

Court No. 8

Case :- SECOND APPEAL No. - 587 of 1983

Appellant :- Ram Shanker And Others

Respondent :- Mohd. Ibrahim And Others

Counsel for Appellant :- V.R.Singh, Mohammad Saeed, Mohd. Naeem, Puttu Lal Mishra, Puttu Lal Misra, Vinay Misra

Counsel for Respondent :- R.C. Gupta, Brijesh Kumar, S.H. Ibrahim, Utkarsh Srivastava

Hon'ble Jaspreet Singh, J.

1. The defendants of Regular Suit No. 115 of 1974 have approached this Court assailing the judgment of the Trial Court dated 05.12.1980 whereby the suit of the plaintiffs-respondents was decreed and the Regular Civil Appeal preferred by the defendants before the First Appellate Court bearing No. 22 of 1981 was also dismissed by means of judgment and decree dated 03.05.1983.

2. The instant second appeal was admitted by means of order dated 27.04.1984, however, substantial questions of law were not framed and later this Court by means of order dated 14.05.2024 framed the following two substantial questions of law, which reads as under:-

"A. Whether the instrument dated 17.02.1937 executed by Late Bhagwan Deen the predecessor in title of the appellants in favour of Late Mohammad Azim-the father of the respondents was a deed of mortgage by conditional sale as defined in Section 58(c) of Transfer of Property Act 1882 and the learned courts below were right by interpreting and holding the instrument as not a deed of mortgage by conditional sale. If so, its effect ?

B. Whether, the learned trial court was right in holding the suit as filed by the respondents to be within the time of limitation. If so, its effect ?"

3. During pendency of the proceedings, certain parties have expired and their legal heirs have been brought on record, however, for the sake of convenience this Court shall refer to the parties as they were originally

impleaded in the suit.

4. Certain brief facts relevant for the adjudication of the controversy involved in the instant second appeal are being noticed first:-

5. Sri Mohd. Azeem, the original plaintiff filed a suit bearing No. 115 of 1974 before Munsif, Raebareli seeking a decree of declaration and possession against Smt. Indrani Devi, Ram Nath, Ram Dulare, Ram Shanker and Mohd. Saleem in respect of the premises bearing Municipal No. 762 in Ward 885 No. 3 in District Raebareli.

6. It was pleaded that the property in question initially belonged to Sri Bhagwandeem who sold the same to the plaintiff Mohd. Azeem by means of a registered sale deed dated 17.02.1937 for a total sale consideration of Rs. 150 which included the consideration for the house as well as one Tamarind tree.

7. It was further stated that the said deed of 1937 contained a re-purchase clause to the effect that in case if the vendor namely Bhagwandeem within ten years from the date of execution of the sale deed dated 17.02.1937 repays the amount to the plaintiff, he would have a right to re-purchase the property in question.

8. It was pleaded that Bhagwandeem during his lifetime did not repay nor exercised his option of repurchasing the property within a period of ten years. Sri Bhagwandeem died in November, 1962 and thereafter his wife Smt. Indrani sold the property in favour of the defendant no. 4 namely Ram Shanker and it is in this context that the plaintiff had sought the relief of declaration and possession.

9. The suit bearing No. 115 of 1974 was contested by Smt. Indrani and Ram Shanker who filed their separate written statements.

10. Primarily, their defence was that the document dated 17.02.1937 was not simplicitor a sale deed but was a mortgage by conditional sale and in this context the right of redemption was available with Bhagwandeem who had paid the money and got an endorsement on the original sale deed, thus, Bhagwandeem got absolute right in the property which was upon his death was inherited by his wife Smt. Indrani who sold the property in on 11.03.1974 in favour of Ram Shanker who was an erstwhile tenant and upon purchasing the property vide sale deed Ram Shanker become its owner.

11. Upon the exchange of pleadings, the Trial Court framed seven issues, however, the important issues which were contested were; (i) whether document No. Ka-7 was a sale deed or document of mortgage; (ii) whether Ram Dulare was the tenant of Mohd. Azeem; (iii) Whether Ram Dulare has a sale deed in his favour from Smt. Indrani dated 11.03.1974 and if so its effect; (iv) whether the suit was within limitation; (v) whether the right of the plaintiff in respect of the property in question was extinguished during the lifetime of Bhagwandeem.

12. The parties led evidence and the Trial Court while dealing with the issues held that the document Ka-7 did not reflect a relationship between Mohd. Azeem and Bhagwandeem as that of creditor and debtor. The document also did not have any recital regarding adjustment of any interest on the sale consideration of Rs. 150 upon which Mohd. Azeem had purchased the property from Bhagwandeem in the year 1937.

13. It also found that the defence taken by the defendant regarding the document being a deed of mortgage by conditional sale was not made out including taking note of the recitals and the language contained in the said document which indicated clearly that the said document was not mortgage by conditional sale but was a sale deed with a clause of re-purchase.

14. It also found that Smt. Indrani did not have the right to sell the property to Sri Ram Shanker and the suit was not barred by limitation, hence, the suit was decreed by means of judgment and decree dated 05.12.1980.

15. The defendants assailed the said judgment and decree by filing an appeal under Section 96 C.P.C. bearing No. 24 of 1981. The First Appellate Court also reconsidered the matter and upheld the judgment and decree passed by the Trial Court and dismissed the appeal by means of judgment and decree dated 03.05.1983.

16. Sri Mohd. Saeed, learned counsel for the appellant has primarily urged that the two courts have erred in treating the document to be a sale deed with a clause to repurchase rather it did not appreciate the evidence nor the contents and recital of the document which clearly indicated that the said document was a document of mortgage by conditional sale.

17. It was further urged by Sri Saeed that the document clearly indicated a period of ten years for repurchase which was contained in the said document itself. However, the fact remains that the period of ten years was the period for which the mortgage was made and the period of redemption would commence from the year 1947. Smt. Indrani being the wife of

Bhagwandeem had a right to exercise the option of redemption and as the suit was filed in the year 1974 i.e. before the period within which Smt. Indrani could have exercised her right of redemption, hence, the decree could not have been passed.

18. It was also urged that there was ample material on record to indicate that Bhagwandeem in his lifetime had paid the mortgage money to Mohd. Azeem and Bhagwandeem had got an endorsement made on the deed itself, however, the said deed was not handed over to Bhagwandeem by Mohd. Azeem and as such the possession was handed over to Bhagwandeem and Ram Shanker who was the defendant no. 3 and his son, were residing in the premises and they started paying rent to Bhawandeem and upon his death to Indrani who later sold the property to Sri Ram Shanker in the year 1974 and thus the rights and interests in the property came to be vested with the defendant no. 4 who is his owner, accordingly, the suit filed by the plaintiff was liable to be dismissed so also the appeal.

19. In support of his submissions, the learned counsel for the appellant has relied upon the judgment of the Apex Court in *Manjabai Krishna Patil and Another Vs. Raghunath Revaji Patil and Another; 2007 (25) LCD 127; Patel Ravjibhai Bhulabhai Vs. Rahemanbhaim M. Shaikh and Others; 2016 (34) LCD 1681* and *Srinivassaiah v. H.R. Channabasappa and others; AIR 2017 SC 2141*.

20. Sri B.K. Saxena, learned counsel appearing for the plaintiff-respondent has refuted the aforesaid submissions and has submitted that the document in question dated 17.02.1937 was a simplicitor document for sale containing a clause for repurchase.

21. It is submitted that normally in respect of suits for specific performance of contract relating to an immovable property, time is not an essence of the contract, however, this is not true for a deed of re-conveyance.

22. It is thus submitted that the document in question contained a strict stipulation that Bhagwandeem could get a deed of re-conveyance executed within ten years and upon the expiry of ten years, all rights would completely vest with Mohd. Azeem. Bhagwandeem had lost his right to get the property repurchased as he did not exercise his option during his entire lifetime i.e. November, 1962, hence, upon his death, Smt. Indrani would have no right to claim any title in respect of the property nor she could have executed a sale deed in favour of Ram Shanker and in such circumstances, the sale deed in favour of the defendant no. 4 was a document which was void ab initio and could be ignored whereas on the strength of the document of 1937, all rights vested with Mohd. Azeem who had a right to get a declaration of his title.

23. It was also urged that from the perusal of the contents of the document of 1937, it clearly used the terminology which reflected that the parties intended the document to be a sale deed with a clause of re-purchase and there is no such clause nor any evidence brought on record to indicate that the parties intended to create a mortgage by conditional sale. Moreover, there were no pleadings nor any evidence to suggest that there was any relationship between Mohd. Azeem and Bhagwandeem as that of creditor and debtor nor there was any explanation as to the payment or adjustment of interest on the mortgage money and in such circumstances

both the Trial Court and the First Appellate Court have given their findings after due appreciation of the evidence available on record and these findings are based on proper appreciation of evidence and are primarily findings of fact which are not liable to be disturbed in exercise of jurisdiction under Section 100 C.P.C.

24. Sri Saxena has further urged that if at all the said document was a document of mortgage by conditional sale then it was the duty of Bhagwandeem and after his death Smt. Indrani to get the mortgage redeemed but no such effort was made nor any suit was filed nor any counter claim was setup, hence, even on this score, the rights of the defendants stood extinguished and even otherwise the right of redemption was available to the mortgager but not to Ram Shanker who was the transferee of Smt. Indrani and the main contesting defendant. Hence, on this count as well, the submissions of the learned counsel for the appellant cannot sustain his case.

25. It is finally urged that the suit was within time as from the date of setting up a title which was adverse to the title of the plaintiff and created a cloud which gave a cause of action to the plaintiff who filed the suit for declaration and in such circumstances, the suit was decreed for declaration and the said decree has been upheld by the First Appellate Court which does not require any interference and the appeal being devoid of merits is liable to be dismissed.

26. The Court has considered the rival submissions and also perused the material on record.

27. While dealing with the first issue relating to the deed in question, it is to be ascertained what is the nature and character of the document. A mortgage by conditional sale is provided in the Transfer of Property Act, 1882 in Section 58 (c). In order to appreciate the submissions of the respective parties at this stage it will be appropriate to notice the said provision which reads as under:-

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” defined.—

(a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor; the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) Simple mortgage.—

Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) Mortgage by conditional sale.—

28. Where, the mortgagor ostensibly sells the mortgaged property—on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the 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.

29. The aforesaid provision of Section 58 (c) came to be considered by the Apex Court in the case of **Manjabai Krishna Patil (supra)** and it was held that in order to ascertain whether a document is a document of sale with a clause to repurchase or is a document of mortgage by conditional sale must be seen whether the stipulations contained in the same very document or in a separate deed and the relevant portion of the said report

reads as under:-

“11. Furthermore, Section 58(c) of the Transfer of Property Act, 1882 (for short “the Act”) provides for satisfaction of the conditions for mortgage by way of conditional sale providing:

“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.”

12. Proviso appended to Section 58(c) is clear and unambiguous. A legal fiction is created thereby that the transaction shall not be held to be a mortgage by conditional sale, unless a condition is embodied in the document which effects or purports to effect the sale. Where two documents are executed, the transaction in question would not amount to a mortgage by way of conditional sale. In a case of this nature, ordinarily the same would be considered to be a deed of sale coupled with an agreement of reconveyance.”

30. The same proposition was also followed and upheld by the Apex Court in ***Bhulabhai (supra)*** and ***Srinivassaiah (supra)*** and relying upon the aforesaid three decisions, it has been submitted by Sri Saeed that in the instant case as well the clause of repurchase is contained in the same document of 1937, thus, it would be a document of conditional sale and not a simplicitor sale deed with a clause of repurchase.

31. Apparently, upon reading the decisions cited by the learned counsel for the appellant, it would indicate that what the Apex Court in ***Manjabhai Krishna Patil (Supra)*** has considered and held is that Clause (c) of Section 58 of the Transfer of Property Act creates a legal fiction to state that unless the condition is embodied in the document which affects the sale, it cannot be treated a document of mortgage by conditional sale, however, this in itself is not the sole determinative factor as to treat a document as mortgage

by conditional sale merely because the condition is contained in the document itself.

32. From the meaningful reading of the decisions cited by learned counsel for the appellant, it would indicate that it must be indicated clearly and established by evidence, that there was a relationship of creditor and debtor between the parties. In case if such relationship has not been established then merely because the condition is contained in the document itself it will not lead the courts to accept the said document as a document of mortgage by conditional sale.

33. From the perusal of the material available on record, it would indicate that the defendants examined four witnesses, however, none of these four witnesses made any such averment or deposition to prove that there was any relationship of debtor and creditor between Bhagwandeem and Mohd. Azeem.

34. From the perusal of the document of the year 1937, it would reveal that it clearly stated that the property in question was free from all encumbrances including mortgage and since Bhagwandeem was in need of money, he had sold the property to Mohd. Azeem and transferred its possession. The document further indicates that Bhagwandeem had a right to repurchase the property and this period expired in the year 1947.

35. Significantly, Bhagwandeem continued to live till 1962 i.e. for a period of 15 years after the period for exercising his option of repurchase had come to an end but during his lifetime, he did not exercise the said option. Even after his death in the year 1962, his wife Smt. Indrani did not

seek any redemption even if she treated the said document to be a document of mortgage by conditional sale.

36. For the sake of argument if the said document is taken to be a mortgage then Smt. Indrani could not have transferred the property to Sri Ram Shanker in the year 1974 without getting the mortgage redeemed. Moreover, if the document is treated to be a document of sale then apparently, Bhagwandeem did not exercise his right of re-purchase, thus, for the said reason, the rights of Mohd. Azeem got perfected and he continued to be its owner. In this light, Smt. Indrani could not inherit the said property nor could she confer any right to Sri Ram Shanker.

37. A plea was taken by the defendants that Bhagwandeem had paid the mortgage money to Sri Mohd. Azeem and got the mortgage redeemed by getting an endorsement on the original document of 1937, however, this plea did not find favour with the two courts, inasmuch as, it was found to be a false as the original document of 1937 was placed on record by Mohd. Azeem and not by Bhagwandeem or his legal heirs. Normally, if Bhagwandeem had got the mortgage redeemed and had paid the mortgage money then the endorsement ought to have been made but the document bearing No. Ka-7 did not contain any such endorsement.

38. Even if the said endorsement was made on the original document then the same ought to have been returned by Mohd. Azeem to Bhagwandeem but that is not the case here as the said document always remained in the custody of Mohd. Azeem and it was placed before the court also through his successors during trial. This has been explicitly noticed by the Trial Court as well as by the the First Appellate Court and there was no

evidence to the contrary.

39. A feeble plea was raised before the two courts by examining Kailash Baksh as D.W.3 to state that before him the said redemption had taken place and the endorsement was made on the document KA-7. His testimony was not reliable and it was discarded by the two courts on the ground that the original document did not contain the said endorsement which was alleged to have been made by Mohd. Azeem.

40. Another plea was taken by the defendants that Bhagwandeem had requested Mohd. Azeem to return the document of 1937 but it was not returned as it was stated by Mohd. Azeem that it had been lost/misplaced.

41. If this was the case as sought to be projected by the defendants then at least the endorsement of payment of mortgage money could have been on some other paper in the shape of a receipt, however, no such document evidencing the payment as allegedly made by Bhagwandeem was brought on record.

42. In the aforesaid facts and circumstances and from the perusal of the material on record, this Court finds that merely because the condition was contained in the document itself will not result in the document to be held as a document of mortgage by conditional sale. It may be true that in case if the condition of repurchase embodied in another document then it cannot be treated to be a document of mortgage by conditional sale as in such circumstances, the said document has to be treated as a sale with a clause for repurchase.

43. It would be equally true to state that a document of sale with a clause

of repurchase may or may not be in one document but in case of a document of mortgage by conditional sale it is necessary that the condition must be incorporated in the document itself. Once, it is seen that the condition is contained in the document itself then the next condition that needs to be established is the relationship of debtor and creditor. Without establishing this relationship, it will be difficult to hold that the document is a document of mortgage by conditional sale merely because the condition is embodied in the same document.

44. In the instant case, there is no such evidence to indicate that there is any relationship of debtor and creditor between Mohd. Azeem and Bhagwandeem. In this regard, this Court is fortified in its view in light of the decision of the Apex Court in ***P.L. Bapuswami Vs. N. Pattay Goundar; 1965 SCC Online SC 346*** wherein it has been held as under.

“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 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 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 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 of document viewed, in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic

evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts.”

45. The Apex Court in ***Patel Ravjibhai (supra)*** in para 9 has noticed the distinguishing feature between mortgage by conditional sale and sale with an option to repurchase which have been enumerated in the Mulla’s Transfer of Property Act, 11th Edition which is being gainfully reproduced hereinafter:

“9. Distinguishing features between 'mortgage by conditional sale' and 'sale with an option to repurchase' are enumerated in Mulla's Transfer of Property Act (11th Edition) as under:-

"(i) In a mortgage with conditional sale, the relation of a debtor and a creditor subsists while in a sale with an option of re- purchase, there is no such relationship and the parties stand on an equal footing.

(ii) A mortgage by conditional sale is effected by a single document, while a sale with an option of repurchase is generally effected with the help of two independent documents.

(iii) In a mortgage with conditional sale the debt subsists as it is a borrowing arrangement, while in a sale with an option of repurchase, there is no debt but a consideration for sale.

(iv) In a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property.

(v) In a mortgage with conditional sale, since this is a mortgage transaction, the right of redemption subsists in favour of the mortgagor despite the expiry of the time stipulated in the contract for its payment. The mortgagor has the option to redeem the mortgage and take back the property on the payment of the mortgage money, after the specified time, but in a sale with an option of re-purchase, the original seller must re-purchase the property within the stipulated time period. If he commits a default the option of re-purchase is lost”

46. In light of the aforesaid propositions and applying the same to the case at hand, it would indicate that the relationship of debtor and creditor was not established. The plea regarding payment of mortgage money to Mohd. Azeem was also not established and in such circumstances, the inferences drawn by the two courts based on proper appreciation of evidence cannot be faulted with. The document Ka-7 has rightly been held to be a document of sale with an option of re-purchase. The first question is

answered accordingly.

47. In so far as the second question regarding the limitation is concerned, it would be seen that the suit has been instituted seeking a decree of declaration which was indicated from the date when title of the plaintiff was put under cloud by execution of a sale deed by Smt. Indrani in the year 1974 and as such it cannot be said that the suit filed was barred by limitation. Moreover, if the issue of limitation is seen in context with the plea of the defendant taking the document to be a document of mortgage by conditional sale this now will not be fruitful to be considered as it has already been held by this Court that the document was a document of sale and not a document of mortgage by conditional sale. Thus, the second question pales into insignificance in light of the findings given in respect of the first question.

48. For the aforesaid reasons, this Court does not find that there is any merit in the appeal which is accordingly *dismissed*. The judgment and decree passed by the Trial Court dated 03.12.1980 in Regular Suit No. 115 of 1974 and affirmed by the judgment of the First Appellate Court dated 03.05.1983 in Appeal No. 22 of 1981 are affirmed. There shall be no order as to costs. The record of the Trial Court shall be returned forthwith.

Order Date :- 09th July, 2024

Asheesh

(Jaspreet Singh, J.)