

Muthuvelu Mudaliar Vs. Vythilinga Mudaliar and ors.

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Court : Chennai

Decided On : Feb-13-1918

Reported in : 50Ind.Cas.205; (1919)36MLJ385

Appellant : Muthuvelu Mudaliar

Respondent : Vythilinga Mudaliar and ors.

Judgement :

John Wallis, C.J.

1. It is in my opinion not open to us to answer the question referred to us in the affirmative consistently with the decisions of the Privy Council in Pattabhiramier v. Venkatarow Naicken (1871) 13 M.I.A 560, Thumbusawmy Moodaly v. Hossain Rowthen I.L.R. (1875) Mad, Sithal Pershad v. Luchmi Pershad I.L.R. (1883) Cal. 30, Bhagwan Sahai v. Bhagwan Din I.L.R. (1890) All. 387, Balkishen Das v. W.F. Legge I.L.R. (1899) All. 149 and Jhanda Singh Wahiduddin I.L.R. (1916) All. 570. All these decisions lay down that in cases in India not governed by Bengal Regulation XVI of 1806 instruments of this kind are to take effect according to their tenor, unless it appears from the terms of the instrument or the surrounding circumstances, excluding oral evidence of intention as inadmissible, that the intention was to effect a mortgage. In Thumbuswamy Moodaly v. Hossain Rowthen I.L.R. (1875) Mad. 1 the Privy Council refused to disturb a decision of this Court which took a different view, because it considered that the parties might have been misled by a course of decisions in this Court which their Lordships held

to be erroneous, but they also indicated with sufficient clearness that there was no room for any such misconception in future.

2. In *Balkishen Das v. W.F. Legge* I.L.R. (1899) All. 149 there were held to be sufficient indications that the transaction was intended to be a mortgage, and this decision was explained as proceeding on this ground in the subsequent decision in *Jhanda Singh v. Wahiduddin* I.L.R. (1916) 38

3. It is true that all these cases dealt with transactions before the passing of the Transfer of Property Act, but I do not think that Act made any difference in the law on this subject in this part of India. In *Balkishen Das v. W.F. Legge* I.L.R. (1899) All. 149 their Lord-ships observed that it might be assumed that the framers of the Transfer of Property Act intended in Section 58 to state the existing law and practice in India. The section begins with a definition of the terms 'mortgage' 'mortgagor.' and ' mortgagee', and proceeds, as pointed out by Napier, J., to describe or define the different sorts of mortgages which are met with in India. Sub-section (c) deals with mortgages by conditional sale in which the transaction is ostensibly a sale or transfer of ownership in exchange for a price (Section 54), but is really intended to be a mortgage or transfer of an interest in specific immoveable property for the purpose of securing the payment of money, Section 55(a). As the transaction is really a mortgage and only ostensibly a sale, Sub-section (c) refers to the transferor as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money. Whether a particular transaction is really a sale, or ostensibly a sale and really a mortgage, must still be decided in accordance with the decisions of the Privy Council in the cases already cited. There is in my opinion nothing in the definition in Section 58 (c) which favours the view that wherever the sale-deed and the agreement to reconvey from one transaction it must necessarily be a mortgage and not a sale. On the other hand both in *Sithal Pershad v. Luchmi Pershad* I.L.R. (1890) All 387 and *Bhagwan Sahai v. Bhagwan Din* I.L.R. (1888) Cal. 30 there was clearly only one transaction, and it was none the less held by the Privy Council to be a sale and not a mortgage. For these reasons I am of opinion that the decision in *Palaiappan v. Subbaraya Goundan* (1913) I.L.W. 80 should be overruled and the question answered in the negative.

Oldfield, J.

4. I agree.

Seshagiri Aiyar, J.

5. I entirely agree with the learned Chief justice. But out of deference to the opinion of Mr. Justice Sadasiva Aiyar from whom we are differing, I wish to say a few words. In *Pattabhiratnier v. Venkatarow Naicken* (1871) 13 M.I.A. 560 the Judicial Committee laid down that a contract between the parties should be interpreted according to its tenor and that the practice of reading into it preconceived legal principles should be discouraged. All the subsequent judgments of the Privy Council seem to me to emphasise this cardinal principle. In *Thumbusawmy Mudaly v. Mahomed Hossain Rowthen* (1875) L.R. 2 I A. 211 the Judicial Committee construed the document in that case as a mortgage because they held that the parties to that contract must be deemed to have contracted with reference to the wrong view of law enunciated by the Sudder Court at Madras before *Pattabhiramier v. Venkatarow Naicken* (1871) 13 M.I.A. 560 was decided. They further said that the legislature should intervene to correct the impression which the decisions of the Sudder Court had left in the minds of the litigant public. In *Sithal Pershad v. Luchmi Pershad Singh* L.R. 10 IndAp 129 which related to a contract before the passing of the Transfer of Property Act, although the documents were of the same date, the Privy Council held that the transaction was a sale and not a mortgage. They stated that evidence can be looked into to ascertain the intention of the parties. *Bhagwan Sahai v. Bhagwan Din* where also the documents were of the same date, the transaction was construed as a sale. In *Balkishen Das v. Legge* it was held that the transaction amounted to a mortgage. But it was pointed out that in the documents themselves there were indications that the parties intended to effect a mortgage by conditional sale'. It was further said that the Transfer of Property Act was framed in accordance with the existing law and practice regarding mortgages. The next case before the Board was *Jhanda Singh v. Wahiduddin* (1916) L.R. 13 IndAp 284 : 38 All. 670. Here again their Lordships held that the transaction was an out and out sale. Their Lordships said that the intention of the parties which was the test in such cases must be

gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. This is a distinct direction to Courts in India that in such matters the intention of the parties and the surrounding circumstances are the proper guide and not the fact that the documents were of the same date or that they were expressed in any particular form. After this statement of the law it is not open to Courts in India to lay down any inflexible rule from the bare fact that the documents were of even date or were interdependent upon a single settlement. Mr. Muthiah Mudaliar referred in support of the view taken by Mr. justice Sadasiva Aiyar to the use of the expression 'one transaction ' in page 288 of this judgment. Then-Lordships said: 'If no such agreement was made before the deed of sale was executed and the latter deed was an after-thought, only suggesting itself after the sale-deed had been executed and delivered, it would not suffice. The execution of the deed of sale and of the contract of repurchase would then form two separate and independent transactions, not two connected and interdependent parts of one and the same transaction.' I do not understand their Lordships to lay down that if there was a single settlement and the two documents are connected and are interdependent it must necessarily lead to the inference that there was a mortgage and not a sale. All that was said was that an essential requisite for construing such documents as a mortgage is that they should be dependent upon a single arrangement, and not that such a test is a conclusive criterion of the transaction being a mortgage. I do not propose to consider the decisions of the various High Courts. In Madras, after *Thumbusawmy Moodelly v. Hussain Rowthan* I.L.R. (1875) Mad. 1 there have been some cases which are not quite reconcilable with each other. But these do not help us much. It is in *Palani-appan v. Subbaraya Goundctn* (1918) I.L.W. 80 that Mr. Justice Sadasiva Aiyar enunciated the proposition which has led to this reference. If I may say so with respect, the learned Judge does not attach sufficient importance to the language of Section 58, Clause C of the Transfer of Property Act. I agree with Mr. justice Napier that the use of the word mortgage is not per incuriam. Clause (C) speaks of a 'mortgagor ostensibly selling the mortgaged property.' That language implies that there must be in reality a mortgage and that the sale must be merely a cloak. A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not

express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports In other words there must be evidence to show that the parties intended a mortgage although they used expressions which prima Jade connote a sale. I am there fore of opinion that the question referred to us must be answered in the negative:

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