Nanjamma Vs. H.N. Siddaiah

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Court : Karnataka

Decided On : Mar-30-2001

Reported in : ILR2001KAR4529; 2002(1)KarLJ239

Judge : H. Rangavittalachar, J.

Acts : Transfer of Property Act, 1882 - Sections 54 and 58; Transfer of Property (Amendment) Act, 1929 - Sections 58

Appeal No. : Regular Second Appeal No. 1293 of 1996

Appellant : Nanjamma

Respondent : H.N. Siddaiah

Advocate for Def. : V. Narayanaswamy and ;S. Mayanna, Advs.

Advocate for Pet/Ap. : B.T. Parthasarathy, Adv.

Disposition : Appeal dismissed

Judgement :

The Court

1. This is a plaintiffs second appeal. The plaintiff filed a suit against the respondent and Special Tahsildar in Original Suit No. 397 of 1986 for declaring that the plaintiff is the owner of the suit item 1 and for consequential permanent injunction

in respect of the suit item 2. The suit item 1, which is the subject-matter of the appeal is the land bearing Sy. No. 465/2 measuring 1 acre 5 guntas situated in Algud Village, T. Narasipur Taluk. She contended in the suit that the defendant-respondent herein by means of registered sale deed dated 11-8-1978 sold the suit schedule properly for a sale consideration of Rs. 2,000/-. Though the said sale deed provided for a condition for repurchasing the property by the defendant since the defendant did not repurchase it, the plaintiff is the owner in possession of the property and the first defendant is interfering with her possession. Therefore, the suit.

2. The first defendant filed a detailed written statement. He denied the transaction dated 11-8-1978 as an 'absolute sale deed'. According to him, it was only a 'mortgage by conditional sale'. Therefore, the plaintiff was not entitled for declaration of title. The defendant also denied the plaintiffs possession.

3. The Trial Judge, held that the transaction referred to was not a 'sale' as contended by the plaintiff. It was only a 'mortgage by a conditional sale'; and therefore not entitled for declaration of title. He has interpreted the contents, of the document and relied on the decision of the Supreme Court in this regard. He, however, injuncted the first defendant from interfering with the plaintiffs peaceful possession of the suit schedule property until the latter redeems the mortgage.

4. Aggrieved by the said judgment and decree, the plaintiff filed an appeal. The appellate Judge after reappraising the evidence, dismissed the appeal holding the transaction as an 'English mortgage'. These two judgments and decrees are under challenge.

5. At the time of admitting the appeal, the Court has framed the following substantial questions of law as arising for consideration.-

'1. Whether the Courts below are justified in arriving at the conclusion that the document dated 11-8-1978 executed by the respondents in favour of the plaintiff in respect of the Item 1 of the suit land is not an 'English mortgage' but a 'mortgage with conditional sale'.

2. Whether the judgments and decrees of the Courts below are sustainable in law when they are contrary to the facts, probabilities, circumstances of the case and evidence let in besides suffered from material irregularities'.

6. The document under which the plaintiff claims title contending that it is an 'absolute sale deed'; while the first defendant claims it as a 'mortgage by conditional sale' is marked as Ex. P. 1.

7. The Trial Court as well as the appellate Court relied on the following condition in Ex. P. 1 i.e.,

to hold that the transaction is a 'mortgage'. The question therefore that arises for consideration is whether the document Ex. P. 1 can be termed as a 'mortgage by conditional sale' or 'a sale'.

8. Before this Court, Sri B.T. Parthasarathy, the learned Senior Counsel appearing for the plaintiff-appellant contended by reading Ex. P. 1 that it is a sale deed and insofar as the conditions stated in the documents that the 'plaintiff should resell the property', is a condition burdening the plaintiff to resell after he having acquired a valid title. Hence, the document is only a 'sale' with a condition of repurchase. The learned Counsel further contended that the plaintiff is a helpless widow. Taking advantage of this fact, the defendant who though has sold the property is now raising a contention that the same is a 'mortgage', in view of there being appreciation in the value of the property. In support of the contention, learned Counsel referred to the decision of the Supreme Court in Bhoju Mandal and Others v Debnath Bhagat and Others. The same will be referred to at an appropriate place.

9. As against the contentions of B.T, Parthasarathy and Sri V. Narayanaswamy appearing for the respondent-first defendant, contended firstly that the consideration stated for sale and repurchase of land in Ex. P. 1 indicates that it can only be a mortgage.

10. In order to appreciate the rival contentions it is necessary to state, the definition of sale, mortgage and find out whether the transaction can be called a

'mortgage' or 'sale'.

11. The word 'sale' has been defined under Section 54 of the Transfer of Property Act as under:

'A transfer of ownership in exchange for a price paid or promised or part paid and part promised'.

12. 'Mortgage' has been defined under Section 58 of the Transfer of Property Act, 1882 as follows. -

'The transfer of an interest in specific immovable 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.

13. 'A mortgage by conditional sale', which is a relevant one for our purposes is defined under Section 58(c) 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 mortgage by conditional sale and the mortgage a mortgage by conditional sale'.

14. A 'mortgage' by its nature is essentially a 'loan transaction' where the relationship of debtor and creditor is established. The repayment of the loan is secured by the 'specific property' pledged by the debtor in favour of the creditor. Various types of mortgages like usufructory, English, simple, mortgage by deposit of title deed, anomalous, etc., mortgage by conditional sale are recognised and

defined by law. 'mortgage by conditional sale' is one such. It also resembles an 'English mortgage'. In both forms of mortgage, the ownership of the property pledged is liable to be transferred from the debtor to creditor on default of payment, with the difference that in English mortgage ordinarily the mortgagor enters into a covenant for the payment of debt and makes himself personally liable to pay the mortgage money,.

15. 'A mortgage by conditional sale' also closely resembles with a 'bona fide sale with a clause to repurchase', in the outer form, but differ widely in their incidents; and the various shades of differences are verynice but thin. These differences have been brought out and applied to solve various disputes by number of judicial decisions. I will only refer to the two decisions of Supreme Court referred to at the Bar.

16. In Chunchun Jha v Ebadat Ali and Another, a question came up for consideration as to 'when a given transaction can be called 'a mortgage by conditional sale' and its distinguishing features from that of 'a mortgage with a condition to repurchase'. After stating the difficulties normally faced by the Courts in answering which resulted in conflict of decisions, and how even after the legislature stepped in to remove the confusion, still the difficulty persisted, the Court has enunciated certain broad principles or tests to be applied for distinguishing one transaction i.e., 'a mortgage by conditional sale' from the other i.e., 'a mortgage with a condition to repurchase' in the following passages. On the difficulties faced by the Courts, at para 5, it is stated as under.-

'The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain'.

17. And, on the difficulties faced by the Courts in spite of legislative intervention and the tests to be adopted is stated at para 8 of the judgment, which is extracted herein.-

'Because of the welter of confusion caused by a multitude of conflicting decisions the legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. 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. But the converse does not hold good, that is to say the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant.

The legislature has made a clear-cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, choose not to use twodocuments, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage'.

18. Similarly, in the case of P.L. Bapuswami v. N. Pattay Gounder, a similar question viz., under what circumstances a transaction will be 'a mortgage by conditional sale' and its distinguishing features from that of 'a mortgage with a condition to repurchase' had come up for consideration. The Court interpreting the proviso to Section 58(c) of the Transfer of Property Act viz., about the legislative intervention to solve the difficulty in distinguishing 'a mortgage by conditional sale' and 'a mortgage with a condition to repurchase' has held as follows.-

'The proviso to Section 58(c) of the Transfer of Property Act was added by Act 20 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 is 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 definition of a 'mortgage by conditional sale' 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 relationship 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. The distinction between 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 question in each case is one of the determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its 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 the existing facts'.______________________

19. Thus, from the discussions made above, the following tests can be employed to distinguish 'a mortgage by conditional sale' with 'a bona fide sale, with a clause to repurchase.-

'(1) Whenever the documents embodying the transaction has to be construed, the intention must first be gathered in the first place from the document itself. If the words are explicit clear effect must be given to them, if however there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.

(2) If a transaction embodied in the document takes place after the amendment to Section 58(c) of the Transfer of Property Act by Act 20 of 1929, and if the sale and agreement to repurchase are embodied in separate documents that the transaction is not a mortgage.-

(i) if the transaction takes place after the amendment of Section 58(c) and the entire transaction is embodied in a single document, a presumption can safely be raised that the transaction is a mortgage, though such a presumption is always rebuttable by evidence;

(ii) if a reading of all the clauses in the document indicate that the relationship of 'debtor' and 'creditor' subsists between the parties then it is safe to lean in favour of the transaction being a mortgage. Some of the methods of finding out 'whether the relationship of creditor and debtor subsists' are:

'If the buyer agrees to transfer the property to seller for the same sum (with or without interest) advanced by him and described as a sale price'; (iii) if money paid by the buyer was not a fair price for the 'absolute purchase' of the property. This test to be applied in conjunction to the above tests;

(iv) it should also be added to the above that in doubtful cases Courts lean strongly to the construction most favourable to the person claiming right to redeem'.

20. Reverting to the facts of the case, in the background of the above tests whether the 'Document Ex. P. 1' is a 'mortgage by conditional sale' or a 'sale'. In answer to the same it is necessary to look at Ex. P. 1. Ex. P. 1 is in Kannada. The transaction regarding sale and repurchase is embodied in a single document Ex. P. 1. It states 'that the first defendant who was in need of money for improving certain other lands, house repairs and clearing debts wanted to sell the property and the plaintiff has agreed to purchase for a safe consideration of Rs. 2,000/-', that after the execution of the said document, the plaintiff shall enjoy the same as an absolute owner with all the rights of ownership. But the further statements or conditions in Ex. P. 1 relevant ones for purposes stated is 'that in case the first defendant repays the sale consideration of Rs. 2,000/- after 6 years within 7 years

from the date of sale, the plaintiffshould reconvey without any obstructions or objections'; and the document is described by the parties as 'a conditional sale'.

(emphasis supplied)

21. Regarding the market value of the property on the date of the document, Ex. P. 1, though neither of the parties have adduced any clear evidence. But, during trial the plaintiff has pleaded her ignorance to a suggestion that market value of each guntas of the dry land in the year 1978 i.e., on the date of Ex. P. 1 was valued for Rs. 500/-, i.e., more than 20.000/- per acre. Having feigned her ignorance about the market value in the plaint, the plaintiff has stated that 15 guntas of the land stated under Ex. P. 1 was mortgaged by the defendant 1 for a sum of Rs. 1,500/-on 30-4-1979 which factor clearly shows the market value of the property alleged to have been sold under Ex. P. 1 is certainly very much more than Rs. 2,000/-, per acre.

22. That apart the evidence of plaintiff gives an indication regarding the intention of the parties for executing Ex. P. 1 which is of the following effect in her own words:

23. Thus, Ex. P. 1 fulfills the tests to hold it as a mortgage viz., the clauses regarding sale and condition of repurchase are expressed in a single document. The seller should resell the property at the same price advanced by the buyer and the market value is more than the price stated in Ex. P. 1.

24. For the reasons stated above, the substantial questions of law framed are answered holding that Ex. P. 1 is a 'mortgage by conditional sale' and the Courts below are correct in holding so and dismissing the suit of the plaintiff for declaration of title. The appeal is dismissed. No costs.