent to be recovered by the transferees from the properties and interest at the rate of nine per cent on the price till the date of reconveyance. In a suit for redemption brought by the transferors on August 26, 1943, on the footing that the deed dated September 10, 1931, was a mortgage by conditional sale, the transferees contended that by

the transaction an absolute conveyance of the properties was intended and that the conveyance was subject to a condition of repurchase to be exercised within a period of five years from the date of the deed. The evidence showed that the price paid for the properties under the deed was wholly inadequate.

Held, that the question whether a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties which has to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. In a mortgage by conditional sale a relation of debtor and creditor is created, the transfer being a security for the debt. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even contradict the recitals as distinguished from the terms of the document may be given. Evidence of contemporaneous conduct is admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.

Narasingerji Gyangerji v. Panuganti Parthasarathi and Others, (1924) L.R. 51 I.A. 305, relied on.

Held, further, that in the present case, the deed dated September 10, 1931, on a true construction in the light of the surrounding circumstances showed that the transaction was one of mortgage enabling the transferors to redeem the properties.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No.16 of 1955.

Appeal from the judgment and decree dated February 14, 1952, of the former Nagpur High Court, in First Appeal No. 10 of 1945, arising out of the judgment and decree dated September 25, 1944, of the Second Additional District Judge, Amraoti, in Civil Suit No. 11-A of 1943, Tr. Civil Suit No.5A of 1944.

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C. B. Agarwal and A. G. Ratnaparkhi, for the appellants.

W. S. Barlingay, S. N. Andley and Rameshwar Nath, for respondents Nos. 2-7.

1959. November 3. The Judgment of the Court was delivered by

SHAH J.-This is an appeal against the decree of the High Court of Judicature at Nagpur in Civil Appeal No. 10 of 1945 reversing the decree passed by the Second Additional District Judge, Amraoti in Civil Suit No. 5-A of 1944. The High Court has by its decree directed the court of first instance to pass a decree for redemption.

The appeal raises a question as to the true effect of a deed dated September 10, 1931, executed by Shri Narayan Rambilas Aggarwal and his two sons Sadan Gopal and Murli Dhar in favour of two brothers Bhaskar Waman Joshi and Trimbak Waman Joshi. The deed ostensibly conveys an absolute title to certain properties described therein. The transferors under the deed contend that the property transferred by the deed was intended to be mortgaged under a deed of conditional sale. The transferees contend that by the deed an absolute conveyance of the property thereby conveyed was intended and that the conveyance was subject to a condition of repurchase to be exercised within a period of five years from the date

of the deed. The court of first instance dismissed the suit holding that the transaction in the deed dated September 10, 1931, was of the nature of an absolute conveyance with a condition of repurchase and the period limited by the deed for reconveyance had expired long before the date of the suit. The High Court held that the transaction was a mortgage by conditional sale and on that view reversed the decree and directed that a redemption decree be passed.

The properties in dispute are three in number: (1) a house in Amravati outside the Amba Gate bearing Municipal No. 5/98, (2) A Chawl in Amravati bearing old Municipal Nos. 6/857, 6/858 and 6/859, and (3) a house situated in Dhanraj Lane Amravati bearing old

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Municipal No. 3/459. By the deed the properties were separately valued. The house at Amba Gate was valued at Rs. 11,500, the Chawl was valued at Rs. 26,000 and the house at Dhanraj Lane was valued at Rs. 2,000. At the date of this transaction, the transferors were indebted to the Imperial Bank of India in the sum of Rs. 30,000 and Rs. 9,500 were due to the transferees and their relations and friends, and to satisfy this liability of Rs. 39,500 the deed was executed. Possession of the property transferred was delivered by calling upon the tenants in occupation to attorney to the transferees. The transferees constructed eight shops in the compound of the Amba Gate house in the year 1940-1941 and made certain other constructions in the compound of the Chawl, and they sold the Dhanraj Lane house to one Suraj Mal Salig Ram. On the August 26, 1943, the transferors served a notice upon Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi stating that they were willing to redeem the mortgage created by the deed dated September 10, 1931, and called upon the transferees "to render full, true and proper account" of the amount claimable under the deed. By their reply Bhaskar Waman Joshi and the representatives of Trimbak Waman Joshi denied that the transferors had any right to redeem the property conveyed by the deed and asserted that the claim "to treat the sale as a mortgage was an afterthought" in view of the abnormal rise in prices which had lately taken place. On September 9, 1943, the three transferors and other members of their joint Hindu family filed suit No. 5-A of 1943 in the court of the Additional District Judge, Amravati against Bhaskar Waman Joshi and the representatives in interest of Trimbak Waman Joshi and Suraj Mal Salig Ram for a decree for redemption alleging that the transfer incorporated in the deed dated September 10, 1931, was in the nature of a mortgage by conditional sale.

Ex. D-1 which is the deed in question recites that the transferors were indebted, that they needed Rs. 39,500 to discharge their liability, that Rs. 2,320 were due to the transferees and that amount was set

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off and the balance of Rs. 37,180 was paid by eight cheques drawn on the Imperial Bank of India. It was then recited that the immovable properties described in the deed were conveyed in full ownership and that possession was delivered to the transferees. The deed then proceeded to recite the conditions "in respect of this sale":

"If our heirs or ourselves demand reconveyance of one, two or all the three houses of the above estate at any time within 5 (five) years of this date (this time limit shall be followed very strictly-it has been finally settled that we will lose this right if one more day expires), you or your heirs shall reconvey to us at our expenses the respective

houses for their respective prices mentioned in this deed of sale. With a view that both sides should have equal rights in respect of this condition, it has been agreed between us that if our heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or any one of them within four and a half years of this day and if for any reasons you or your heirs do not deem it proper to retain anyone or all these houses hereafter, you and your heirs have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs express such a desire and if we or our heirs fail to comply with it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages. It has been (further) agreed between us that in the event of such a reconveyance, our heirs and ourselves will pay full prices (as mentioned in this deed of sale) of the estate in the condition in which it may be at that time, that is, in the condition in which it may be on account of heavenly mishap or Government action, on account of any reason whatsoever or on account of fall in prices."

The courts below differed in their interpretation of the true effect of these conditions. In the view of the learned Trial Judge, the intention of the parties was to effect an absolute sale and not a mortgage. The High Court did not agree with that view.

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By cl. (c) of s. 58 of the Transfer of Property Act, mortgage by conditional sale is defined 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 ;

provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale."

The proviso to this clause was added by Act XX of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional

sale

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postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanagerji v. Panuganti Parthasarathi and Others* (1), the circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly reiterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.

(1) (1924) L.R. 51 I.A. 305.

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In the light of these principles the real character of the document Ex. D-1 may be ascertained. The conditions of reconveyance may be analysed:

(1) that the transferees shall reconvey the property to the transferor at the expense of the transferors for the price mentioned in the deed; (2) that if within four years and six months from the date of the conveyance, the right of reconveyance in respect of the three houses or any of them is not exercised by the transferors and if the transferees do not desire to retain all or any of the houses, they have the right to recall from the transferors the amount of the consideration and to return all or any of the three houses in the condition in which they may be; (3) that in the event of failure on the part of the transferors to comply with the request to take back the houses, a breach of agreement of reconveyance rendering the transferors liable to pay damages shall be committed; (4) that in the event of reconveyance the transferors shall pay the full price set out in the sale deed and take back the houses in the condition in which by vis major, Government action or any reason whatsoever they may be. Evidently the transferors have under the deed a right to call upon the transferees to reconvey the

properties within five years from the date of the conveyance; but after the expiry of four years and six months the transferees are given the option to call upon the transferors to take back all or any of the properties for the prices mentioned in the deed ; and if such right was exercised the transferors were bound to take back the properties and return the price even if on account of vis major or action of the public authorities the property was prejudicially affected. The deed does not set out the period within which this right is to be exercised by the transferees. Granting that the option of reconveying -the properties against the price mentioned in the deed was to be exercised by the transferors before the expiry of five years from the date of the deed, the covenant that damage to property even on account of circumstances over which the transferees had no control was in the

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event of reconveyance to be borne by the transferors, is strongly indicative of a mortgage. By this covenant the transferees were invested with the right to call upon the transferors to " take back " all or any of the houses and to return the price therefor, indicating thereby that the price paid is in truth charged upon the property, By calling upon the tenants to attorn to the transferees, possession of the property transferred was delivered and pursuant to the transfer, it was mutated in the names of the transferees. By an express covenant the period of five years was also made of the essence of the contract, but as observed in Narasingerjis case (1) the description of the document as one of an absolute sale and the right of repurchase bearing the appearance of a right in relation to the exercise of which time is of the essence are not decisive of the true nature of the transaction.

The circumstances surrounding the deed at the date of the execution of the deed also support the view that the transaction incorporated in Ex. D-1 was intended to be a mortgage. Before the execution of the deed Ex. D-1 a draft sale deed was prepared. By the draft sale deed Ex. P-13, only two properties, the Amba Gate house valued at Rs. 10,000 and the Chawl valued at Rs. 25,000 were to be conveyed. By the final sale deed, the Dhanraj Lane house was also agreed to be conveyed and that house was valued at Rs. 3,500. The transferors were evidently in straitened circumstances and immediately needed Rs. 30,000 to discharge their liability to the Imperial Bank; and the liability to the transferees and their relations and friends amounted to Rs. 9,500. It is for this amount of Rs. 39,500 that the properties were conveyed. On the date on which the deed was executed, also an agreement Ex. D-3 was executed by the three transferors. That agreement recited that the sale deed was to be executed for past debts and for paying off the debts cheques were taken from the transferees and the transferees were put in possession of the houses sold. A request was then made that the transferees should not get the deed registered for two months or at least for eight to fifteen days, because the transferees had

(1) (1924) L.R. 51 E.A. 305.

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to make arrangements for payments to the creditors and in the event of the deed being registered, other creditors may make demands for their dues. It was then stated, " you want that you should get an income of nine per cent per annum from these houses till reconveyance but it is evident that after meeting repairing or insurance charges thereof, there will not remain so

much profit in balance. Therefore, we have already agreed before that the agreement of reconveys mentioned in the deed of sale shall be brought into effect only when ourselves or our heirs pay to you all the expenses incurred by you as found due according to your account books and complete your (nine) per cent." This agreement and the sale deed were executed on the same day. Evidently by this agreement the transferors undertook to pay the difference between the net rent to be recovered and interest at the rate of nine per cent, on the price till the date of reconveyance, and that the right of reconveyance was to be enforceable only when the difference between the interest at nine per cent on the price and the rent recovered less repairs, insurance charges according to the books of account of the transferees was paid. Prima facie this is a personal covenant whereby the transferors agreed to pay interest at the rate of nine per cent, on the price paid till the date of reconveyance. This agreement strongly indicates that the parties regarded the arrangement incorporated in the deed dated September 10, 1931, as a mortgage. The contention raised by the transferees that by this covenant they were to erect additional structures at their own expense upon the land and collect rent which may be equivalent to interest at the rate of nine per cent, on the price paid and the amounts spent by them is on the language used in the deed unwarranted. There is in the deed no reference to any additional amount to be spent by the transferees for erecting buildings upon the land conveyed; and the books of the transferees are referred to in the agreement only to make the accounts maintained by them binding upon the transferors. Counsel for the transferees urged that this agreement not being registered was inadmissible

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in evidence. Ex facie the document does not purport to create, declare, limit or extinguish any right, title or interest in immovable property; it incorporates a mere personal covenant and it is difficult to appreciate the plea that the document wholly inadmissible for want of registration. This agreement indisputably contains a condition relating to reconveyance incorporated in a registered instrument and may not be admissible in the absence of registration as evidencing any alteration of the terms of reconveyance. But this agreement in so far as it evidences a personal covenant to pay interest at the rate specified, is admissible. It is a somewhat singular circumstance that before the High Court, when counsel for the contending parties were invited by the court to argue whether the document was by law required to be registered counsel urged that the document was admissible in evidence without registration and insisted upon arguing the case on that footing.

The question whether the price paid was adequate may also be adverted to. The court of first instance held that the consideration for the properties was not inadequate; but in the view of the High Court the consideration was wholly inadequate. Counsel for the transferees contended that the monthly rent received from the tenants occupying the properties was Rs. 270 and deducting therefrom Rs. 48 for municipal taxes and an amount equal to rent for two months as properly chargeable for repairs, insurance and collection charges, there remained only a balance of Rs. 186 per month available to the transferees and capitalizing the net rent at 6% the value of the property conveyed could not exceed Rs. 30,000, and even capitalising the net rent at 5% counsel contended that the value of the property may be

approximately equal to the consideration paid. There is, however, no clear evidence as to what municipal taxes were payable in respect of the houses, and whether the taxes were payable by the tenants or by the landlord. Dr. Trimbak Joshi one of the transferees in his evidence in Suit No. 112 of 1932 deposed " that the tax came to Rs. 48 on the date of purchase ", but he did not state that this amount was

payable monthly. There is again evidence of witness Balkrishna examined by the transferees that the water tax was paid by the tenants. In their written statement, the transferees had set out a statement of income and expenditure for the years 1931-40 and in that statement for the year 1933 the expenses debited against income were Rs. 426-11-0, for 1934 Rs. 346-15-6 and for 1935 Rs. 542-2-6, for 1936 Rs. 1,666-7-0, for 1937 Rs. 1,160-1-3, for 1938 Rs. 529-2-3, for 1939 Rs. 570-11-3 and for 1940 Rs. 46-2-0. If Rs. 48 were payable as municipal tax every month, the liability on account of taxes alone far exceeded the expenses debited against the rent received. This statement of account abundantly shows that the municipal taxes were borne by the tenants and not by the landlords. The High Court in para. 34 of its judgment proceeded to estimate the rental of the properties at Rs. 245 per month and capitalised the same at 5%. The High Court is not shown to be in error in accepting the net monthly rental at Rs. 245 per month.

The area of the land of the Amba Gate house is 9,037 square feet, the area of the land at Chawl is 23,805 square feet, and the area of land of Dhanraj Lane house is 817 square feet, There is no clear evidence on the record about the precise area of the lands covered by the structures, but it is conceded that the structures stood on an area less than one-half of the total area of the land. From the evidence especially of the valuation reports, it appears that of the Amba Gate house 5,800 square feet of land were open and of the Chawl 12,000 square feet of land were open, Valuation of building land with structures by capitalising the rental may yield a reliable basis for ascertaining the value of the land together with the structures only if the land is developed to its full capacity by erection of structures. If the land is not fully developed by raising structures, valuation of houses together with lands by capitalising the rent received may not furnish reliable data for assessing the market value. By aggregating the value of the land and the value of the structure separately estimated, a scientifically

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accurate value of the land with the structure may not be obtained. But where the land is relatively valuable and the structures are old and of comparatively small value, this method may afford a rough basis in the absence of other reliable data for ascertaining the value of the land and the structure. Exs. D-52 and D-53 are the reports prepared by a valuer, of the market value of the Chawl and the Amba Gate house. According to the report Ex. D-52, the value of the superstructure of the Chawl was Rs. 31,708. Out of this amount the valuer sought to deduct 20% " as per Superintending Engineer's letter dated the 21st August, 1931". On what basis that deduction has been made has not been explained. He again proceeded to deduct 20% as depreciation on the cost of the building and estimated at Rs. 20,293 the value of the superstructure. It is evident that a deliberate attempt was made by the valuer to depreciate the value of the super-structure by making at least one

deduction of 20% for which there is no warrant. Even assuming that this valuation of Rs. 20,293 is accurate, the value of the Chawl together with the land considerably exceeds Rs. 26,000. The valuer has valued the site at 4 as per square foot, but no reliable evidence has been led to support that estimate. Similarly for the Amba Gate house the valuer estimated the value at Rs. 18,556 for the super-structure and he deducted 20% " with effect from the 22nd August, 1931 according to the Superintending Engineer's letter dated the 21st August 1931 " and 25% as depreciation charges on building and arrived at the figure of Rs. 11,134 and added thereto the value of the land at the rate of 4 as per square foot. The evidence on the record does not warrant the assumption that the land was worth only annas four per square foot. As pointed out by the High Court in view of the sale deeds Exs. P-9 and P-21 the price of the land fluctuated between Rs. 1 and Rs. 2-4 as per square foot. Even if the lower of the two rates be adopted, the value of the Chawl at the Amba Gate house will considerably exceed the price embodied in the sale deed.

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The house in Dhanraj Lane was valued in the draft sale deed at Rs. 3,500 and in the sale deed at Rs. 2,000. No explanation has been given for this disparity between the prices mentioned in the draft and the deed and there is substance in the contention strongly pressed by counsel for the transferors that the value of Rs. 2,000 for a house with a ground floor and two stories is artificial. The evidence discloses that the house was let out on a monthly rent of Rs. 20 and capitalising that rent at 5% on the assumption that by the construction the land was fully developed, the price thereof was more than double the price set out in the deed. It is clear that this house was included in the deed to make up the total value of Rs. 39,500, the amount required by the transferors to tide over their immediate difficulties.

Counsel for the transferees sought to rely upon the evidence of subsequent conduct of the transferors as indicative of the character of the transaction as a sale, but as already observed, that evidence is inadmissible. In our view, the High Court was right in holding that the real transaction incorporated in Ex. D-1 was a mortgage and not a sale. The appeal therefore fails and is dismissed with costs. Appeal dismissed.