IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 27.08.2018
DELIVERED ON: 12.09.2018

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

Second Appeal No.224 of 2002

D.Selvaraj ...Appellant/Appellant/Defendant

vs.

1. Palaniswami
2. Minor Ramkumar
   Represented by natural guardian and father,
   Palanisami ..Respondents/Respondents/Plaintiffs

PRAYER: Second Appeal filed under Section 100 of the Code of Civil Procedure against the decree and judgment dated 13.11.2001 made in A.S.No.108 of 2001 on the file of the II Additional District Judge, Salem upholding the decree and judgment dated 23.04.2001 made in O.S.No.59 of 1998 on the file of the Subordinate Judge, Attur.

For Appellant : Mr.K.Selvaraj
For Respondents : Mr.R.Siddharthan

JUDGMENT

The unsuccessful defendant in O.S.No.59 of 1998 on the file of the Subordinate Judge, Attur and the appellant in A.S.No.108 of 2001 on the file of the II Additional Judge, Salem is the appellant herein.

2. The respondents/plaintiffs filed a suit in O.S.No.59 of 1998 before the Sub Court, Attur praying for a specific performance of contract dated 25.01.1995 (Ex.B1). Briefly stated the case of the respondents/plaintiffs in O.S.No.59 of 1998 is as follows. The first plaintiff for himself and on behalf of the 2nd plaintiff mortgaged the suit property with the defendant/appellant and a mortgage by conditional sale for a sum of Rs.35,000/- was executed vide a registered deed dated 25.01.1995 (Ex.B1). As per the recitals of the said deed, the appellant/defendant agreed to transfer back the suit property within 5 years from the date of the deed (Ex.B1). The plaintiffs though were always ready and willing to perform their part of contract, the appellant/defendant evaded performance of their part of contract. Therefore, the plaintiff

issued a telegram on 23.01.1998 showing his readiness and willingness to purchase the property as per the conditional sale deed (Ex.B1). The defendant though received the said telegram, did not come forward to execute the sale deed. Hence the suit for specific performance.

3. The appellant/defendant filed a written statement contending that the respondents/plaintiffs were not ready and wiling to perform their part of the contract though in the ' conditional sale deed ' it is clearly indicated that time for reconveyance of the property is 5 years. Furthermore, the transaction is not a mortgage by conditional sale as alleged by the respondents/plaintiffs and on the contrary, it is only an outright sale. There is no relationship of debtor-creditor between the respondents/plaintiffs and the appellant/defendant. In fact, the property was sold for a consideration of Rs.35,000/-, which was the market value at that point of time and the possession of the suit property was also handed over to the appellant/defendant. He therefore, prayed for the dismissal of the suit.

4. On the basis of the above pleadings, the following issues were framed by the trial court.

1. Whether it is true that the plaintiffs executed a conditional sale, after receiving Rs.35,000/- from the defendants on 25.01.1993?
2. Whether the plaintiffs are entitled to the relief of specific performance?
3. To what relief, the plaintiffs are entitled?

The said issue No.1 was recast subsequently as

1. Whether it is true that the plaintiffs mortgaged the suit property by executing a conditional sale, after receiving a sum of Rs.35,000/- from the defendants on 25.01.1993?

5. In the trial court, the first plaintiff examined himself and marked Ex.A1 to Ex.A6 and the defendant examined himself and marked Ex.B1.

6. After full contest, the learned Subordinate Judge, Attur decreed the suit as prayed for by the plaintiffs by holding that the transaction between the respondents/plaintiffs and the appellant/defendant is a mortgage by conditional sale. The defendant filed an appeal in A.S.No.108 of 2001 before the II Additional District Judge, Salem. The II Additional District Judge after analysing the evidence on record, upheld the findings of the learned Subordinate Judge, Attur and dismissed the appeal filed by the appellant/defendant.

7. The present appeal is filed by the defendant.

8. In this second appeal, the following substantial questions of law were raised.

1. Whether the courts below are right in holding that the deed of conditional sale (Ex.A1 and Ex.B1) is a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act?

2. Whether the courts below erred in holding that the suit is not barred by limitation since it is admittedly filed after the expiry of the period of 5 years mentioned in the deed (Ex.A1)?

3. Whether the courts below are right in accepting the oral evidence of the plaintiff alone as admissible to hold that it is a mortgage by conditional sale against the provisions of Section 92 of Evidence Act, 1872 and the terms of the document?

4. Whether the courts below are right in holding Ex.A1 as mortgage by conditional sale in a suit for specific performance?

9. The crux of the issue to be decided in this appeal is whether the conditional sale deed dated 25.01.1993 (Ex.B1) is a ''mortgage by conditional sale'' or a "sale with a condition to repurchase". The certified copy of Ex.B1 is marked as Ex.A1 by the plaintiff. In the case of a ''mortgage by conditional sale'', the mortgagor ostensibly sells the mortgaged property on the condition that on default of repayment of the mortgage money by a certain date, the sale will become absolute. On the payment being made, the sale will become valid and the buyer will have to transfer the property back to the seller.

10. Section 58(c) of the Transfer of Property Act defines a mortgage by conditional sale.

> 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.

The essential features of a mortgage by conditional sale are

(1) If the mortgagor fails to repay the mortgage money by a certain date, the sale becomes absolute.

(2) If the mortgagor repays the mortgage money by a certain date, the sale becomes void and the mortgagor becomes the owner of the property.

11. The ostensible sale becomes an absolute sale, if the mortgagor fails to repay the debt by the specified date. This absolute sale can be enforced through proceedings for foreclosure of the mortgage. The order of foreclosure by a court converts the mortgage by a conditional sale into an absolute sale. It is also to be remembered that a mortgage once created remains a mortgage unless it is foreclosed or redeemed.

12. There is a clear legal distinction between the two concepts, a "mortgage by conditional sale" and a "sale with a condition to repurchase". The former is a mortgage, wherein the relationship of creditor-debtor subsists and the right to redeem remains with the debtor. The latter is an out right sale whereby the owner transfers all his rights in the property to the purchaser reserving a personal right of repurchase .

13. Infact, the proviso to Section 58(c) of the Transfer of Property Act was added by Act XX of 1929 so as to set at rest the conflict of decisions on the question whether the conditions, specially the condition relating to reconveyence contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the Principal deed. Therefore, the Legislative in its wisdom enacted the proviso clause to Section 58(1) of the Transfer of Property Act that a transaction shall not be deemed to be a mortgage unless the condition for re-conveyance is contained in the document, which purports to effect the sale.

14. In Bhaskar Wama Joshi and other Vs. Shrinarayan Ramblas Agarwal and other reported in AIR 1960 SC 301, it was held that " But it does not follow that if the condition is incorporated on the deed effecting or purporting to effect a sale a mortgage transaction must of necessarily have been intended. The question whether by the incorporation of such a condition in 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 " . Ofcourse, oral evidence of intentions of parties is not admissible as the same is hit by Section 92 of Indian Evidence Act, but evidence to explain or even to contradict the recitals as distinguished from the terms of

documents may be given.

15. In the instant case, the vendors have agreed to purchase the property sold through Ex.B1, during the 5th year of the deed on payment of the same sale consideration of Rs.35,000/-. The main contention of the defendant is that since the plaintiffs were not ready and willing to perform their part of contract within the stipulated period of 5 years mentioned in Ex.B1, they cannot maintain a suit for specific performance of contract. It is pertinent to point out that the time prescribed in Ex.B1 is not " within 5 years " as alleged by the appellants/defendants. On the other hand, the time stipulated in Ex.B1 is "during 5th year of the date of the deed". The plaintiffs in fact have contended that they sent a telegram on 23.01.1998 (Ex.A2). Though the defendant contends that he did not receive the said telegram, it is to be borne in mind that the plaintiffs have filed the suit immediately i.e. on 8.3.1998. The five year period mentioned in Ex.B1 does not end on 24.01.1998, as claimed by the defendant/appellant. Even if we construe that the term "fifth year " would commence from 24.01.1997, the plaintiff has filed the suit on 08.03.1998, well within the period of limitation.

16. Now, coming back to the point of intention of parties in executing Ex.B1, the following circumstances found in the deed Ex.B1 should be considered.

(i) As required by the proviso to Section 58 (c), the condition for repurchase was embodied in the same document.

(ii) patta was not transferred to the defendant, after the execution of Ex.B1 bythe plaintiffs and there is no mention about this in the deed Ex.B1.

(iii) The plaintiffs continued to pay kist for the land as evidenced by Ex.A3 to Ex.A6.

(iv) The defendant did not adduce any documentary evidence to show that there was mutation of records to hold that the transaction through Ex.B1 was outright sale.

(v) The plaintiff had agreed to purchase the property for the same consideration of Rs.35,000/- even after 5 years, even though both the parties are aware that there will be escalation in the price.

17. Ofcourse, in the case on hand, there is no mention about the payment of interest. But, it should be borne in mind that the possession was handed over to the defendant for their enjoyment for five years, as per the recitals of Ex.B1.

18. Mr. V.Selvaraj, learned counsel appearing for the appellant relied on the decision in Tamboli Ramanlal Motilal

(dead) by L.Rs. V. Ghanchi Chimanlal Keshavlal (dead) by L.Rs and another reported in AIR 1992 SC 1236 and contended that if the intention of parties is explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. His further submission is that since there is no relationship of debtor and creditor between the plaintiffs and the defendant, the question of the deed being a mortgage by conditional sale does not arise. In the aforesaid decision, it was factually found that there was no relationship of creditor-debtor between the parties. In the instant case, the plaintiffs had received Rs.35,000/- from the defendant for discharging their loans and for their family expenses and both the courts below had analysed the evidence on record and had concurrently held that Ex.B1 is a mortgage by conditional sale.

19. The decision in Uday Chand Dutt (deceased) through his L.Rs. V. Saibal Sen (deceased) through his LRs 1(a) Shyamli Sen w/o Saibal Sen and others reported in AIR 1998 SCC 367 is relied on by the learned counsel appearing for the appellant would not also apply to the facts of the present case, because, in that case, the defendant / the purchaser was found to have 'constructed a superstructure in the property, purchased by him and had also started collecting rents from the tenants.

20. At this juncture, it is relevant to point out that there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption, within the prescribed period of limitation. This might have happened in the instant case also and instead of executing a mortgage deed in respect of the suit property, the plaintiffs were persuaded to execute a sale deed in favour of the defendant. In the decision in U.Nilan Vs. Kannayan (deceased) through L.Rs. reported in 1998(8) SCC 511, the Honourable Supreme Court has observed thus

> "Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefore, the situation cannot be exploited by the person,who had advanced the loan. The court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy, which is followed by the court in allowing that person to redeem his properties by making the deposit under order 34 Rule 5 of the Code of Civil Procedure

21. Yet another judgment relied on by the learned counsel appearing for the appellant is Pachappan and 2 others Vs. S.P.Koon Mari reported in 1996 2 Law Weekly 10. The facts of the case in the above decision are totally different. In fact, in that case, the appellants purchased the suit property under

Ex.B1 for a sum of Rs.21,000/-. Out of which, a sum of Rs.13,200/- was paid in cash. As regards the balance of Rs.7,800/- the appellants agreed to discharge within a period of five years, the loan due to Dharmapuri Co-operative Land Development Bank. On the same day, the appellants executed a document agreeing to re-convey the property to the respondent, if the latter paid the entire amount of sale consideration within a period of 5 years therefrom. Subsequently, a suit for specific performance of contract was filed by the respondent. The court held that, time is the essence of contract. In the instant case, as already observe, the time mentioned in Ex.B1 is not "within 5 years" as claimed by the defendant. Further more, in Ex.B1, there is an agreement for reconveyance of the said property at the same price at which it was sold after a certain period would itself show that the parties agreed that there was no permanent transfer of ownership and in the event of the vendor paying the amount of consideration,within the prescribed time, his ownership would be restored.

22. The learned counsel for the appellant also relied on the decisions in Raj Kishore (dead) by Lrs. V. Prem Singh and others reported in (2011) 1 Supreme Court Cases 657, Smt.Bismillah Begum (dead) by LRs V. Rahmatullah Khan (dead) by LRs. reported in 1998(1) CTC 621 and contended that time is the essence of contract. As already observed by this court, the time stipulated in Ex.B1 is not within the period of 5 years and hence the arguments of the learned counsel appearing for the appellants with regard to time as essence of contract is of no avail, as far as the present case is concerned.

23. Infact, there are the numerous decisions on the point whether a particular document is a "mortgage by conditional sale"or a "sale with a condition to repurchase". Several High Courts have analysed the same. However, each case must be decided on its own set of facts, as it is necessary to consider the attendant circumstances and one case cannot be compared with another.

24. Apart from this, the Court of first appeal is competent to entertain a question of fact and decide whether the findings of fact by the trial court are erroneous or not. The court of second appeal is not competent to entertain the question, as to the soundness of finding of fact by the courts below. Time and again, the Apex Court has held that High Court has no jurisdiction in second appeal to interfere with the finding of fact given by the first appellate court based upon appreciation of relevant evidence. In these circumstances, I do not find any valid ground to allow the second appeal.

25. In the result,

(i) the second appeal is dismissed. No costs.

(ii) The decree and judgment dated 13.11.2001 made in A.S.No.108 of 2001 by the II Additional District Judge, Salem is upheld.

(ii) The decree and judgment dated 23.04.2001 made in O.S.No.59 of 1998 by the file of the Subordinate Judge, Attur is upheld.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

mst

To
1. The II Additional District Judge, Salem .
2. The Subordinate Judge, Attur.

+1 CC to Mr.K. Selvaraj, Advocate sr 63546.
+1 CC to Mr.T.R. Rajaraman, Advocate sr 63996.

Second Appeal No.224 of 2002

GJ(CO)
SP(16/10/2018)