IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on 22.11.2021	Judgment Pronounced on 0702.2022

CORAM:

THE HONOURABLE MR. JUSTICE G.CHANDRASEKHARAN

S.A.No.571 of 2019

Balasubramaniyam ... Appellant/Appellant/Plaintiff

..vs..

Paneer Selvam (died on 22.09.2013)
1. Muthaiyan
2. Mythili
3. Priya
4. Minor Murali ... Respondents/Respondents/Nil
rep by Guardian Mother Mythili

This Second Appeal is filed under Section 100 of Civil Procedure Code against the judgment and decree dated 07.12.2018 made in A.S.No.75 of 2016 on the file of learned Additional District and Sessions Judge, Ariyalur, confirming the judgment and decree dated 27.09.2012 made in O.S.No.225 of 2008 on the file of the learned Principal District Munsif, Ariyalur.

For Appellant : M/s.V.Raghavachari

For Respondents : Mr.C.Umashankar

JUDGMENT

This Second Appeal is filed challenging the judgment and decree of learned Additional District and Sessions Judge, Ariyalur, in A.S.No.76 of 2016 dated 07.12.2018 confirming the judgment and decree of the learned Principal District Munsif, Ariyalur in O.S.No.225 of 2008 dated 27.09.2012.

2.Appellant/plaintiff filed the suit to declare his right and title to the suit property with the consequential relief of permanent injunction restraining the defendants, their men, servants, agents, police in interfering with the peaceful possession and enjoyment of the suit property. The case of the appellant/plaintiff is that the suit property originally belongs to deceased first defendant Panneer Selvam, through a partition held in his family on 23.12.1998. Appellant/plaintiff purchased the suit property from him on behalf of his son-second defendant on a conditional sale with the condition to repurchase for a good and valuable consideration of Rs.3,200/- on 18.06.1999 by a sale deed. Second defendant was a minor at the time of the sale. Appellant/plaintiff is in possession and enjoyment of the suit property. Condition of repurchase is that defendants, within 1½ years, should get repurchase of the suit property, otherwise defendants loose their right of repurchase. Since the repurchase clause was embodied in the same document, the document would not come under the category of mortgage by conditional sale, but an outright sale with a condition to repurchase. Since the defendants had not exercised their right of repurchase option within the time stipulated under the document, the claim is barred by limitation. Without any legal right, they gave complaint to the police. Patta and Chitta are in the name of appellant/plaintiff. Suit property is a vacant site and appellant/plaintiff is intended to construct a building in the suit property. In the said circumstances, the suit is filed for the aforesaid reliefs.

3.Case of the defendants/respondents, in brief is as follows:-

It is denied that the appellant/plaintiff purchased the suit property from the defendants as conditional sale with a condition to repurchase. First defendant Panneer Selvam borrowed a sum of Rs.3,200/- from the appellant/plaintiff on 18.08.1999. Since the appellant/plaintiff demanded the document as security for the loan transaction, first defendant executed a deed of mortgage by conditional sale. First defendant was paying interest to the appellant/plaintiff regularly. Document dated 18.06.1999 is only a mortgage by conditional sale and not an outright sale with a condition to repurchase. There is only a debtor-creditor relationship between the appellant/plaintiff and defendants. There was no intention on the part of the defendants to sell the suit property as the property would fetch more than Rs.1,00,000/- even in 1999. First defendant approached appellant/plaintiff in 2000 with the principal amount to settle the loan amount. But appellant/plaintiff refused to receive the amount and demanded another loan transaction pending between them has to be cleared. Since the first defendant had only money to settle this loan amount and the appellant/plaintiff insisted on paying another loan transaction, this loan could not be settled. Only recently, appellant/plaintiff made attempts to change patta in his name. Then only first defendant came to know that appellant/plaintiff had obtained a deed of conditional sale instead of mortgage by conditional sale. Appellant/plaintiff misrepresented to the first defendant with regard to the nature and character of the document. Since the appellant/plaintiff and first defendant were colleagues, first defendant believed the words of appellant/plaintiff and executed the document in good faith. Appellant/ plaintiff misused the good faith and created the document. On 11.10.2007, first defendant entered into a sale agreement in respect of the suit property with Thangarasu with the consent of appellant/plaintiff, to settle the loan amount. First defendant issued a notice to the appellant/plaintiff on 03.07.2008 and the appellant/plaintiff managed to return the notice as "unclaimed." The suit has no merits and is liable to be dismissed.

4.The trial Court framed the following issues:-

1) Whether it is correct to state that the sale deed dated 18.06.1999 is an outright sale with the condition to repurchase ?

2) Whether it is correct to state that the sale deed dated 18.06.1999 is a mortgage by conditional sale ?

3) Whether the plaintiff is entitled for the relief of declaration as prayed for ?

4) Whether the plaintiff is entitled for the relief of permanent injunction as prayed for ?

5) To what relief the plaintiff is entitled ?

5.During trial, PW.1 was examined and Exs.A1 to A3 were marked on the side of appellant/plaintiff. DW.1 to DW.3 were examined and Exs.B1 and B2 were marked on the side of the respondents/defendants.

6.Learned trial Judge, on going through the oral and documentary evidence, came to the conclusion that Ex.A1 document is a mortgage by conditional sale and therefore, the appellant/plaintiff is not entitled to any relief claimed in the suit. In an appeal before the learned Additional District and Sessions Judge, Ariyalur in A.S.No.48 of 2012, first appellate Court had also confirmed the view taken by the learned trial Judge and dismissed the appeal. Therefore, the appellant/plaintiff has filed this Second Appeal.

7.At the time of admission of this Second Appeal, the following substantial questions of law were framed:-

1. Whether the courts below are right in

construing Ex.A1 as a mortgage by conditional sale, when the document is one of sale with an option to repurchase ?

2. Whether the courts below are wrong in misplacing the burden of proof for proving the nature of the document ? ”

8.Heard the submissions of learned counsel for the parties and perused the records.

9.The short point arises for consideration of this Court is whether Ex.A1 is a deed of mortgage by conditional sale or it is an outright sale with an option to repurchase.

10.It is seen from the case of the parties that there is no dispute that the suit property belongs to the respondents/defendants. It is also not in dispute that the respondents/defendants executed Ex.A1 document in favour of the appellant/plaintiff on 18.06.1999. The case of the appellant/plaintiff is that Ex.A1 document is a conditional sale with an option to repurchase within a specified period. If the Respondents failed to repurchase the property within the specified period, then they lose their right of claiming the property. In the case before hand, respondents failed to repurchase the property within the time stipulated in Ex.A1 and therefore, they lost their right in the suit property and the purchase made by the appellant/plaintiff became absolute and therefore, the suit for declaration of title and injunction. On the other hand, respondents' case is that the sale is not a conditional sale with the option to repurchase, but it is only a loan transaction evidenced by document of mortgage by conditional sale. Respondents approached the appellant/plaintiff to repay the loan amount with the request to cancel the document, but the appellant/plaintiff avoided to receive the amount stating that the respondents have to settle another loan transaction pending between them. Therefore, Ex.A1 deed could not be cancelled.

11.In support of his case that Ex.A1 document is an outright sale with an option to repurchase, learned counsel for the appellant/plaintiff submitted that the respondents have not produced any evidence to show that they paid interest towards the mortgage loan. No evidence has been produced to show that an attempt was made to pay the debt amount. Witnesses to Ex.A1 document were not examined to prove the terms of the document. Notice was issued only in 2008. No suit was filed by the respondents for redemption of mortgage.

12.In response, learned counsel for the respondents/defendants submitted that through Ex.A1 document, no right in presenti was transferred. It is purely a document evidencing mortgage by conditional sale fitting into the definition of mortgage by conditional sale defined under Section 58(c) of Transfer of Property Act. The value of the suit property is much more than that was reflected in Ex.A1, which supports the case that Ex.A1 is the mortgage by conditional sale. Appellant/plaintiff's right is postponed to a future date in Ex.A1. It again confirms that Ex.A1 is a mortgage by conditional sale. As of now, appellant/plaintiff has no absolute title in the suit property and therefore, the suit for declaration of title and for consequential injunction is not maintainable. Assuming that the suit is maintainable, the declaration suit ought to have been filed immediately after three years period in July 2001. Appellant/plaintiff should have filed the suit only for foreclosure of mortgage and not for declaration of title. In support of his case, learned counsel for the respondents relied on the judgments reported in 1954 AIR SC 345 (Chunchun Jha ..vs.. Sheikh Ebadat Ali and another); 1966 AIR SC 902 (P.L.Bapuswami ..vs.. N.Pattay Gounder); 1974 AIR (Mad) 311 (Murugan ..vs.. Jayarama Pillai and others), AIR 1983 (Pat) 60 (Madhu Lal Singh ..vs.. Dhonga Manda) and (2021) 9 SCC 45 (Bhimrao Ramchandra Khalate (deceased) through legal representatives ..vs.. Nana Dinkar Yadav (Tanpura) and another).

13.The above judgments have been cited to understand as to whether a document is a mortgage by conditional sale or an outright sale with an option to repurchase. It is useful to refer to the relevant portions of these judgments for better appreciation of the construction of the document, especially as to whether a document is a mortgage by conditional sale or an outright sale with an option to repurchase.

14.It is observed in 1966 AIR SC 902 (P.L.Bapuswami ..vs.. N.Pattay Gounder) as follows:-

> “We consider that in the present case there are several circumstances to indicate that Ex. B-1 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/-.

15.In 1974 AIR (Mad) 311 (Murugan ..vs.. Jayarama Pillai and others), it is held that,

> "4. Apart from the document having been styled as a Kedukirayam there are two or three other circumstances indicating that the document is really a mortgage by conditional sale. The most important circumstance is that the consideration is an odd sum, namely, Rs. 3826.50. If it is an outright sale, we do not understand as to why the parties should agree upon such an odd figure as the consideration for the same. It is significant to note that the entire sum of Rupees 3826.50 paid by the defendant under the document went towards the discharge of loans due by the plaintiffs. As we said, there are five items of consideration making up the total sum of Rs. 3826.50. The first four items are mortgages and promissory notes which had been executed by the plaintiffs and which were directed to be discharged by the defendant himself. The fifth item is a cash consideration of Rs. 797.50. But even this amount is really for discharging sundry debts due by the plaintiffs. This fact, namely, that the consideration is for an odd amount, is clearly indicative of the fact that the document is really not an outright sale. The learned Counsel for the appellant contends that the first two Courts have found that the value of the property dealt with under document was not Rs. 7,000/- as claimed by the plaintiffs, and that the consideration mentioned in the document was adequate. But, as pointed out by the learned Judge, there is some evidence in the case that the property was worth much more than Rs. 3826.50 as on the date of the document. That apart, it is impossible to hold that the value of the property was exactly Rupees 3826.50 as on the date of the document."

16.It is observed in AIR 1983 Patna 60 (Madhu Lal Singh ..vs.. Dhonga Manda) that,

> "13. ......

.... It cannot be disputed that when a draft is made of a mortgage by conditional sale, the form and the language of the document as required under Section 58(c) of the Transfer of Property Act would show the transaction covered by that document to be an ostensible sale and as laid down in Chunchun Jha's case (AIR 1954 SC 345) (supra), "if a sale is ostensible , it must necessarily contain all the outward indicia of a real sale". The decision further says "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 be under Section 58(c), but whether that is done 'ostensibly' and whether conditions of a certain kind are attached."

Therefore, in my view, in absence of attendant circumstance, it cannot be construed from the clauses used in the document in question that it was a 'deed of sale with condition of repurchase'; and the defendant has miserably failed to discharge the onus which lay upon him. It is true that the lower appellate Court has relied upon the circumstances that Rs. 400/- was not the real value of the land for holding that the document is a mortgage by conditional sale, which conclusion is not borne out by the materials on record, but in my view the same conclusion can be arrived at from the reasons discussed above. It was for the defendant to show that the price of Rs. 400/- was the real value of the land and it was adequate. The defendant has not chosen to show it Therefore absence of such evidence does not help the defendant. There is also no clinching circumstance in favour of holding that the document in question was a sale. I, accordingly, hold that the document in question is a 'deed of mortgage with conditional sale'.

17.In 1954 AIR SC 345 (Chunchun Jha ..vs.. Sheikh Ebadat Ali and another), it is observed as follows:-

> "8. Because of the welter of confusion caused by a multitude of conflicting decisions the Legislature stepped in and amended section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. 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. But the converse does not 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 effects or purports to effect the -sale, then it is a matter for construction which was meant.
> The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore 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 if the conditions of section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage."

18.The judgment of Full Bench of Hon'ble Supreme Court reported in AIR 1954 SC 345 (cited supra) is followed in the ruling reported in 2021 (9) SCC 45 (cited supra). The relevant portions is extracted hereunder:-

> 12. In view of the judgments mentioned above, the intention of the parties has to be seen when the document is executed. It is not in dispute that the condition of retransfer is a part of the same document (Ex. 68). Such is the condition inserted by an amendment in the year 1929 expressed by the proviso of Section 58(c) of the Act. As held in Pandit Chunchun Jha, a transaction which takes the outward form of a sale but in essence the documents are of a mortgage, though it is couched in the form of a sale. This

Court held that it is impossible to compare one case with another. Each case must be decided on its own facts and circumstances. The document has to read as a whole and if any word is ambiguous, then to find out the intention of the parties when such document was executed.

13. Therefore, a reading of the document would show that the document was executed for the reason that the plaintiff has borrowed a sum of Rs.3,000/- for his household expenses and the defendant is bound to retransfer the land if the amount is paid within one year. The advance of loan and return thereof are part of the same document which creates a relationship of debtor and creditor. Thus, it would be covered by proviso in Section 58(c) of the Act."

19.From the combined reading of these judgments, it can be gathered that,

i) The intention of the parties have to be gathered in the language of the deed interpreted in the light of the surrounding circumstances.

ii) When the words are plain and unambiguous, they must, in the light of the evidence of surrounding circumstances, be given a true legal effect.

iii) 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.

iv) Whether the document is covered by Section 58(c) of Transfer of Property Act, if it is not, then it cannot be a mortgage by conditional sale.

v) The first point is to see whether there is an ostensible sale. That means a transaction, which takes the outward form of sale, for the essence of a mortgage by conditional sale is that though in substance it is the mortgage it is couched in the form of a sale, with certain conditions attached.

vi) If the sale and the agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage by conditional sale irrespective of whether the documents are contemporaneously executed or not. But the converse does not hold good. Merely because there is only one document, it does not necessarily mean that it must be a mortgage and cannot be a sale.

vii) Legislature has made clear cut classification and excluded transaction embodied in more than one documents from the category of mortgage, therefore, it is reasonable to support that persons, who after the amendment, chose not to use two documents, do not intend the transaction to be a sale, unless, they displace the presumption by clear and express words and if the conditions of Section 58(a) are fulfilled, then we are of the opinion that the deed should be construed as a mortgage.

viii) The definition of 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.

ix) When a question to be examined is 'whether the transaction is a mortgage by conditional sale or a sale outright with an option to repurchase', it was held that two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances, the imponderable variables, which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts.

20.We have to analyse Ex.A1-document with this legal background and understanding of what is a mortgage by conditional sale and what is an outright sale with an option to repurchase.

21.Ex.A1 is titled as 'conditional sale'. This deed was executed by the first defendant, for himself and on behalf of his minor son/second defendant, in favour of appellant/plaintiff on 18.06.1999. The sale consideration is Rs.3,200/-. It is recited that

(i) The property covered in this document was allotted to the first defendant as 'B' schedule property in a family partition on 23.12.1998. (ii) Ever since the allotment of the property in the partition, defendants are in possession and enjoyment of the suit property and he sold the suit property with a condition for a consideration of Rs.3,200/-. (iii) The reason for sale is that the defendants have to settle some loans.

(iv) To settle the loans, the property was sold to the appellant/plaintiff with the condition that the appellant/plaintiff has to enjoy the property with the condition attached and the defendants are entitled to repurchase the same within 1½ years from the date of execution of this document.

(v) In case, the defendants failed to pay the amount within the period of 1½ years, the defendants would lose their right to repurchase and on the expiry of 1½ years, appellant/plaintiff would get absolute right in the suit property and he can enjoy the property without any conditions.

22.At the time of execution of this document, second defendant was a minor. The recitals in this document show that the defendants have some loan amounts to be paid and that was the primary reason for getting money from the appellant/plaintiff and executing this document. Though there is an ostensible sale, the absolute right in the suit property was not transferred to the appellant/plaintiff. It was postponed to a future date ie., after the expiry of 1½ years from 18.06.1999, in case of failure on the part of the defendants to repay the amount and get a sale deed executed. All these conditions ie., ostensible sale, right of repurchase, receiving the amount for settling the loan amount had all been incorporated in a single document. It is quite obvious from these terms that the transfer is a security for the debt and the relationship of debtor and creditor is created. This document squarely confirms to the definition of mortgage by conditional sale as defined under Section 58(c) of Transfer of Property Act. For better appreciation, Section 58(c) of Transfer of Property Act is extracted hereunder:-

> Section 58(c) in The Transfer of Property Act, 1882:-
>
> (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 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].

23.The condition that on default of payment of mortgage money on such a date, the sale become absolute; the condition that on such payment being made, the buyer shall transfer the property to seller are incorporated in this document. Both the conditions had been incorporated in the same document to confirm to the provisions of Section 58(c) of Transfer of Property Act. Therefore, this Court is of the considered view that Ex.A1 document is a mortgage by conditional sale. Both the Courts have also concurrently found that Ex.A1 document is a mortgage by a conditional sale and therefore, appellant/plaintiff is not entitled for the relief as claimed in the suit.

24.The submission of the learned counsel for the appellant/plaintiff that respondents have not shown any material to show the payment of interest and they have not filed the suit for redemption of mortgage cannot be entertained for the reason that appellant/plaintiff is in possession of the suit property and therefore, there is no question of payment of interest. Suit for redemption can be instituted within 30 years, when the right to redeem or recover possession accrues. Still the respondents have time to file the suit for redemption.

25.For the reasons aforesaid, this Court answers the substantial questions of law No.1 that courts below are right in construing Ex.A1 is a mortgage by conditional sale. Courts below have not misplaced the burden of proof wrongly and took a decision that Ex.A1 is a mortgage by conditional sale on the basis of evidence available. Thus, the substantial questions of law No.2 is answered.

26.In view of the reasons said above, this Court finds no reason to interfere with the judgments of the Courts below and therefore, this Court confirms the judgment of the first Appellate Judge/Additional District and Sessions Court, Ariyalur, in A.S.No.75 of 2016 dated 07.12.2018 confirming the judgment and decree of trial Court/Principal District Munsif Court, Ariyalur. in O.S.No.225 of 2008 dated 27.09.2012.

27.Resultantly, the Second Appeal is dismissed with the costs of the respondents throughout. Consequently, connected Miscellaneous Petitions, if any, is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District and Sessions Judge,
   Ariyalur.

2. The Principal District Munsif,
   Ariyalur.

Copy To

The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.V.Raghavachari, Advocate SR.No.7640
+1cc to Mr.C.Umashankar, Advocate SR.No.7828

S.A.No.571 of 2019

VG II(CO)
GN(10/06/2022)