

Ramegowda Vs. Boramma and Others

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Court : Karnataka

Decided On : Jul-29-2011

Judge : A.S. Pachhapure

Appeal No. : Regular Second Appeal No. 364 of 2006

Appellant : Ramegowda

Respondent : Boramma and Others

Advocate for Pet/Ap. : For the Appellant: D.R. Sundaresha, Advocate. For the Respondents: N.S. Sanjay Gowda, Advocate. for C/R1, Advocate R2 to 6 are served.

Judgement :

(Prayer: This RSA is filed under Section 100 of CPC against the Judgment and Decree dt. 10.11.2005 passed in R.A.No.73/2000 on the file of the Prl.Civil Judge (Sr.Dn) and JMFC, Srirangapatna, allowing the appeal and setting aside the Judgment and Decree dt. 30.8.2000 passed in O.S.No.66/95 on the file of the Civil Judge (Jr.Dn) and JMFC, K.R.Pet.)

1. The appellant has challenged the judgment and decree passed by the First Appellate Court allowing the appeal of the respondent herein and dismissing the suit filed by the appellant herein.

2. The facts relevant for the purpose of this appeal are as under:

The parties are referred to as per their rank before the Trial Court for the purpose of convenience.

The appellant herein is the plaintiff whereas the respondents are the defendants.

3. The appellant instituted a suit for redemption of mortgage and it is his claim that on 25-05-1976, he executed a conditional sale deed after receiving loan amount of Rs.4,000/- from Late Thimme Gowda, the husband of respondent No.1. So also, he claims that the suit land is a wet land having an assured source of irrigation capable of raising two paddy crops in a year or one crop of sugar cane and the value of the land was more than Rs.20,000 at that time. When the transaction took place, there was a condition in the deed to reconvey the property on or before 10th March 1978 i.e., within two years of the date of the transaction and the plaintiff insisted the defendant to hand over the possession of the suit property on receiving the amount of Rs.4,000 as agreed under the deed referred to supra by way of redeeming the mortgage and as the defendant did not reconvey the property the plaintiff instituted the suit seeking the relief of redemption of mortgage and delivery of possession of the schedule property with ancillary reliefs.

4. The defendants filed the written statement denying the allegations that it is a mortgage transaction and borrowing an amount of Rs.4,000 by the plaintiff from the defendant. It is their contention that the transaction is an out and out sale with a condition to repurchase the same on or before 10th March 1978, the property was then worth Rs.4,000/- and the amount received was the sale consideration and in the RTC extract the name was changed and the name of their father Late. Thimme Gowda was entered in to records. It is in these circumstances that the defendants contend that there is no cause of action for the suit for redemption of property and that the suit is barred by time and therefore, sought for the dismissal of the suit.

5. On the basis of these pleadings, the following issues have been framed.

“1. Whether plaintiff proves that the document dated 25.05.1976 is a mortgage by conditional sale as contended by him?

2. Whether defendant Nos.1 to 4 prove that the document dated 25.5.1976 is out and out sale deed with a condition of repurchase within the stipulated period as contended by them?
3. Whether the market value of the property was more than Rs.20,000/- as on the date of the above referred document?
4. Whether the suit is barred by limitation?
5. Whether the defendant Nos.1 to 4 are liable to render account?
6. Whether the plaintiffs are entitled for the relief of redemption of mortgaged?
7. What decree or order?"

6. During the course of the evidence, the plaintiff examined himself as PW.1 and in his evidence got marked the certified copy of the mortgage deed Ex.P.1 whereas the defendant did not lead any evidence. The Trial Court after hearing the counsel for the parties and on appreciation of the material on record decreed the suit with costs granting the relief of redemption of mortgage and delivery of possession. Aggrieved by the judgment and decree, the defendant preferred RA 73/2000 and the First Appellate Court after hearing the counsel for the parties and on appreciation of the material on record held that it is an out and out sale with condition to repurchase and in the circumstances allowed the appeal and dismissed the suit of the appellant herein. Aggrieved by the judgment and decree of the Lower Appellate Court, the present appeal has been filed.

7. The substantial question of law raised vide order dt.15.07.2009, are as under:

1. Whether Ex.P.1 styled as sale deed which contains recital to re-convey the property within certain time limit on repayment of the consideration amount to the vendor would amount to a mortgage in terms of Section 58 (c) of T.P.Act?
2. Whether the Lower Appellate Court is justified in law in reversing the finding so of the Trial Court that the document in question (Ex.P.1) is a Mortgage Deed and not an out-and-out sale deed?

3. Whether the Lower Appellate Court is justified in holding that the suit filed for redemption is barred by time?"

8. I have heard the learned counsel for both the parties.

9. The defendant has not entered the witness box. It is only the evidence of the plaintiff and the document Ex.P.1 which will have to be looked into for the purpose of finding out as to whether it is mortgage by conditional sale or a sale with a condition to repurchase. On this aspect of the matter, it is relevant to refer to the provisions of Section 58(c) of the Transfer Property Act, (hereinafter called as 'the Act' for short)

"58(a)...

58(b)...

58(c) Mortgage by conditional sale-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 mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale".

10. So as could be seen from the requirements to fulfil a mortgage by conditional sale, there must be an ostensible sale of the property mortgaged and the condition is that on default of payment of 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 and thirdly, there is a condition that on such payment being made, the buyer shall transfer the property to the seller. In such circumstances the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale. So in the context of this definition provided, it is necessary to appreciate the material placed on record and find out as to whether the document Ex.P.1 falls within the purview of Section 58(c) of the Act.

11. Section 58(c) was amended by Act No.20/1999 and if there is a sale agreement to repurchase, then in such circumstances, the transaction is said to be not a mortgage. After the amendment of the provisions of Section 58(c) of the Act, if the entire transaction is embedded in a single document, a presumption can safely be raised that the transaction is mortgage though such a presumption is always rebuttable by evidence. If the reading of all the clauses in the document indicate that the relation of debtor and creditor subsists between the parties, then it is safe to lean in favour of the transaction being a mortgage and some of methods of finding out is whether the relationship of creditor and debtor subsists. If the buyer agrees to transfer the property to the seller for the same sum with or without interest advanced by him and describe as a sale price or if money paid by buyer was not fair price for absolute property the test can be applied to find out as to whether it is a mortgage by conditional sale or a sale with condition to repurchase. It has been held that in doubtful cases, Courts lean strongly to the construction lent favourable to the person claiming right to redeem. So considering these principles regarding the interpretation of the document, now, it is necessary look into the evidence and the document Ex.P.1 to find out as to whether it is a mortgage transaction or a sale transaction with a condition to repurchase.

12. The perusal of the document Ex.P.1 reveals that it is referred to as a sale deed and the amount of consideration is mentioned as Rs.4,000. Prior to the deed Ex.P.1, an amount of Rs.1,500/- was paid and on the date of the registration, the remaining amount of Rs.2,500/- was paid by the transferee to the transferor. It is also stated that the absolute consideration under the sale transaction has been received by the vendor, the possession was also handed over on the date of the transaction and they state that her father, the predecessor, his children and the descendants would go on enjoying the property as absolute owners and in case, if

there is any dispute is raised by a third party, the vendor undertook to defend the cases at his own costs. After the description of the property, which is measuring about 20 guntas, it is mentioned that the landing question shall be reconveyed under the registered deed, in case, if the amount of Rs.4,000/- is repaid on 10-03-1978. The vendor undertook to repay the amount on 10-03-1978 and get a registered reconveyance deed on payment of Rs.4,000/-. So the conditions incorporated in Ex.P1. referred to supra will have to be appreciated in the context of the oral evidence of PW.1.

13. PW.1 the plaintiff in his evidence states that he was in need of money to perform the marriage of his daughter and therefore, he executed a conditional mortgage deed in favour of Late. Thimme Gowda on 25-05-1976 and the mortgage period was for three years. He also states that the value of the property at the time of the transaction was about Rs.25,000/-. The land in question is a irrigated land and he also speaks about the conditions incorporated in the document and his willingness to get the property reconveyed on payment of Rs.4,000/-. So far as the value of the property as stated by PW. 1 that it is Rs.22,000/-, except his interested version, there is no material on record. In the cross examination, PW.1 admits and states "It is correct to suggest that it is stated in Ex.P.1 that we will get back our land through registered sale deed". So relying upon this statement of PW.1 in the cross examination, it is the contention of the appellant that the intention of PW.1 is very much clear and with this intention the plaintiff executed a conditional sale deed and hence, it is out and out sale with a condition to repurchase the property on payment of Rs.4,000/- and in the circumstances, it is his submission that the transaction in question is not a mortgage and it is a sale transaction. On this aspect of the learned counsel for the appellant has relied upon the decision of the Apex Court reported AIR 1966 SC 902 (P.L. Bapuswami vs. N. Pattay Counder). As could be seen from the facts in the case referred to supra, a document was executed in favour of the first defendant for a consideration of Rs.4,000/- on May 28, 1946. The document was in the form of a sale deed had contained a stipulation that the first defendant should reconvey the property to Palani Moopan on his repaying an amount of Rs.4,000 after 5 years and before the end of 7th year. It is in these circumstances that the Apex Court held that the document was a transaction of mortgage by

conditional sale and not a sale with condition for retransfer. It took into consideration the condition for repurchase was embodied in this document and in the second place, the consideration for the transaction was Rs.4,000/- while the real value of the property was Rs.8,000/- and in the third place, a property was not transferred to the first defendant after the execution of the document by Palani Moopen and the land revenue for the land was also continued to be paid by Palani Moopan and after his death by his sons and lastly, the consideration for reconveyance was Rs.4,000/-, the same amount as a consideration for the original transaction. The plaintiff in the circumstances was granted a preliminary decree for redemption of mortgage under 0.34 R.7 CPC.

14. At the same time, the learned counsel for the respondents has relied upon the decision of the Apex Court reported in AIR 1992 SC 1236 (Tamboli Ramanlal Motilal vs. Ghanchi Chimanlal Keshavlal). The fact reveal that the property was sold conditionally by a document for a period of five years and possession was handed over at the same time. There was a recital to the effect “therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right.” A further clause in the said document is to the effect that the executant shall repay the amount within a period of five years and in case if he fails to repay, neither he nor his heirs will have a right to take back the said property. The last important clause is after the period of five years, the transferee will have a right to get the municipal records mutated in his name and pay tax. Thereafter, the transferee will have the absolute right to mortgage, sell or gift the suit property. Neither the executant nor any one else could dispute the title. It was held that all the above clauses are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. In the circumstances, the decision of the High Court was upheld by the Apex Court.

15. The counsel also relied upon the decision reported in AIR 2009 SC 1502 (S. Cheriathan vs. P. Narayanan Embranthiri) and as could be seen from the facts in this decision, it was a deed dated 27-10-1969 and the question was as to whether it is one of absolute conveyance with a condition to repurchase or a mortgage with conditional sale. Further, the facts reveal that the appellant was granted a

Purchase Certificate under the Kerala Land Reforms Act in respect of the entire property in the year 1978 and the respondent did not take any steps to set aside the said certificate for a long time and in the year 1984, he filed the suit for redemption and partition in respect of his share alleging that the said deed dated 27-10-1969 represented only a loan transaction, whereas, the appellant took the defense that it is a deed of sale with a condition to repurchase. Considering the fact that there was a stipulation that the vendor had repurchased the same at his expense within a period of three years from the date of execution thereof and therefore it was held that that it is not a mortgage transaction, but a sale transaction with a condition to repurchase.

16. Now, in the context of the principles laid down by the Apex Court, in the decisions referred to supra and the evidence on record, it is necessary to see as to whether the document Ex.P.1, is a mortgage transaction or a sale transaction.

17. The defendant has not entered the witness box. So it is the oral evidence of PW.1 which will have to be taken into consideration. PW.1 in his evidence states that the suit property was worth more than Rs.20,000/- at the time when the transaction took place. Except a denial in the cross examination, there is nothing on record to say that the suit property was worth Rs.4,000/- on the date of the transaction. Now, the perusal of this document Ex.P.1 reveals certain features which would indicate both the requirements of a mortgage by conditional sale and a sale with condition to repurchase. The perusal of the document reveals that there was a necessity for the plaintiff to sell the property or mortgage the property for some legal necessities, i.e., the performance of the marriage of his sister and some other expenses which he had to incur. So if this purpose is looked into, if there was no marriage, then there was no question for the plaintiff to execute this document. So he was in need of money to perform the marriage of his sister and it is because of this reason that he executed this document. Furthermore, so far as the amount of Rs.4,000/- mentioned in the document is concerned, there is no specification that it is the price or mortgage value of the land and apart from this, so far as the condition is concerned, it is stated that the amount of Rs.4,000/- which was paid as consideration will be returned under a registered deed and the possession of the land will be taken back on or before 10-03-1978. If it is a

condition for repurchase, then the market value of the land as on 10-03-1978 can never be Rs.4,000/- because generally, there will be rise in the prices or the market value of the land. So when the plaintiff paid Rs.4,000/- and for the same amount, the property is to be repurchased, then, it is a feature which indicates that the document is a mortgage by conditional sale.

18. There is one more feature of the document wherein it is stated in Ex.P.1 that the family of the purchaser, his children and descendants will enjoy the property permanently from the date of taking the possession. Infact, this recital in the document indicates that it must be a sale deed. But it is subject to the condition that incase if the plaintiff repays the amount of Rs.4,000/- taken, then the question of permanent use of the property by the members of the family their legal representatives does not arise for consideration. It is well established principle that when there are both the features of a mortgage deed by conditional sale and also a sale with condition to repurchase, these are the doubtful cases wherein the Courts have to lien strongly to the construction of the document most favorably to the person claiming right to redeem. So applying this principle, I am of the opinion that the document in question is a mortgage with conditional sale and therefore, the Trial Court was justified in granting a decree in favour of the plaintiff whereas the Lower Appellate Court committed an error in holding that the document is a sale transaction with a condition to repurchase. In that view of the matter, I answer the substantial question of law No.1 in affirmative and No.2 and 3 in negative holding that the Ex.P.1 is a mortgage by conditional sale and proceed to pass the following:

ORDER

The appeal is allowed. The judgment and decree of the First Appellate Court in RA No.73/2000 dated 10-11-2005 is set aside and the judgment and decree of the Trial Court passed in O.S.No.66/1995 dated 30-08-2000 is restored. No costs.

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