

CASE NO.:
Appeal (civil) 1276 of 2006

PETITIONER:
Bishwanath Prasad Singh

RESPONDENT:
Rajendra Prasad & Anr

DATE OF JUDGMENT: 24/02/2006

BENCH:
S.B. SINHA & P.K. BALASUBRAMANYAN

JUDGMENT:
J U D G M E N T
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 26865 OF 2004)

P.K. BALASUBRAMANYAN, J.

1. I respectfully agree with the reasoning and conclusion of my learned Brother. But I feel that I ought to add a few words of my own in the light of the contentions raised.

2. Going by Section 58 (c) of the Transfer of Property Act, it is clear that for an ostensible sale deed to be construed as a mortgage by conditional sale, the condition that on repayment of the consideration by the seller the buyer shall transfer the property to the seller is embodied in the document which effects or purports to effect the same. It has so been clarified by this Court also in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Anr. [1955 (1) SCR 174] by stating, "If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not." Therefore, it is clear that what was involved in this case was the sale followed by a contemporaneous agreement for re-conveyance of the property. Such an agreement to re-convey is an option contract and the right has to be exercised within the period of limitation provided therefor. It has also been held that in such an agreement for re-conveyance, time is of the essence of the contract. The plaintiffs not having sued within time for re-conveyance, it would not be open to them to seek a declaration that the transaction of sale entered into by them construed in the light of the separate agreement for re-conveyance executed by the purchaser, should be declared to be a mortgage. Such a suit would also be hit by Section 91 of the Evidence Act, subject to the exceptions contained in Section 92 of that Act.

3. Learned counsel for the respondents vehemently contended that the permission granted to the plaintiffs to make a deposit under Section 83 of the Transfer of Property Act involved an adjudication that there was a subsisting mortgage since the permission to deposit was granted by overruling the objections of the defendant that the transaction was not a mortgage. That adjudication would operate as res judicata and bar the appellant from contending now that the transaction is not a mortgage but is a sale. The question is whether any adjudication is

involved when a mortgagor in terms of the Section makes a deposit of the amount remaining due on the mortgage even though he is permitted to do so after overruling the objections of the alleged mortgagee that there was no mortgage involved or there was no subsisting right to redeem. The Section itself indicates that on deposit of the money, it is open to the mortgagee either to receive the money on complying with the obligations imposed on him by the Section or refuse to receive the money. In a case where the mortgagee refuses to perform what he is to perform under Section 83 of the Act, the only remedy available to the mortgagor is to sue for redemption in terms of Section 91 of the Transfer of Property Act.

4. Section 83 is a survival from Bengal Regulation I of 1778 which enabled the mortgagor to redeem by payment into court. A corresponding right was given to the mortgagee by Bengal Regulation XVII of 1806 to make an application in the court if he intended to foreclose a mortgage by conditional sale. (See Mulla's Transfer of Property Act, 9th Edn. Page 83). It was held by the Privy Council in Forbes Vs. Ameeroonissa Begam [10 MIA 340 at page 350] that under the Bengal Regulation XVII of 1806, the functions of the Judge were purely ministerial. The same position was adopted by the various High Courts. In Ramakrishnaiah Vs. Krushi Vidyalaya Sangam [(1944) 2 MLJ 284], it was held that the question of correctness of the amount could not be gone into as such an enquiry was beyond the scope of Section 83 of the Transfer of Property Act. The Court was not called upon to give any findings. This view was followed by the same Court in Govindaswami Vs. Bakkim [(1983) 2 MLJ 207]. My learned Brother has referred to Chandramani Pradhan Vs. Hari Pasayat [1974 Orissa 47]. It is not necessary to multiply authorities on the question.

5. If the proceedings were only ministerial as held by the Privy Council and the various High Courts, obviously, it could not be argued that anything was "heard and finally decided" in a proceeding under Section 83 of the Act, which could operate as res judicata. For, the essential requirement of a bar by res judicata is that a matter should have been directly and substantially in issue in a prior litigation, and it should have been heard and finally decided by a court of competent jurisdiction. Of course, Explanation-VIII to Section 11 of the Code of Civil Procedure justifies a contention that even if the court that heard and finally decided an issue between the parties was one of limited jurisdiction, its adjudication would operate as res judicata. But, that would not enable learned counsel for the respondents to contend either that the court which entertained the application under Section 83 of the Act is a court of limited jurisdiction within the meaning of that Explanation, or that any issue was heard and finally decided in the proceeding under Section 83 of the Act. It may be noticed that the deposit under Section 83 of the Act has to be made in a court in which the mortgagor might have instituted a suit for redemption. Obviously, that is not a court of limited jurisdiction in the sense of the term as used in Explanation-VIII to Section 11 of the Code of Civil Procedure.

6. Thus the plea of bar of res judicata has only to be rejected.