

Natesa Pathar (Died) and Others Vs. Pakkirisamy Pathar and Others

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Court : Chennai

Decided On : Feb-05-1996

Reported in : AIR1997Mad105; 1996(1)CTC337

Judge : Raju, J.

Acts : [Transfer of Property Act, 1882](#) - Sections 58; Bihar Tenancy Act - Sections 40; [Code of Civil Procedure \(CPC\), 1908](#) - Order 34, Rule 7; [Stamp Act, 1899](#)

Appeal No. : S.A. No. 1809 of 1982

Appellant : Natesa Pathar (Died) and Others

Respondent : Pakkirisamy Pathar and Others

Advocate for Def. : Mr. T. R. Rajagopalan

Advocate for Pet/Ap. : Mr. S. Parthasarathy

Judgement :

1. The above Second Appeal has been filed by the first defendant in O.S. No. 56 of 1978 on the file of the District Munsif of Ariyalur, who died during the pendency of the above Second Appeal and whose Legal Representatives are pursuing the above proceedings in this Court against the Judgment and decree of the learned Subordinate Judge, Ariyalur, dated 10-9-1992 in A.S. No. 130 of 1981 reversing the judgment and decree of the learned Principal District Munsif, Ariyalur dated 28-

1-1981 in O.S. No. 56 of 1978.

2. The Suit O.S. No. 56 of 1978 was filed by the first respondent herein for redemption of the suit property from the mortgage by conditional sale deed dated 20-3-1959, for directing the first defendant to surrender possession of the suit property to the plaintiff, for ascertaining the mesne profits from the date of plaint till delivery of possession from the first defendant to the plaintiff and for costs in the following circumstances;-- The plaintiff claims that the suit property along with other properties originally belonged to one Valambal, who sold the same to one Ramasamy Pathar, husband of the second defendant under a sale deed dated 4-1-1932, that again Valambal and her sons have sold the residuary portion of the house and houlds site portions to one Govindasamy Father, Sundaresa Pathar and Natesa Pathar (1st Defendant), that at the time of sale in the year 1932, the suit property remained only as a pial portion and in the year 1947, Ramasamy Pathar converted the pial portion into a shop which was assessed to house tax by Jayangondam Town Panchayat and was given separate door number as 32 and that the said Ramasamy Pathar was in continuous possession and enjoyment of the shop, that he mortgaged the same to the first defendant on 20-3-1958 for Rs.200/- by conditional sale, that the first defendant was in possession and enjoyment of the property only as a mortgagee and the plaintiff has since purchased other house portions of Ramasamy Pathar on 18-8-1977 and defendants 2 and -3 have surrendered possession of the property except the suit property on 17-8-1977 and when the plaintiff paid Rs. 250/- to defendants 2 and 3 out of the sale consideration to redeem the mortgage by conditional sale dated 20-3-1958, the first defendant refused to receive the said amount and permit the mortgage to be redeemed. It is in such circumstances, the suit came to be laid after exchange of notices between the parties making claims and counter claims. The substantial plea taken on behalf of the first defendant was that it was an outright sale with a condition for re-purchase within the stipulated time and inasmuch as the time stipulated for re-purchase was long over, there was no question of the plaintiff being entitled to any relief much less the relief of redemption as though it is a mortgage. It was also contended that the suit for redemption was not maintainable and if at all a suit should have been in the form of a declaration of title. Defendants 2 and 3 supported the claim of the plaintiff contending that de-fendams 2 and 3

and Ramasamy Pathar have been in enjoyment of the pial portion that Ramasamy Pathar borrowed Rs. 250/- on 30-3-1958 from the first defendant and executed a mortgage by conditional sale deed in respect of the suit property, that the possession and enjoyment of the suit property by the first defendant was only as that of a mortgagee towards interest, that the suit property was worth Rs. 2000/- even in the year 1955 and since defendants 2 and 3 refused to sell the property in favour of the first defendant, the first defendant started denying the right to redeem the mortgage by conditional sale, that the plaintiff is really in possession and enjoyment of other portions only of the properties except the suit item and that the suit may be dismissed as prayed for.

3. On the above pleadings and claims and counter claims of the respective parties, the suit was tried and oral and documentary evidence was marked in support of the respective claims and stand taken by the contesting parties. A Commissioner was also appointed and the report and plan of the Commissioner were marked in the proceedings. After considering the materials placed on record, the learned trial Judge by, his judgment and decree dated 28-1-1981 dismissed the suit on the view that the document Ex. A. 5 dated 20-3-1958 was only a sale deed with a condition for re-purchase of the suit property within the stipulated time and that, therefore, the plaintiff was not entitled to redeem the suit property. The plea of adverse possession raised by the first defendant was rejected on the ground that being a person holding title, right and interest of the property, cannot claim right of adverse possession. Aggrieved, the plaintiff pursued the matter before the lower Appellate Court. The learned first Appellate Judge, on a consideration of the materials placed on record and on analysing the position of law on the subject, has chosen to accept the stand, of the plaintiff that the document Ex. A-5 was only a mortgage by conditional sale and not a sale with a condition for re-purchase and on that view, decreed that suit, granting relief of redemption as prayed for. Aggrieved, the first defendant filed the above Second Appeal.

4. Mrs, Pushpa Sathyanarayanan, learned counsel appearing for the appellants, reiterated the stand taken before the Courts below on behalf of the first defendant that Ex. A-5 is a document of sale with a condition for re-purchase within the stipulated time and not a mortgage by conditional sale as claimed by the plaintiff

and the lower Appellate Court has misdirected itself in construing the nature and character of the document to be otherwise. Mr. S. Parthasarathy learned counsel appearing for the plaintiff, respondents, contended that the trial Court was in error in construing the the document and the Lower Appellate Court was right in construing Ex. A-5 to be a mortgage by conditional sale and the said construction only accords with the correct and well settled principles laid down by judicial pronouncements on the subject and that, therefore, no interference is called for the Second Appeal at the instance of the appellants.

5. I have carefully considered the submissions of the learned counsel appearing on either side. It would be appropriate to advert to some of the decisions of the various High Courts and that of the Apex Court placed before me for my consideration by the learned Counsel appearing on either side before undertaking a consideration of the issue in the appeal, namely the nature and character of the document Ex. A-5 and the character of the transaction comprised therein. The decision in : [1955]1SCR174 . (Chunchun Jha v. Ebadat Ali) is that of the Apex Court, by a Bench of four Learned Judges, wherein the question, whether a given transaction was a mortgage by conditional sale or a sale Outright with a condition of repurchase was considered in the light of Section 58(c) of the [Transfer of Property Act, 1882](#). It was Held therein that the question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase must be decided on the facts of each case in the light of certain broad principles of which the foremost is the intention of the parties which would operate as a determining factor to a great extent. While emphasising the fact that the rule of law on the subject should be more one dictated by common sense and the difficulties would arise only in the border line cases where there is ambiguity and certain amount of confusion caused by a multitude of conflicting decisions, it was also held therein that 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 and that the converse does not also 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 effect or purports to effect the sale, then it is a matter for construction as to what was meant. Their

Lordships have also held that in view of the amendment to Section 58(c) of the Transfer of Property Act, the legislature must be considered to have made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages and consequently, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words, and that if the conditions of Section 58(c) are fulfilled, the deed should be construed as a mortgage. The learned Judges have analysed the documents that fell for their consideration with reference to the various terms found in the document and ultimately applying the principles laid down in the earlier decisions to the case held that the document before them was a mortgage by conditional sale falling under Section 58(c) of the Act. As for the principles to be kept in view in the matter of construction, it was held as follows:

'(6), The first is that the intention of the parties is the determining factor: see -- 'Balkishen Das v. Legge' (1900) 27 IA 58 (PC). But there is nothing special about that in this class of cases and here, as in every other case, where a document has to be construed, the intention must be gathered, in the first place, from the document itself. 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. If however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.'

The Court further held, while analysing the documents as follows :-

'(14) Now, as we have already said, once a transaction is embodied in one document and not two and once its terms are covered by Section 58(c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion.

(15). There are no express words here which say that this is not a mortgage but there is ambiguity, so we must probe further. The respondents, who claim that this

is a sale and not a mortgage, rely on the following circumstances. They are all culled from the deed itself.

(16). First, they point to clause (5) which says that the transferee has been made the absolute proprietor in place of the executants. Those, they say, are the operative words and point to an out and out transfer of title. Next, they point to clause (2) where the executants say that they have no other means of raising the money they want except by selling the property. The respondents argue that the word 'sale' could not have been used inadvertently because it is contrasted with a mortgage in the very same sentence. The word 'mortgage' is also used in clause (1), therefore it is clear that when a mortgage is intended the word 'mortgage' is used. It must follow that when the word 'sale' is used, a sale must have been meant. The only weakness in this argument is that when a mortgage is by conditional sale this is the form it has to take, because Section 58(c) postulate, that there must be an 'ostensible sale' and if a sale is ostensible it must necessarily contain all the outward indicia of a real sale. The question we are considering can only arise when the word, 'sale' is used and, of course, a sale imports a transfer of title. The use of the words 'absolute proprietor in our places' carries the matter no further because the essence of every sale is to make the vendee the absolute proprietor of what is sold. The question here is not whether the words purport to make the transferee an absolute proprietor, for of course they must under Section 58(c), but whether that is done 'ostensibly' and whether conditions of a certain kind are attached'.

Vis-a-vis on the question of consideration for the transaction and the absence of stipulation for payment of interest, it was observed as follows: --

'(20.) The point made on behalf of the respondents about the adequacy of the consideration and the absence of interest can be explained. The transferee was to take possession of the property and would thus get the produce and it is evident to us from the tenor of the document that he was not to be accountable for it. We say this because the indemnity clause (Clause 9) says in sub-cl, (b) that in the event of the transferee's possession being disturbed the executants would, among other things, pay him, in addition to damages, the entire consideration together with

interest at 2 per cent per month from the date of the deed and would not require the transferee to account for the usufruct.

It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustics with whom he was dealing and that he would not have agreed to account for the profits; indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt and the value of the property as is ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act'.

6. In : (1956)1MLJ388 (B. A. Khan alias Bahadur Ali Khan v. Nawaz Khan, a single Judge of this Court had dealt with this issue and after applying the principles laid down in Chunchun Jha case : [1955]1SCR174 . The document, which was under consideration, was analysed and held to be one of mortgage by conditional sale in the following manner:--

'There are five circumstances in this case showing the document under consideration is a mortgage by conditional sale. First of all, the period fixed for repayment, viz., six years cannot be considered to be a long period for a mortgage in the circumstances of this case, because the document was executed in 1937 which was a period of economic depression. In fact, Madras Act IV of 1938 and other ameliorative measures came into existence for that reason. Though generally speaking a short period is indicative of sale and a long period of a mortgage, in the context in which this document has been executed the period seems to be indicative of a mortgage. Secondly, the amount agreed upon as the price of repurchase is the same as the consideration for the original sale and this is generally considered to be a circumstance indicative of a mortgage by conditional sale. Thirdly, the fact that the document has been drafted in the form of a sale deed would not make any difference because a mortgage by conditional sale is an ostensible sale, that is, it is executed in the form of a sale with a

condition attached to it. Forthly, the fact that there are no two documents in this case but only one in which the condition regarding repurchase is embodied would be indicative of the transaction not being an outright sale. Fifthly, there is another point in favour of the appellant and that is that the surrounding circumstances show that there was the relationship of debtor and creditor between the parties existing at the date of the suit transaction'.

in : (1956)2MLJ565 (Ramachandrayya v. Laxminarayana Rao), another learned Judge of this Court has held as hereunder :--

'The learned District Judge, however, has not accepted the evidence as to the price and is of the opinion that the price of Rs. 900/- would be a reasonable price for the property. Further, he has not given due weight to the several circumstances referred to and relied on by the learned District Munsif, and has apparently erred in assuming that to establish that a particular document is a mortgage by conditional sale as per the definition in Section 58(c) it must be first of all established that there is a mortgagor, mortgagee, mortgaged property and mortgaged money and that without showing that there was a mortgage relationship at the time of the execution of the ostensible sale deed, Section 58(c) cannot be invoked. I am unable to appreciate the reasoning of the learned Judge when he says that a person who wants a document to be construed as a mortgage by conditional sale should show that he was the mortgagor, that there was a mortgagee, a mortgaged property and mortgage amount. There need not be a pre-existing mortgage transaction in order to create mortgage by conditional sale. It is enough if the document is in accordance with the requirements of Section 58(c) of the Transfer of Property Act. In order to further support the intention of the parties that they contemplated only a mortgage by conditional sale, there are the circumstances referred to as to the price, the pre-existing creditor and debtor relationship, the purchase of the stamp papers in the name of the transferor, etc. I am unable to agree with the learned District Judge in the view he has taken as to the construction of the document, and the learned District Munsif has properly construed the document as a mortgage by the conditional sale and passed a decree for redemption'.

In : [1960]2SCR117 , (Bhaskar v. Shirma-ryan), the Apex Court had an occasion to lay down the tests for deciding the question as to whether a particular document is a sale or a mortgage by conditional sale. Justice Shah, as the learned Judge then was, has highlighted the principles to be kept under consideration and the nature of exercise to be undertaken as follows:--

'(7) 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 circumstances 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 postulates the creation by the transfer of a relation of mortgagor and the 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. P. Parthasaradhi* 51 IA 305 : AIR 1924 PC 226 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 iterating the

discription 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 circumstance. 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.'

Thereupon, the learned Judge has undertaken an analysis of the character of the document which fell for their Lordship's consideration and held as follows:

'(8) 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 transferee shall reconvey the properties within five years from the date of the conveyance 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 liable to pay damages shall be committed; (5) 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 (' 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 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 therefore, 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 *Narasingerji's case* 51 I A 305 : AIR 1924 PC 226 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 learned Judge has also adverted to the circumstances surrounding the deed at the date of the execution and the subsequent conduct of parties as factors indicative of the character, of the transaction, in addition to the element of adequacy of the sale price which was also considered to be a relevant factor.

7. In : AIR1961 Mad276 , (N. Patti Gounder v. L. Babuswami), a learned single Judge of this Court while adverting to some of the earlier decisions of this Court and that of the Apex Court in : [1960]2SCR117 (supra), construed the document

under consideration to be one of sale, the Apex Court on an appeal taken from the said decision has reversed the judgment of the learned single Judge and once again the Apex Court had an occasion to exhaustively deal with the principles to be observed in this connection in the decision reported in : [1966]2SCR918 .

8. In : AIR 1963 SC1906 , (Bhoju Mandal v. Debnath Bhagat), the Apex Court had an occasion to consider the issue in a case arising out of an appeal from the decision of the Patna High Court in the decision reported in : AIR1958 Pat371 . Subba Rao, J., as the learned Judge then was, held as hereunder:

'4. There is a clear legal distinction between the two concepts, a mortgage by conditional sale and a sale with a condition of repurchase. The former is a mortgage, the relationship of debtor and creditor subsists and the right to redeem remains with the debtor. The latter is an out and out sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of repurchase. The question to which category a document belongs presents a real difficulty which can only be solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. Deckled cases have laid down many tests to ascertain the intentions of the parties but they are only illustrative and not exhaustive. Let us therefore look at the terms of the document extracted above.'

After advertng to the striking features of the document concerned and while distinguishing the case before, them from the case earlier considered in : [1955]1SCR174 (supra), it has been held as hereunder:

'(7) Reliance is placed by the learned counsel for the appellant on a judgment of this Court in Chunchun that v. Ebadat Ali : [1955]1SCR174 . It may be stated at the outset that for ascertaining the intention of the parties under one document a decision on a construction of the terms of another document cannot ordinarily afford any guidance unless the terms are exactly similar to each other. It is true that some of the terms of the document in that case may be approximated to some of the terms in the present document but the said judgment of this Court really turned upon a crucial circumstance. There is one important recital found in the document in that case which does not appear in the document in question and

there is another important recital found here which is not present there. There the document under scrutiny was executed on April 15, 1930. Before the execution of the document, the executants initiated commutation proceedings under S. 40 of the Bihar Tenancy Act. Those proceedings continued till February 18, 1931 i.e. for some ten months after the deed. The executants borrowed Rs. 6561 to enable them to carry on the commutation proceedings even after they executed the document. Bose, J. speaking for the Court advertent to the said circumstance observed at page 183: This, we think, is crucial. Persons who are selling their property would hardly take the trouble to borrow money in order to continue revenue proceedings which could no longer benefit them and could only enure for the good of their transferees.' It is, therefore, obvious that this circumstance clinched the case in favour of the executants. The crucial circumstance on the present case, namely that a smaller extent was sold for a higher amount in discharge of an earlier mortgage of a larger extent for a smaller amount was not present in that case. The said crucial circumstances make the two cases entirely dissimilar and therefore the said judgment of this Court is not of any help in construing the document in question. On a consideration of the cumulative effect of the terms of the document in the context of the surrounding circumstances we hold that the document in question is not a mortgage but a sale with the condition of repurchase. The conclusion arrived at by the High Court is correct.'

In : AIR 1966 AP252 (Koteswara Rao v. Sambiah), a Division Bench of the Andhra Pradesh High Court had an occasion to construe a document and in the light of the peculiar features and terms and conditions of the document held the same to be one of outright sale; the relevant head-note which culls out the principles may be set out below:

'Held (1) that the fixation of a short period for the exercise of the right of reconveyance was indicative of a sale rather than a mortgage. The fact of making time essential for the exercise of the right was also a pointer in the same direction. Thus, the parties did not contemplate the relationship of debtor and creditor or mortgagor and mortgagee.'

(2) That the purchaser under Ext.B. obtained immediate possession of the property which would not have been the case if a mortgage by conditional sale was within the contemplation of the parties. While the purchase had no right to insist upon the repayment of the money, the seller alone was given the option to repurchase the property.

(3) That the real transaction taking place two years prior to the execution of Ext. A. did militate against the theory that the transaction in question was only a mortgage by conditional sale. Therefore, the circumstance that both Exs.A and P-I came into existence simultaneously was of no avail to the seller appellant.

(4) That an agreement to pay interest by transferor was not indicative of the transaction being a mortgage by conditional sale.

Hence, the two instruments read together establish that the transaction was an outright sale and not a mortgage by conditional sale and that the transferor was not entitled to redeem it.

The test in cases of this kind is the intention of the parties to be gathered from the language of the documents themselves. The meaning of the instrument has to be collected from a fair reading of the two documents constituting a single transaction. (1890) ILR 12 All 387 (PC) and AIR 1916 PC 49, Rel. on).'

In : [1966]2SCR918 (P. L. Bapuswami v. N. Pattay Gounder), the Apex Court, while reversing the decision of a learned single Judge of this Court reported in : AIR1961 Mad276 (supra) has adverted to several circumstances pertaining to the document under their Lordships' consideration to come to the conclusion that the document was really a mortgage by conditional sale cannot a sale with a condition for retransfer. It was held therein as follows (at p. 903 of AIR) :--

'The proviso to this clause 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 clauses 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 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 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. 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 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 that manner the language of the deed was related, to existing facts

6. We consider that in the present case there are several circumstances to indicate that Ex.B.I was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place, there is the important circumstance that the condition for repurchase is embodied in the same document. In the second place, there is the significant fact that the consideration for ' Ex.B. 1 was Rs. 4,000/-, while the real value of the property was, according to the Munsif and the Subordinate Judge, Rs. 8,000/-. The High Court has dealt with this question and reached the finding that the value of the property was Rs. 5,500/-, but it is submitted by Mr. Ganapathi Iyer on behalf of the appellant that the question of valuation was one of fact and the High Court was not entitled to go into the question in the second appeal. The criticism of learned counsel for the

appellant is justified and we must proceed on the basis that the valuation of the property was Rs. 8,000/- and since the consideration for Ex.B.I was only Rs.4,000/- it was a strong circumstance suggesting that the transaction was mortgage and not an outright sale. In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Ex.B.I by Palani Moopan. It appears that defendant No. 1 did not apply for the transfer of patta and the patta admittedly continued in the name of Palani Moopan even after the execution of Ex.B.I. Exs.A-6 and A-7 are certified copies of thandal extract of patta for the years 1945-54 and they prove this fact. These exhibits also show that the plaintiff had obtained patta for the land on the basis of Ex.A.2. The registered deed of transfer of patta was executed by the sons of Palani Moopan in favour of the plaintiff. There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000/- the same amount as the consideration for Ex.B.I. Having regard to the language of the document Ex.B. 1 and examining it in the light of these circumstances we are of the opinion that the transaction under Ex.B.I was mortgage by conditional sale and the view taken by the High Court with regard to the legal effect of the transaction must be reversed. It follows, therefore, that the plaintiff is entitled to a 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 Ex.B.I."

9. In : AIR1974 Mad311 (Murugan v. Jayarama Pillai), a Division Bench of this Court considered the various decisions of the Supreme Court referred to above in construing the document before them and held as could be noticed from the head-note which has brought out effectively the substance of the decision as hereunder:--

'(A). The circumstances that the reconveyance was for the same amount as the consideration for the ostensible sale, that the condition regarding the reconveyance was embodied in the very same document, that the document described itself as a sale which was to take effect after a particular time limit, that the consideration was for an odd amount (Rs. 3826.50) were held to be clearly

indicative of the fact that the document was a mortgage by conditional sale and not an outright sale with a right to repurchase. An omission to mention interest on the sum would not make it an outright sale, in view of the fact that the defendant immediately after execution of document was put into possession and was to enjoy property in lieu of interest.'

In : AIR1975 Mad282 (Prakasam v. Rajambal) yet another Division Bench of this Court has considered the very issue. The Division Bench has held as hereunder (at pp. 283 to 285 of A,IR) :--

'7. It is seen from the evidence that the consideration stated in the document works out at the rate of Ra. 1,015/ - per acre and that actually the value of the property at the time of the transaction was much more than what is recited in the document. Even D.W.3 the Karnam of the village, who was examined on behalf of the defendant, admits in cross-examination that in 1948, nanja lands in Killiyur were sold from Rs. 700 to Rs. 1,700 per acre, though he would add that the suit lands were not worth more than Rs. 1,000 per acre then. The plaintiff has produced a sale deed, Ext.A-3 (registration copy) dated 18th March, 1953 under which the property was sold at the rate of Rs. 2,586 per acre. There is no dispute that that property is adjoining the property now under 'this discussion except that the sale under Ext.A-3 was about 5 years after the suit transaction. But there is no evidence to show that the price of properties was increasing in that area or that the increase was so much as from Rs. 1,000 to Rs. 2,500 per acre. We should also bear in mind that the suit property is an agricultural land and unlike house-sites in urban area, the increase in value of agricultural lands could not have-been so phenomenal. In Ext.B-14, dated 7th August, 1962 which is a lawyer's notice issued by the plaintiff prior to the filing of the suit, the plaintiff had stated that the property was worth much more than Rs. 30,000 at the time of the transaction. Of course, in the reply notice, the defendants had denied that the property was so valuable. But in spite of the assertions by the plaintiff, the defendants had not chosen to let in proper evidence to discredit the evidence of the plaintiff that the suit property was much more valuable than what was recited in the document itself. We have also got the admission of the Karnam as, D.W.3, that even at the time of the registration of the document, no patta transfer application was filed. If really the

transaction was intended to be a sale, one would normally expect that such a patta transfer application would be filed even at the time of the registration. We find in this case that as late as August, 1962 there was no patta transfer and that after the lawyer's notice was issued by the plaintiff to the defendants, the defendants appear to have got the patta transferred just prior to the suit.

8. One other important circumstance in this case is that admittedly Shanmuga Muda-liar, provided the stamp papers for the execution of Ext.B-2. Under the Stamp Act, in the case of sales, normally, unless there is a contract to the contrary, it is the purchaser who will have to provide the stamp papers and in the case of mortgages, it is the mortgagor who will have to provide the stamp papers. The supply of stamp papers by Shanmugha Mudaliar is in consonance with the fact that it should have been intended to be a mortgage and not a sale. It may be noted that there is neither allegation much less any evidence that there was any contract to the contrary requiring the vendor himself to provide the stamp papers for the execution of the sale deed. These circumstances, in our opinion, clearly show that the document was intended to be and was a mortgage by conditional sale and not an outright sale of immovable property.

9. We are fortified in the opinion by a decision of the Supreme Court in P. L. Bapuswami v. N. Pattay : [1966]2SCR918 . In that case also, the transaction was identically worded and the deed itself is set out at pages 903-904 of the report

In these circumstances, the Supreme Court held that the document was a mortgage by conditional sale. Except that the kist was paid by the defendants in this case, all the other circumstances pointed out by the Supreme Court are present in this case. We consider that the payment of kist by the defendants does not in any way alter the situation. The Supreme Court also specifically pointed out that there need not be any debtor-creditor relationship prior to the transaction itself in order to make the transaction a mortgage by conditional sale, though if there had existed a debtor-creditor relationship, even prior to that document that would be a very strong consideration, as pointed out by this Court in Ramachandrayya v. Laxminarayana Rao : (1956)2MLJ565 . In the above decision of this Court, it was

held further that the circumstances that the stamp papers were purchased in the name of the transferor is also very relevant in holding what the transaction is a mortgage by conditional sale. We may also point out that the decision relied on by the Court below in Pattay Gounder v. Bapuswami : AIR1961 Mad276 in support of its view that the document is not a mortgage by conditional sale is the very decision which on appeal was reversed by the Supreme Court in P. L. Bapuswami v. N. Pattay : [1966]2SCR918 , referred to already.'

In : AIR1978 Mad75 (Karuppanna v. Thirumalai), Ismail, J., as the learned Judge then was, had an occasion to consider the question in the light of the decision in : [1955]1SCR174 (supra) and with particular reference and principles laid down therein held as follows on the nature of the documents considered by the learned judge (at pp. 76 and 77 of AIR) :--

'As I pointed out already, the condition is embodied in the same document and it is not embodied in a separate document. The terms of Ex.B-2 are covered by S. 58(c) of the T.P. Act. Therefore, according to the observation of the Supreme Court referred to above, the transaction under Ex.B-2 must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in the case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion. In this case, the learned Subordinate Judge has unfortunately committed a mistake. In para 6 of his judgment he has stated, 'the plaintiffs have to prove that Ext.B-2 is a mortgage by conditional sale and not an outright sale'. This statement of the learned Subordinate Judge, on the face of it, is erroneous and runs counter to the law laid down by the Supreme Court. From the law laid down by the Supreme Court it will follow that once the condition is incorporated in the same document and the terms of the document are covered by S. 58(c) of the T.P. Act, the transaction will be considered to be a mortgage only unless the person who asserts it is not a mortgage is able to prove either from the language contained in the document or from the attendant circumstances, that the transaction was intended to be an outright sale. By throwing the burden wrongly on the appellants herein, the learned Subordinate Judge has committed an error and, as a matter of fact, the conclusion of the learned Subordinate Judge would appear to be based upon his view that the appellants had failed to prove that Ex.B-

2 was a mortgage by conditional sale. On the face of it, such a conclusion is erroneous. Therefore, I have no alternative but to set aside the judgment and decree of the learned Subordinate Judge and remand the matter for fresh disposal again by the lower Appellate Court by finding out whether the respondents herein had shown that the transaction under Ex.B-2 is not a mortgage by conditional sale, but an outright sale. As a matter of fact, from the extract from the judgment of the Supreme Court referred to already by me, it will be clear that the same can be shown by two means; one, by establishing that there are express words in the document itself which will be indicative of the character of the document not as a mortgage by conditional sale and establish it to be an outright sale; and secondly, by establishing the attendant circumstances which will necessarily lead to the inference that the transaction was meant to be an outright sale only. If, in the document itself, express words are to be found to show that the transaction was intended to be only an outright sale, there would be no need for me to remand the matter and therefore, I, gave an opportunity to Mr. T. R. Rajagopalan, learned counsel for the respondents, to draw my attention to any term in Ext.B-2 which will lead to the inference that the transactions under Ex.B-2 was only an outright sale. Apart from referring to certain statements and words contained in the document showing that the transaction was a sale, the learned counsel was not able to draw my attention to any express words which will preclude the transactions being a mortgage by conditional sale and establish that the same is only an outright Sale. As a matter of fact, with regard to the reliance on the recitals and words contained in Ext.B-2 as showing the transaction as a sale, the Supreme Court itself, in the judgment referred to already, has given an answer. The Supreme Court pointed out at page 348 (of AIR) as follows:--

'The only weakness in this argument is that when a mortgage is by conditional sale, this is the form it has to take, because S. 58(c) postulates that there must be an 'ostensible sale' and if a sale is ostensible it must necessarily contain all the outward indicia of 'a real sale. The question we are considering can only arise when the word 'sale' is used and, of course, a sale imports a transfer of title. The use of the words 'absolute proprietor in our places' carries the matter no further because the essence of every sale is to make the vendee the absolute proprietor of what is sold. The question here is not whether the words purport to make the

transferee an absolute proprietor, for, of course, they must under S. 58(c), but whether that is done 'ostensibly' and whether conditions of a certain kind are attached.'

Thus, the recitals contained in Ext.B-2 to show that the transaction was a sale were consistent with the sale being an ostensible one, and therefore, from those recitals, no inference can be drawn that the transaction was not intended to be a mortgage by conditional sale, but was intended to be only an outright sale.'

10. In : AIR1982 Bom437 (Nana Tukaram v. Sona Bai), a learned single Judge of the Bombay High Court has held as follows:--

'(11) In the instant case, the deed does not create, expressly or by implication, the relationship of debtor and creditor, nor is the amount paid by the transferee to the transferor made a charge on the land. There is no provision in the deed in regard to interest. Possession of the land is handed over to the transferee. Municipal taxes are made payable by the transferee. A period is stipulated, viz., five years, within which the transferor may purchase the land after making payment of the amount for which it was originally transferred. The statement in the deed that if the amount was not paid within the stipulated period the deed was to be treated as a permanent sale deed and the transferee could thereafter enjoy the land for ever without the transferor and his successors claiming any ownership emphasises that the condition of repurchase was to operate only within the stipulated period and no further. These, as I see it, are indications of a sale with a condition of repurchase.

(12) Mr. Dhorde placed reliance upon the recital in the deed that the amount had been received by the transferor for the marriage of his daughter and family expenses. He submitted that this was indicative that the transaction was a transaction of mortgage by way of conditional sale. This recital is not indicative either way. A man may, when he is in need of money, sell his property or he may mortgage it. Mr. Dhorde also submitted that it was the appellant's case that the property had been transferred at an undervaluation, which was indicative of a mortgage, but the trial Court rejected that contention. It had done so quite rightly since it was sought to be established by nothing more than the appellant's bare word.

(13) In the result, I am inclined to take the view, having regard to the text of the deed interpreted in the light of surrounding circumstances, that it is a deed of sale with a condition of repurchase.'

11. The decision in : AIR 1992 SC1236 (Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal) dealt with the question and a Division Bench of two learned Judges of the Apex Court considered the same in the light of the decision reported in : [1955]1SCR174 . It is this judgment that has been the sheet anchor of the challenge for the appellant by the learned counsel. From the report of the judgment, it is seen that the details pertaining to the document under consideration of their Lordships are found stated in paragraph 17 of the said report. The appellants before the Apex Court appear to have placed strong reliance upon the decisions reported in : [1955]1SCR174 . While observing that that was a case which will have no application to the case considered by their Lordships, the distinguishing features of the case also have been noticed in paragraphs 15, 18 and 19. It was also observed therein that having regard to the nice distinction between a mortgage by conditional sale and a sale with an option to repurchase, 'one should be guided by the document alone without much help from the case law'. Of course, cases could be referred for the purpose 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, their Lordships of the Apex Court proposed to analyse the document. It was also pointed out therein that the document was styled as a deed of conditional sale. A sum of Rs. 5,000/- was said to be the consideration and the same was received for clearing earlier mortgage and miscellaneous debts and that the amount was not found noticed as having been taken as a loan at all. Observed their Lordships in the said case, 'where, therefore, for a consideration of a sum of Rs. 5,000/- with the conditional sale is executed, we are unable to see how the relationship of the debtor and creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and creditor. This is a vital point to determine the nature of the transaction'. It was also noticed therein that the property was found sold conditionally for a period of five years and possession

was handed over with the further recital. 'Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right'. Their Lordships gave due legth and emphasis to the right of the purchacr or enjoy the property 'under the ownership right'. The further feature which weighed with their Lordships to come to the conclusion that the document therein was a conditional sale was the clause in the document to the effect that the executant shall repay the amount within a period of five years and in case, he fails to repay, neither he nor his heirs or legal representatives will have any right to take back the said properties. In addition thereto, the absence of any clause enabling the transferee therein to foreclose the mortgage. was held to militate against the document being a mortgage. In the view of their Lordships, the absence of a condition and the absence of a clause regarding the right of the transferee to foreclose the mortgage will exclude the application of the first condition, spoken to under S. 58(c) of the Transfer of Property Act, and that the absence of such a right of the mortgagee meant only that it is a conditional sale. That apart in paragraph 20 of the judgment, it is found stated that the last important clause, according to their Lordships, Supporting the view that the document in that base was a conditional sale is that after the period of five years, the transferee will have a right to get the Municipal records mutated in his name and pay tax and thereafter, the transferee will have an absolute right to mortgage, sell or gift the suit property. It was also observed therein that all the various clauses referred to are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. This declaration of law does not appear to fall in line, at least to some extent with the earlier declaration of law made by larger Benches of the Apex Court. But that at any rate does not matter for the consideration of this case.

12. The learned counsel for the respondents relied upon the decision reported in : (1993)4SCC6 (Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam v. Atma-ram Kumar) that the non-denial of the claim made about the valuation of the property at the relevant point of time would constitute an implied admission of the correctness of the valuation as claimed by the defendants.

13. The decision reported in : 1995(1)CTC174 (Panchatchara Mudaliar v. Kandaswami Acharil is that of a learned single Judge of this Court rendered in the light of the decisions in : AIR 1963 SC1906 (Shoju Mandal v. Deb-nath Bhagat); 1977 TLNJ 290 (Kalyani alias Pandi v. Ellaichami alias Udaya Thevar) and : [1966]2SCR918 . P. L. Bapuswami v. N. Pattay Gounder). The document that was considered by the learned single Judge contained recitals that only after the expiry of six years time stipulated therein for repurchase, the transferee would enjoy the property absolutely, that the condition for repurchase was embodied in the same document and the consideration for reconveyance was also the same amount as the consideration for the sale executed. The surrounding facts about the payment of the registration charges by the transferor, the difference in valuation the inaction on the part of the transferee to effect mutation of records were all taken into account. The learned Judge came to the conclusion that the fact that in the said document, it has been stated what the vendor has been given is the right of repurchase and to enforce and obtain reconveyance after complying with the stipulated condition did not in any manner affect the position that the document considered by the' learned Judge was only a mortgage by-conditional sale and not a sale with a clause for repurchase.

14. Before considering the submissions of the learned counsel it becomes also necessary to analyse the salient features of the document before us which is the subject matter of the suit: (2) The document, Ex.A.5 was executed as a sale on 20-3-1958 for a sum of Rs. 250/-; (b)The very same document contains a condition and recital that on the seller repaying the said sum of Rs. 250/ - within five years, a resale shall be executed by the purchaser to the seller; (c) The conspicuous and important stipulation which is decisive of the character of the document that within the said five years period, the purchaser shall not encumber the property in any manner is found specifically engrafted in this document;(d) The further recital and condition of the transaction is that if only within the said stipulated time, the sale amount is not repaid and the resale obtained thereafter the sale will become confirmed in favour of the purchaser;(e) The consideration of Rs. 250/ - was recited as having been already received; (f) The possession of the property has been handed over on the date of the execution of the sale; (g) The undertaking to clear the encumbrances, if any, is found stipulated after the

stipulation in the document that the sale will get confirmed, if within five years the amount is not repaid and resale obtained; (h) The property is said to be of the land with the roof portion pertaining to the land.

15. The lower Appellate Court specifically found as a finding of fact that there was clear evidence to show that on the date of Ex. A.5 the property was worth Rs. 2,000/- as against the consideration of Rs. 250/- for the document. The lower Appellate Court disagreed with the view taken by the trial Court that the absence of any agreement to pay interest will militate against the document being a mortgage by conditional sale, in view of the fact that the possession and enjoyment of the suit property by the mortgagee was only towards interest. In the view of the lower Appellate Court, the payment of kist by the vendee does not alter the situation by making a mortgage by conditional sale into a sale with a condition for repurchase relying upon the decision of this Court reported in : AIR1975 Mad282 (supra).

16. In the light of the above principles of law as also the terms and conditions contained in Ex.A.5, it becomes necessary to adjudicate upon the nature and character of the document as to whether it is a mortgage by conditional sale or a sale with a condition for retransfer. In my view, the reliance placed by the learned counsel for the appellants on the decision of the Apex Court in : AIR 1992 SC1236 is inappropriate and the said decision has no application to the case on hand for the simple reasons that as referred to earlier, in the document which was considered by their Lordships of the Supreme Court, there was a positive recital entitling the purchaser from the date of purchase to use, enjoy and lease the said house 'under the ownership right' unlike the positive stipulation to the contra in negative terms in the case before me specifically prohibiting the purchaser from encumbering the property in any manner within the period of five years stipulated for repurchase. Taking together this most vital aspect along with the valuation of the property and substantial difference between the actual value of the property. As found by the lower Appellate Court as a finding of fact and the consideration for Ex.A.5, there can be no difficulty whatsoever in holding that the document in question was only a mortgage by conditional sale and not a sale with a condition for retransfer, as rightly, in my view, held by the lower Appellate Court.

Indisputably, the condition for repurchase is found engrafted in the same document. The fact that in the document under consideration in this case, the condition stipulated is that only on default of payment of the amount, on or before a certain date the sale shall become confirmed and the specific stipulation contained in the very document that on the seller repaying the sum of Rs. 250 / - which was the consideration for the documents the buyer shall transfer the property to the seller, the character of the document necessarily has to be held as that of a mortgage by conditional sale. The stipulation for retransfer within five years from the date of conveyance to the transferor at the expense of the transferor for the very price mentioned in the deed was held to be indicative of the document being a mortgage by conditional sale in : [1960]2SCR117 (supra). In this case also, the same identical situation is reflected in the document. The substantial difference in the valuation of the property was held to be a vital pointer to the document being a mortgage by conditional sale in more than one decision particularly in : [1966]2SCR918 and the document in this case also satisfies the said requirement.

17. For all the reasons stated above, in my view, the interpretation placed by the lower Appellate Court on Ex.A.5 as to its character cannot be said to be either unreasonable or unwarranted or perverse. The interpretation placed by the lower Appellate Court on Ex.A.5 also accords with the well settled principles laid down by more than one decision of the Apex Court as well as this Court, and therefore, cannot be said to be contrary to law. Consequently, I see no reason or justification to interfere with the decision of the lower Appellate Court and the second appeal, therefore, fails and shall stand dismissed. But in the circumstances of the case, there will be no order as to costs.

18. Appeal dismissed.

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