

Bidha Ram and ors. Vs. Chhidda

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Court : Allahabad

Decided On : Jan-25-1950

Reported in : AIR1950All430

Judge : Bind Basni Prasad, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58

Appeal No. : Second Appeal No. 2562 of 1946

Appellant : Bidha Ram and ors.

Respondent : Chhidda

Advocate for Def. : M.L. Chaturvedi, Adv.

Advocate for Pet/Ap. : S.B.L. Gour, Adv.

Disposition : Appeal allowed

Judgement :

Bind Basni Prasad, J.

1. This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage. On 3rd January 1936, the plaintiffs appellants executed ostensibly a deed of sale in favour of the defendant-respondent in respect of a house situated in the city of Agra for a sum of Rs. 150 only. Towards the end of this deed there was the

following condition to the sale:

'There is one important condition which has been agreed to between the parties. If within the period of three years I, the vendor, pay Rs. 150 in a lump sum to the vendee I shall be entitled to the house and at my own expense I shall cause a sale-deed to be executed in my favour by the vendee. Otherwise after the expiry of the period fixed above this deed of sale will become a deed of absolute sale. I have, therefore, executed this deed of conditional sale providing for a period of three years in favour of the vendee.'

2. On the same date, the appellant executed a rent deed also in favour of the defendant, respondent. It begins with a recital that the appellant had executed a deed of conditional sale on the same day. It provides that the appellant shall continue in possession of the house on a monthly rent of Rs. 3. It further stipulates that the liability to keep the house in repairs and to pay its taxes shall be upon the tenant, viz., the appellant.

3. The plaintiffs contend that the transaction was in reality a mortgage, although ostensibly it was a sale. On this ground they brought a suit for redemption. Both the Courts below have held that the transaction was an out and out sale and not a mortgage by conditional sale.

4. The sole point for determination is whether the transaction before us is a mortgage by conditional sale or a sale with a condition of repurchase.

5. Clause (c) of Section 58, T. P. Act defines a mortgage by conditional sale as follows:

'(c) 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 mortgage a mortgage 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."

6. One thing is clear from the above definition and it is this. A mortgage by conditional sale is ostensibly a sale. The law provides that even though a transaction may ostensibly be a sale it will nevertheless be treated as a mortgage if the intention was not an out and out sale but to advance the money to the transferor and to give him a right to get back the property on the repayment of the money and if the property was transferred only for the purpose of serving as a security for the money advanced, The real test in such cases is to see the intention of the parties. Intention can be judged only from the surrounding circumstances. If we were to go only by the language used in the deed then there would hardly be any case of a sale which could be treated as a mortgage. Learned Civil Judge has relied upon two cases of this Court in support of his finding : The first case is *Bishan Lal v. Banwari Lal* : AIR1939 All713 . I am unable to see how this case lends support to the view which the learned Civil Judge has taken. It was held in that case that the question whether a deed is a mortgage by conditional sale or an out and out sale is a question which falls to be determined on a consideration of the terms of the deed itself and of the surrounding circumstances. In that case a lady had executed a sale deed by which she had conveyed the property to the vendee for a reasonable price. The deed contained a condition that if she should repay the amount of the sale consideration to the vendee within one year the vendee would be bound to reconvey the property. It was in those circumstances that the Court held that the terms of the document were consistent only with an intention upon the part of the executant to make an absolute sale retaining to herself the right to repurchase within one year. Learned Civil Judge has not attached due weight to the circumstances of the present case.

7. The second case relied upon by the learned lower appellate Court is *Thakra Singh v. Sheo Nath Singh* : AIR1940 All227 . The principle laid down in this case also is the same as in *Bishan Lal v. Banwari Lal* : AIR1939 All713 , Their Lordships held that

'it cannot be broadly laid down that where the contract of sale and the contract of repurchase are evidenced by a single document the transaction is a mortgage by conditional sale and is not a sale out and out with the condition of repurchase.'

It was further held that 'in every case it is a question of intention to be gathered from the document itself and the surrounding circumstances.'

8. Now what are the circumstances in the present case The house which was transferred to the respondent is situated in the important city of Agra. It was partly kachcha and partly pakka. Its net annual rental value must be taken as Rs. 36 because while letting out the house to the appellant the stipulation was that the appellant was to meet the coats of repairs and was also to pay the taxes. Capitalising this profit at the rate of 3 per cent per annum, the value of the house would be Rs. 1200, We find, however, that the transfer was made only for Rs. 150. The second circumstance to be noted is that despite the sale, the transferor continued in possession of the property. The third fact to be noted is that in the deed itself the transfer has been described as a conditional sale and not an out and out sale. Further it appears from the deed that the appellant was in pressing need of money for the marriage of his son and for raising this money he had to enter into this transaction, His anxiety to save his house from passing out completely from his hands is evident from the condition quoted above appearing in the deed of sale. In *Abdul Rahman v. Mt. Bismillah Begum* 0065/1939 : AIR1939 All539 , it was held :

'In order to determine whether the transaction amounts to an out and out sale or was a mortgage by conditional sale, the following tests may be applied to determine the case: (1) The existence of a debt. (2) The period of repayment; a short period being indicative of a sale and a long period of a mortgage, (3) The continuance of the grantor in possession indicates a mortgage. (4) A stipulation for interest on repayment indicates a mortgage. (5) A price below the true value indicates a mortgage. (6) A contemporaneous deed stipulating for a reconveyance indicates a mortgage.'

It was, however, pointed out in that case that any one of the circumstances mentioned above will not necessarily prove that a sale-deed with a condition of

repurchase is in fact a mortgage by conditional sale.

9. Now applying the above tests we notice that in the present case several of them exist. The grantor continued in possession of the property. The price was far below the true value of the property. Though there was no stipulation of interest in clear words yet the agreement by the grantor to pay rent was in the nature of a stipulation for interest at the rate of 24 per cent per annum. There is no question of any contemporaneous deed stipulating for reconveyance in the present case because that stipulation exists in the deed of sale itself, It is true that the period of repayment here is only three years, but this by itself is only an indication of the nature of transaction and not a conclusive factor. In view of the circumstances just stated I am of opinion that the transaction in reality was one of mortgage by conditional sale. The respondent advanced a sum of Rs. 150 to the appellant on the security of the house worth Rs. 1,200 and the rent which the appellant agreed to pay was in the nature of interest on this loan.

10. Learned counsel for the respondent has laid great emphasis upon two contentious : (1) that the language of the deed itself does not show that the transaction was one of mortgage; and (2) that there should be a proof of the relationship of the mortgagor and the mortgagee.

11. If we were to go solely by the language of the deed in transactions of mortgage by conditional sale, then the factor of surrounding circumstances on which so much emphasis has been laid in the decided cases would have no meaning. The statute itself provides that the transaction is ostensibly a sale and the duty has been cast upon the Courts to determine whether in essence the contract between the parties was one of mortgage or of an absolute sale.

12. In *Man Singh v. Guman Singh* : AIR1929 All619 , it was held that it was not necessary that the deed itself should contain the words, mortgage, mortgagor, mortgage money or security of the loan. If such words were expressly entered in the deed the transaction would hardly be an ostensible sale.

13. Learned counsel for the respondent has relied upon *Ram Das v. Brinda Ban Ram* : AIR1931 All113 . That was a case in which the Court had to deal with

documents executed in 1864, that is to say, about seventy years before the case came up for hearing. In the peculiar circumstances of that case it was held that:

'where a document is ostensibly a sale deed and has held its ground as such for a long course of years, the onus of establishing that the transaction is not what it purports to be lies upon the party who disputes its nature.'

It was further held that in a case of that nature 'the matter has primarily to be determined upon a construction of the document or documents concerned.' It was, however, added that it was permissible to appeal to the surrounding circumstances for determining the real nature of the transaction. Their Lordships observed;

'If the ostensible vendee, out of courtesy and kindness, agrees, to convey the property, this will be an important circumstance to indicate that the transaction was a sale and not a mortgage. In order to constitute a mortgage, there must be a debt and there must be a security. A stipulation to pay interest on the amount of the purchase money may be an indication of the fact that the transaction is a mortgage. If the entire transaction shows an accountability on the part of the ostensible vendee, this would warrant an inference in favour of a mortgage, It may also be an important factor as to whether the sale consideration represents the actual value of the property. These and other cognate tests may be reasonably applied for determining the question in issue between the parties.'

14. No hard and fast rule can be laid down as to when a transaction is an out and out sale and when a mortgage by conditional sale. It depends upon so many circumstances.

15. I hold that the transaction in the present case is one of mortgage by conditional sale and not an out and out sale.

16. The appeal is, therefore, allowed with costs of all the Courts. A preliminary decree under Order 34, Rule 7, Civil P. C., shall be framed. Six months are allowed for the payment of the mortgage money which is hereby declared to be Rs. 150.

17. Leave for Letters Patent Appeal was asked for and granted.

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