

CASE NO.:
Appeal (civil) 3861 of 1999

PETITIONER:
Chennammal

RESPONDENT:
Munimalaiyan & Ors.

DATE OF JUDGMENT: 19/10/2005

BENCH:
Arijit Pasayat & Dr. AR. Lakshmanan

JUDGMENT:
J U D G M E N T

Dr. AR. Lakshmanan, J.

This appeal is directed against the final judgment and order dated 06.03.1998 passed by the High Court of Madras in Second Appeal No. 1966 of 1984 allowing the same and reversing the judgment and order dated 15.11.1983 passed in A.S. No. 51 and 1982 by the Additional Subordinate Judge, Dharmapuri at Krishnagiri and restoring the order and judgment dated 20.11.1981 passed by the District Munsiff, Hosur in O.S. No. 542 of 1978.

The short facts of the case are as follows:-

The defendant is the appellant in this civil appeal. One Munimalaiyan (plaintiff) executed a simple mortgage in favour of the appellant for a sum of Rs.3,000/-. For securing the due repayment, 3 items of properties belonging to Munimalaiyan was given as security. Munimalaiyan was unable to discharge the simple mortgage and on the intervention of Panchayatdars, a deed was executed by Munimalaiyan in favour of the appellant herein (Chennammal). In and by the said deed, one of the properties which was given as security for the simple mortgage was sold to the appellant herein with a right reserved to the said Munimalaiyan to repurchase the same within a period of 3 years on payment of Rs.3,000/-. A legal notice was issued by the said Munimalaiyan to the appellant herein seeking redemption of the property which was the subject-matter of the deed dated 22.10.1970. The appellant issued a reply notice contending that the deed dated 20.10.1970 was a deed of sale and not a mortgage by conditional sale as sought to be contended by the said Munimalaiyan.

The said Munimalaiyan instituted a suit in O.S. No. 542 of 1978 on the file of the District Munsiff, Hosur against the appellant herein praying for a decree for redemption. It was contended that the deed dated 20.10.1970 was a mortgage by conditional sale and that pursuant to the sale, the appellant was put in possession of the suit property and that the deed is not a sale deed and that a right to redeem the property within a period of 3 years was reserved and failing which the appellant herein was entitled to have the patta transferred in her own name. As on 20.10.1970, the property was valued at Rs.12,500/-. It was further contended that Munimalaiyan was paying the kist for the suit properties and that the appellant had raised various crops and derived sufficient income every year and that the mortgaged debt has to be scaled down as per Section 8 of Act 5 of 1978 and that since the appellant has been in possession for 8 years Rs.2,400/- ought to be deducted and that the appellant herein is entitled only to Rs.600/- as per law and that the said sum of Rs.600/- has been deposited into Court and that, therefore, the property has to be re-transferred and possession handed over. On these allegations the said Munimalaiyan prayed for the aforesaid relief.

Pending the suit, the said Munimalaiyan died and his LRs were brought on record as his legal representatives and they continued to prosecute the suit.

The appellant herein resisted the suit contending that the deed dated 20.10.1970 was an outright sale and that since Munimalaiyan was unable to discharge the simple mortgage the deed in question came to be executed and that the sale consideration under the document was adjusted towards the amounts due under the simple mortgage deed of the year 1961 and that the said document was executed on the advice of the Panchayatdars and that half the property is rocky and unfit for

cultivation and that the income therefrom was very meagre and that a right to repurchase had been reserved under the document within a period of three years failing which the document stipulated that the appellant would have absolute rights and that the option to repurchase was not exercised within the stipulated period of three years and that from the date of the document the appellant has been in possession as absolute owner and has been paying kist and that patta has also been transferred in her name and that the appellant had made certain portions of the property cultivable and the value thereof has increased and in order to get the benefit of the increase in value the present suit has been laid wrongly alleging that the document is a mortgage by conditional sale and that the suit is barred by time and that the provisions of Act 40 of 1978 are not applicable to the facts of the case and that the question of scaling down of the debt does not arise and that court fee paid is incorrect. On these allegations the appellant herein prayed for the dismissal of the suit.

The District Munsiff, Hosur who tried the suit held that the document in question which was marked as Exhibit A1/B1 was only a mortgage by conditional sale and that it is not a sale deed as contended by the appellant herein and that from the intention of the parties and the document in question, it was clear that only a mortgage by conditional sale had been executed and that Munimalaiyan was entitled to the benefits under Act 40 of 1978 and that, therefore, only Rs.600/- was due and that the question of mesne profits was relegated to the final decree proceedings. The trial Court thus passed a preliminary decree for redemption.

Aggrieved by the preliminary decree, the appellant preferred an appeal on the file of the Additional Subordinate Judge, Dharmapuri. The Additional Subordinate Judge on an interpretation of the document in question held that the document was only an outright sale and not a mortgage by conditional sale. In this view of the matter, the Additional Subordinate Judge allowed the appeal and thereby set aside the judgment and decree passed by the District Munsiff.

The respondents herein being aggrieved by the appeal being allowed and their suit being dismissed, preferred S.A. No. 1966 of 1984 on the file of the High Court at Madras.

S. Jagadeesan, J. who heard the second appeal allowed the same and restored the judgment and decree of the trial Court by setting aside the judgment and decree of the Appellate Court. The High Court held that the document in question is only a mortgage by conditional sale since vesting absolute rights in the property had been postponed under the document and that since interest had been paid regularly there was no necessity for a sale deed to be executed by discharging the earlier mortgage and that there was no necessity for the appellant to agree to re-convey the property after the period of 3 years and that the value of the property though Rs.12,500/- had been shown as only Rs.3,000/- and that all these factors could only lead one to conclude that the document in question is only a mortgage by conditional sale. On these findings, the second appeal was allowed.

We have carefully perused the judgment under appeal in the second appeal and also the judgment and decree passed by the Appellate Court and also of the trial Court and perused the document conditional deed of sale for Rs.3,000/- dated 22.10.1970.

We have also perused the certified copy of the Tamil version of the document and the translated English version.

We heard Mr. V. Prabhakar, learned counsel for the appellant/defendant and Mr. K.K. Mani, learned counsel for the respondents/plaintiffs.

Mr. V. Prabhakar, learned counsel for the appellant, made the following submissions:-

- 1) the recitals in the disputed document Ex.A1/B1 are unambiguous and clearly refer to an absolute sale and not a mortgage by conditional sale;
- 2) the document in question had been executed due to the inability to discharge the principal under the simple mortgage and, therefore, the High Court should have held that the document in question is an outright sale;
- 3) the High Court has overlooked the very fact that the document in question recites that the property would be reconveyed if the money is paid within 3 years would clearly show that a right of re-purchase alone had been reserved while the sale effected was absolute;
- 4) the High Court has failed to note that the absence of stipulation as to payment of interest but containing recitals as to payment of taxes, handing over of possession and a right to re-purchase the property coupled with a pointed recital that the sale is being effected would

clearly establish that the document in question is an outright sale;

5) that the term "mortgage by conditional sale" referred to in Section 58(c) of the Transfer of Property Act, 1882 could only mean that an ostensible sale effected with the right to redeem being reserved vide in instant case an outright sale has been effected with a right to re-purchase alone being reserved which is sufficient in itself to indicate that the document in question is an outright sale deed;

6) that the High Court erred in interpreting the document in question as one of mortgage by conditional sale despite clear recitals therein that the sale is an absolute sale;

7) that the respondents having lost the right to re-purchase the property by not exercising the option as recited in the document within the period stipulated therein cannot turn around and contend that the document in question is a mortgage by conditional sale.

Mr. Prabhakar, learned counsel for the appellant, has taken us through the pleadings, judgments and also the Ex.A1/B1. In support of his contention, he relied on the following judgments:-

1) Tamboli Ramanlal Motilal (dead) by L.Rs. vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and Another, AIR 1992 SC 1236

2) Chunchun Jha vs. Ebadat Ali and Another, AIR 1954 SC 345

3) Bhaskar Waman Joshi (deceased) and Others vs. Shrinarayan Rambilas Agarwal (deceased) and Others, AIR 1960 SC 301

4) Umabai and Another vs. Nilkanth Dhondiba Chavan (dead) by LRs and Another, (2005) 6 SCC 243

According to Mr. K.K. Mani, learned counsel for the respondents, the document in question was

a) a mortgage by conditional sale;

b) pursuant to the sale, the appellant was put in possession of the suit property;

c) right to redeem the property within a period of 3 years was reserved failing which the appellant was entitled to have the patta transferred in her own name;

d) though the value of the property as on 22.10.1970 was Rs.12,500/- but the deed was executed for Rs.3,000/-;

e) since Munimalaiyan was unable to discharge the simple mortgage, he executed the document in favour of the appellant herein;

f) one of the property which was given as security for the simple mortgage was sold to the appellant with a right reserved to Munimalaiyan to re-purchase the same within a period of 3 years on payment of Rs.3,000/-.

He also invited our attention to the very same Ex.A1/B1 and placed strong reliance on the judgment of this Court in P.L. Bapuswami vs. N. Pattay Gounder, AIR 1966 SC 902

In the above factual background, the only question for determination is whether the document in question is a mortgage by conditional sale as contended by plaintiff/respondent herein or a sale out and out with a condition of re-purchase as alleged by the defendants. If the former, the plaintiff/respondent succeeds. If the latter

appellant/defendant are out of Court. Therefore, the entire case is based on the construction of the document.

Before proceeding to consider the rival submissions, we feel it is beneficial to reproduce the conditional deed of sale for Rs.3,000/- i.e. Ex.A1/B1 document

"Conditional Deed of Sale executed on 22.10.1970 (Twenty Second Day of October, Nineteen Seventy) by Munimayan, S/O Ariyan, Harijan, Cultivation residing at No. 252, Odyanda Halli, Kuruppu, Odayanda Halli Village, Denkanikottai Taluk, in favour of Chennammal, W/O Govindachami, residing at the said village, in respect of the properties mentioned hereunder in the presence of the Panchayatadar mentioned hereunder is as follows:

The Punja Land described hereunder is belonging to me as self acquired property and in my possession and enjoyment and registered as Document No. 4625/1961 dated 20.12.1961.

(1 Book 867 Volume Pages 63 to 70). As per the advice of the Panchayatdar I have executed this Deed of Sale in respect of the said Punja Lands (inclusive of the same properties) in favour of you for consideration of Rs.3,000/- (Rupees three thousand only). Since I could not pay the principle amount of Rs.3,000/- found in the document, I have handed over the possession of the undermentioned property to you today in the presence of the witnesses signed hereunder. Since I have received the sale consideration by way of returning the document dated 20.12.1961. I shall purchase the said property from you within the period of three years, at my cost. Till then, you shall pay the kist to the Government from Fasli 1380. In case of failure on my part to purchase the property from you within the period of three years, you and your heirs shall hold and enjoy the property with absolute rights, from the next day onwards. I undertake that neither my heirs nor myself and would give any trouble by indulging in civil and criminal proceedings, in respect of the said property. If it is so, it has no proof. My heirs and myself shall stand surety for the said sale consideration of Rs.3,000/-. You shall apply for transfer of patta for the property on the next day of the expiry of the three years period. I shall not raise any objection, then. This property is situated within the limits of Kelamangalam Panchayat Union, Rayalkottai, Panchayat.

SCHEDULE OF PROPERTY

Dharmapuri Dist. \026 Rayakottai Sub-Registration District \026 Denkarikottai Taluk \026 256 No. Oadayanda Halli Group \026 Thinu Halli Village, West of the land belonging to Manthedu Gounder, East of the land belonging to Kalan and Pathiran; South of the Onipuram Pathway; comprised within these limits, Punja AC.8.05 in Re-survey No. 80/1 Kist is 9.02. The said extent of the land is the subject matter of this conditional sale. Present value Rs.12,500/-.

L.T.I. of Munimayan

WITNESSES

- 1) Venkatappan s/o Thayappan @ Venkatan, Oadayanda Halli
- 2) M.M. Ramaiah, s/o M. Munivenkatan, Royakottai
- 3) L.T.I. of Narayana Gounder, s/o Thimmu Gounder, Oadayanda Halli

Scribed by : R.V. Venkataraman."

A careful perusal of the document would clearly show that the document has been couched in a simple Tamil language. The recitals are clear and unambiguous. It is seen from the document that Munimalaiyan was unable to discharge the simple mortgage. Panchayatdars intervene and amicably settled the matter. A deed was executed thereupon by Munimalaiyan in favour of the appellant herein and in and by the said deed one of the properties which was given as security for the simple mortgage was sold to the appellant with a right reserved to the said Munimalaiyan to re-purchase the same within a period of 3 years on payment of Rs.3,000/-. The right to redeem the property within a period of 3 years was specifically reserved. The recitals, in our opinion, would only show that the deed in question is not a deed of sale but a mortgage by conditional sale.

Section 58(c) of the Transfer of Property Act, 1882 deals with mortgage by conditional sale. The said section reads thus:

"58(c) Mortgage by conditional sale \026 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 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."

A mortgage by conditional sale takes the form of an ostensible sale of the property with the condition superadded that it shall become an absolute sale on default of payment on a certain date or subject to the proviso that the sale shall be treated as void and the property re-transferred on payment being made.

We shall now consider the judgments cited;

1) Tamboli Ramanlal Motilal (dead) by L.Rs. vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and Another, AIR 1992 SC 1236

This Court, in this case, held as under:

"13. The attendant circumstances could be looked into only to gather the intention. Such an intention, if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. If, therefore, there is no relationship of the debtor and the creditor, the question of it being a mortgage by conditional sale does not arise.

16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex.26 dated 11.12.1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter."

2) Chunchun Jha vs. Ebadat Ali and Another, AIR 1954 SC 345

We have perused the above judgment. The judgment explains as to how a document has to be construed. The judgment says that the intention must be gathered from the document itself and if the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used and if there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.

3) Bhaskar Waman Joshi (deceased) and Others vs. Shrinarayan Rambilas Agarwal (deceased) and Others, AIR 1960 SC 301

This Court, in this case, has explained the circumstance that the condition 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 postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. This Court further held that in a sale coupled with an agreement to re-convey 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 specified period. This Court also held that 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 relating to existing

facts.

4) Umabai and Another vs. Nilkanth Dhondiba Chavan (dead) by LRs and Another, (2005) 6 SCC 243

Paras 19 & 21 of the above judgment was relied on by counsel for the appellant which reads thus:

"19. It may be true that level of a document is not decisive. The true nature of transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wordings used in the document in question.

21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See Pandit Chunchun Jha vs. Sk. Ebadat Ali, (1955) 1 SCR 174, Bhaskar Waman Joshi v. Narayan Ramblidas Agarwal, (1960) 2 SCR 117, K. Simrathmull v. S. Nanjalingiah Gowder, 1962 Supp (3) SCR 476, Mushir Mohammed Khan v. Sajeda Bano, (2000) 3 SCC 536 and Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal, 1993 Supp (1) SCC 295."

5) P.L. Bapuswami vs. N. Pattay Gounder, AIR 1966 SC 902 (Four Judges) was cited by Mr. K.K. Mani, learned counsel appearing for the respondent. In this case, one Palani Moopan executed a document in favour of the defendant for a consideration of Rs.4,000/- on May 28, 1946. The document was in the form of a sale-deed but it contained a stipulation that the first defendant should re-convey the property to Palani Moopan on his repaying the amount of Rs.4,000/- after 5 years and before the end of the 7th year. This Court held as under: "that there were several circumstances to indicate that the document was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place, the condition for repurchase was embodied in the same document. In the second place, the consideration for the transaction was Rs.4,000/- while the real value of the property was Rs.8,000/-. In the third place, the patta was not transferred to the 1st defendant after the execution of the document by Palani Moopan. The kist for the land was also continued to be paid by Palani Moopan and after his death, by his sons. Lastly, the consideration for reconveyance was Rs.4,000/-, the same amount as the consideration for the original transaction. The plaintiff was entitled to preliminary decree for redemption under O.34, R.7, Civil Procedure Code, for taking accounts and for declaration of the amounts due to the 1st defendant under the document."

The above judgment, in our opinion, squarely applies to the facts and circumstances of the case on hand. They are:

- 1) the transaction in question is a mortgage by conditional sale;
- 2) the condition for re-purchase of 3 years was embodied in the same document;
- 3) the consideration for the transaction was Rs.3,000/- while the real value of the property was Rs.12,500/-;
- 4) patta was not transferred to the defendant after the execution of the document;
- 5) as per the evidence available on record, the kist for the land was continued to be paid by the plaintiff \026 Munimalaiyan;
- 6) the consideration for re-conveyance was only for Rs.3,000/-;
- 7) the appellant was given liberty to have the patta transferred and also to enjoy the property absolutely after the period of 3 years expired;

8) the trial Court granted a preliminary decree which was reversed by the lower Appellate court and again interfered with by the High Court.

We have considered all the attendant circumstances to cover the intention of the parties. The intention is explicitly expressed in the document itself. There is, therefore, no scope for looking at the attendant circumstances. There is no relationship of the debtor and the creditor. This Court also in *Tamboli Ramanlal Motilal (dead) by L.Rs. vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and Another*, AIR 1992 SC 1236 has pointed out that the Court should be guided by the terms of the document alone without much help from the case law. Viewed from any angle, we are of the opinion that the document in question is a mortgage by conditional sale.

In the result, the appeal stands dismissed and the judgment and decree of the High Court is affirmed. However, we order no costs.