REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos.5576-5577 OF 2017
(ARISING OUT OF SLP (C) Nos.9582-9583/2013)

Sri Srinivasaiah ...Appellant(s)

VERSUS

H.R. Channabasappa
(since dead) by his LRs
and Ors. ....Respondent(s)

J U D G M E N T

Abhay Manohar Sapre, J.

1) Leave granted.

2) These appeals are filed by defendant No.2 against the order dated 18.04.2012 passed by the High Court of Karnataka at Bangalore in R.P. No. 387 of 2011 and the final judgment and order dated 25.07.2011 in R.S.A. No.1253 of 2005 by which the High Court allowed the appeal filed by the respondents herein and set aside the judgment and

decree dated 18.02.2005 passed by the Additional Civil Judge (Sr.Division), Ramnagaram in R.A. No.35 of 2000 and restored the judgment and decree dated 30.06.2000 passed by the Civil Judge (Jr.Division) Kanakapura in O.S. No.152 of 1987.

3) We herein set out the facts, in brief, to appreciate the issues involved in these appeals.

4) The appellant is defendant No.2 whereas respondent Nos. 1 to 5 are the legal representatives of original plaintiff and respondent Nos. 6 to 11 are the legal representatives of original defendant No. 1 in the civil suit out of which these appeals arise.

5) The original plaintiff - M.N. Channabasappa was the owner of the suit land (described in detail in schedule to the plaint). He fell in need of money in 1969. He, therefore, approached the original defendant No.1 - B.M. Narayana Shetty and requested him to give some money to overcome the financial crisis faced by him during that time. Defendant No.1 agreed and accordingly gave

Rs.1500/- to the plaintiff by way of loan. In order to secure the repayment, the plaintiff on request made by defendant No.1 executed a document on 28.07.1969 (Ex-P-1) in favour of defendant No.1 and got the same registered with the sub-Registrar, Kanakpura. Defendant No.1 was also placed in possession of the suit property pursuant to the document.

6) On 30.06.1987, the plaintiff sent a legal notice to defendant No.1 and offered to repay Rs.1500/- to him with a further request to redeem the suit land in his favour in terms of the conditions of Ex. P-1. The plaintiff contended that the Ex.P-1 was essentially a mortgage deed executed by him in favour of defendant No.1 by way of security for repayment of the loan given to him by defendant No.1. The plaintiff contended that in terms of the conditions of Ex.P-1, he delivered possession of the suit land to defendant No.1 for a period of 5 years to enable defendant No.1 to reap the fruits of the suit

land and on repaying Rs.1500/- within five years, restore the possession of the suit land by redeeming the mortgage.

7) Defendant No.1 sent a reply to the notice on 13.08.1987. He denied the plaintiff's offer and contended therein that the document dated 28.07.1969 (Ex.P-1) is not a "mortgage deed" as described by the plaintiff in the notice but it is in substance a "sale deed" out and out in relation to the suit land executed by the plaintiff in his favour for Rs.1500/- pursuant to which defendant No.1 was also placed in possession of the suit land as owner. It was contended that defendant No.1, in the meantime, on 25.09.1986 sold the suit land to the appellant herein (defendant No.2) by executing the deed of sale for consideration.

8) This gave rise to filing of the Civil Suit by the plaintiff on 19.09.1987 against the original defendant No.1 and the appellant herein who, as mentioned above, is the purchaser of the suit land.

The suit was filed in the Court of Civil Judge (Jr. Division) at Kanakapura for claiming reliefs namely- (1) redemption of the mortgage of the suit land in plaintiff's favour (2) for a declaration that the sale made by defendant No.1 of the suit land in favour of defendant No. 2 vide sale deed dated 25.09.1986 is bad in law and not binding on the plaintiff and (3) for recovery of possession of the suit land from the defendants.

9) It was alleged that the Ex.P-1 is a mortgage deed pursuant to which plaintiff had delivered the possession of the suit land to defendant No.1 for a period of 5 years on taking loan of Rs.1500/- from defendant No.1. It was alleged that the mortgage was created by the plaintiff of his suit land in favour of defendant No.1 only by way of security to secure payment of loan amount and in terms of condition of the deed, defendant No.1 was to enjoy the fruits of suit land for a period of 5 years and within the said period, the plaintiff was to return Rs.1500/- to

defendant No.1 and, in turn, defendant No.1 was to redeem the mortgage to the plaintiff. It was alleged that the plaintiff offered Rs.1500/- to defendant No.1 but he declined and on the other hand asserted his right of ownership over the suit land and hence need to file the civil suit arose and seek aforementioned reliefs against the defendants in relation to the suit land.

10) Defendant No.1 filed the written statement and denied the plaintiff's claim. He reiterated his stand taken by him in reply to legal notice. It was alleged that document in question (Ex.P-1) is not a mortgage deed but in substance a sale deed on the strength of which he has become the exclusive owner. It was alleged that since the plaintiff failed to come forward to pay the loan amount to defendant No.1 on the expiry of 5 years, he lost the right to get the suit land restored in his name. It was alleged that defendant No.1 has already sold the suit land to defendant No.2 on 25.09.1986 by

sale deed for consideration. A plea of suit to be barred by limitation was also raised.

11) The Trial Court framed issues on the basis of pleadings. The parties adduced evidence. During the pendency of the suit, both plaintiff and defendant No.1 died and, therefore, their respective legal representatives were brought on record to continue the *lis*.

12) The Trial Court by its judgment/decree dated 30.06.2000 decreed the plaintiff's suit. It was held that the document dated 28.07.1969(Ex.P-1) is a mortgage by conditional sale and not a sale deed. It was held that the plaintiff is entitled to claim redemption of the mortgage by paying the mortgage money to defendant No.1 and seek restoration of the suit land from the defendants.

13) The defendants felt aggrieved, filed first appeal before the Additional Civil Judge (Sr.Division) being R.A. 35/2000. By judgment/decree dated 18.02.2005, the first Appellate Court allowed the

appeal and set aside the judgment/decree of the Trial Court. It was held that the document dated 28.07.1969 (Ex.P-1) is not a mortgage deed but it is in the nature of a conditional sale deed. It was also held that the suit is barred by limitation. In the light of these findings, the plaintiff's suit stood dismissed.

14) Felt aggrieved, the plaintiff filed Second Appeal before the High Court out of which this appeal arises. The High Court admitted the appeal on the following substantial questions of law:-

> **"(i) Whether the interpretation placed by the first Appellate Court as the suit document to hold that it is not a mortgage by conditional sale is proper?**
>
> **(ii) Whether the finding of the first Appellate Court that even if it is construed as a mortgage by conditional sale that the suit is barred by law of limitation is false?"**

15) By impugned order, the High Court allowed the appeal, set aside the judgment/decree of the first Appellate Court and restored the

judgment/decree of the Trial Court. The High Court held that the document dated 28.07.1969 is a mortgage by way of conditional sale and not a sale out and out. It was held that the suit was filed within time. It is governed by Article 61(a) of the Limitation Act which prescribes limitation of 30 years when right to redeem accrues. In this case, it was accrued on 27.07.1974 whereas the suit was filed on 19.09.1987.

16) Against the judgment in second appeal, defendant No.2 filed review petition before the High Court. By order dated 18.04.2012, the review petition was dismissed.

17) Against the order in review petition and the judgment in second appeal, defendant No.2 filed these appeals by way of special leave petitions before this Court.

18) Heard Mr. Shailesh Madiyal, learned counsel for the appellant and Mr. Trideep Pais, learned counsel for respondents.

19) The only question involved in this appeal is what is the true nature of the document dated 28.07.1969 (Ex.P-1). Is it a "mortgage by conditional sale" or a "sale out and out with a condition to repurchase"?

20) This question needs to be answered keeping in view the requirement of Section 58(c) of the Transfer of Property Act,1882 (hereinafter referred to as "the T.P. Act") and the law laid down by this Court in **Chunchun Jha vs. Ebadat Ali and Another,** AIR 1954 SC 345.

21) Section 58(c) of the Act reads as under:

> **"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—**
>
> **(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."**

22) In **Chunchun Jha's case** (supra), this Court examined this very question as to what constitutes "*a mortgage by conditional sale or a sale out and out with a condition of repurchase*".

23) The learned Judge, Vivian Bose J., in his distinctive style of writing speaking for the Bench posed the question as under:

> **"This is a plaintiff's appeal in a suit for redemption of what the plaintiff calls a mortgage dated 15-4-1930. The only question for determination is whether this is a mortgage by conditional sale or a sale out and out with a condition of repurchase. If the former the plaintiff succeeds. If the latter he is out of Court."**

24) His Lordship then examined the question in the context of several leading English authorities on the subject and Section 58(c) of the T.P. Act and laid down the following test for deciding the true nature of the document. This is what His Lordship held:

"5. The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because 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. But certain broad principles remain.

6. The first is that the intention of the parties is the determining factor: see Balkishen Das v. Legge. 22 Ind. App.58 (P.C.) (A). But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.

As Lord Cranworth said in Alderson v. White (1858) 44 E.R.924 at p. 928 (B)-

"The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and

become a mortgage merely because the vendor stipulates that he shall have a right to repurchase.... In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"
Their Lordships of the Privy Council applied this rule to India in Bhagwan Sahai v. Bhagwan Din3 and in Jhanda Singh v. Wahid-ud-din, AIR 1916 P.C. 49 at p.54 (D).

7. The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction.

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."

25) Keeping in mind the requirement of Section 58(c) of the T.P. Act and the test laid down in **Chunchun Jha's case** (supra), let us examine the nature of Ex.P-1 which reads as under:

"This Deed of Conditional Sale is made on this Twenty eighth day of July, Year-Nineteen Sixty nine, by M.N. Channabasavaiah, s/o Patel Nanjappa, resident of Kasaba Maralwadi village, Maraiwadi Hobli, Kanakapura Taluk to B.M. Narayan Shetty s/o Bhoopalam Munirama Shetty at Kasaba Maralwadi Village, maralwadi Hobli, Kanakapura Taluk. Witnesseth, to meet my financial necessities such as agricultural expenses, to clear loans and to meet domestic family expenses, today I am selling the schedule property for a sale consideration of Rs.1,500/- (Rupees one thousand five hundred) received in cash. The possession of the schedule property of this Conditional sale has been delivered to you today only. From now onwards you shall pay to the Government all taxes and other payments and shall peacefully enjoy the schedule property of this Conditional sale according to your wish. In the presence of the witnesses, this Conditional sale deed, I have received the entire sale price and no arrears are pending payable to me in this regard. The schedule property of this Conditional sale has not been alienated earlier to anyone in any manner either by my ancestors or by myself. In the event of any such litigation arises, I will clear the same at

my own expenses. There is no attachment of any minor claims or any charge for maintenance exists on the schedule property of this Conditional sale deed.

Within five years from the aforesaid date of this Conditional sale deed, I will repay the entire conditional sale price of Rs.1,500/- (Rupees one thousand five hundred) to you and get executed a sale deed from you. In the event of default, after the said period of five years mentioned in this Conditional sale deed, then together with all the privileges, easements, advantages and appurtenances whatsoever in or to the schedule property and every part thereof belonging to or to the said schedule property or hereinto before held, used, occupied or enjoyed or known as part and parcel thereof or appurtenant thereto shall belong to you and your legal heirs forever, free from all encumbrances, charges, liens whatsoever. Myself and my legal heirs shall have no manner of right, claim, interest or title whatsoever in or upon or in respect of the schedule property.

SCHEDULE

All that piece and parcel of the land measuring Twenty Eight Guntas in Sy.No. 168 (One hundred and sixty eight) situated at kasaba Maralwadi village, Maralwadi Hobli, Kanakapura Taluk, which is my ancestral property acquired by me by way of partition entered amongst myself and my brothers. The schedule land is bounded on:
East by : Land belonging to Narasegowda;
West by : Lane and water channel;
North by : Thothi Inamthi land;
South by : Garden land belonging to Vendor;"

When we examine the nature of document in question (Ex.P-1), we are of the opinion that the document (Ex.P-1) is a mortgage with conditional sale as defined under Section 58 (c) of the T.P. Act. This we say for following reasons:

26) First, it is not in dispute that the plaintiff was the owner of the suit land. Second, the parties concluded the transaction in question by executing one document (Ex.P-1). Third, the document (Ex.P-1) is styled as a "*Deed of Conditional Sale*". Fourth, it contains a condition that defendant No.1 will be allowed to remain in possession of the suit property for 5 years and enjoy the fruits of the land and that during this period, the plaintiff will be entitled to get the suit property re-conveyed in his name on paying Rs.1500/- by getting the sale deed executed in his name and obtain possession of the suit land from defendant No.1. Fifth, the plaintiff offered to pay Rs.1500/- to defendant No.1 with a request to resale the land to him.

27) In our considered opinion, the aforesaid five reasons satisfies the third condition of Section 58(c) of the T.P. Act, namely, "*on condition that such payment being made, the buyer shall transfer the property to the seller*". It also satisfies the tests laid down by this Court in **Chunchun Jha' case** (supra), namely, First, the transaction is concluded in one document; Second, the document styled as a "*Deed of Conditional Sale*" itself contains the condition of repurchase on offering the sale money without interest for the reason that defendant No.1 was allowed to use the land till the money is not paid back to him by the seller (plaintiff); and Third, parties' intention as per terms of Ex.P-1 is also supported by the evidence which was accepted by the two Courts - Trial Court and the High Court.

28) In the light of foregoing discussion, we are of the considered opinion that the Trial Court and the High Court was right in decreeing the plaintiff's suit

whereas the first Appellate Court was not right in dismissing the suit.

29) In other words, the reasoning and the conclusion arrived at by the Trial Court and the High Court while holding that Ex.P-1 is a "*mortgage deed by conditional sale*" as defined under Section 58(c) of the T.P. Act is just and proper and hence it deserves to be upheld by this Court.

30) We also note that the High Court rightly took note of the law laid down in the case of **Chunchun Jha** (supra) and the requirements of Section 58(c) of the T.P. Act and keeping the same in mind interpreted Ex.P-1 and came to a right conclusion.

31) Learned Counsel for the appellant, however, placed reliance on the decision in **Vanchalabai Raghunath Ithape vs. Shankarrao Baburao Bhilare,** (2013) 7 SCC 173 and contended that the law laid down therein supports his contention that the Ex.P-1 is a sale out and out.

32) We have perused the decision in **Vanchalabai Raghunath Ithape's case** (supra). First, we note therein that it did not take note of law laid down by this Court in the case of **Chunchun Jha** (supra), which is a decision of larger Bench (4 Judge Bench); Second, we further find that there the High Court had affirmed the findings of fact recorded by the Courts below in paras 19, 20, 25, 26 and 29 which are reproduced in para 9 of the decision at pages 176 and 177 wherein it is mentioned in para 26 of the first appellate order "*Admittedly there was no relationship of debtor and creditor between the parties*". This finding of fact was affirmed by the High Court, which, in turn, was upheld by this Court; Third, such is not the case here because in the case at hand, the plaintiff came out with a case that he took loan of Rs.1500/- from defendant No.1 and to secure the payment of loan, a conditional sale deed was executed in the form of mortgage

deed. It was not so in the case of **Vanchalabai Raghunath Ithape** (supra).

33) It is for these three reasons, we prefer to rely upon the law laid down by the earlier larger Bench in the case of **Chunchun Jha** (supra) which continues to hold the field to guide us as to how to examine the true nature of the document such as the one involved in the case (Ex. P-1).

34) This takes us to the next question as to whether the High Court was justified in holding that the suit was filed within limitation? In our opinion, the High Court was right. The case at hand would be governed by Article 61(a) of the Limitation Act which provides a limitation of 30 years when the right to redeem or to recover possession accrues to the mortgagor. Ex.P-1 is of dated 28.07.1969. In terms of the conditions, five years expired on 27.07.1974. The plaintiff filed a suit on 19.09.1987. It was thus filed within 30 years.

35) Now coming to another question though not pressed in service by the parties but, in our view, does arise in the case as a result of the plaintiff's suit having been decreed against the defendants by the Trial Court and affirmed by the High Court and lastly, by this Court.

36) The question arises in this way. The effect of the decree passed in this case is that the original plaintiff, now represented by his legal representatives (respondent Nos.1 to 5) are required to return Rs.1500/- to the original defendant No. 1, now represented by his legal representatives (Respondent Nos.6-11) and in turn, defendant No. 1 (respondent Nos.6-11) are required to execute the sale deed by retransferring the suit land to the plaintiff(respondent Nos.1-5) and restore them the possession of the suit land. Since during the pendency of the litigation, original defendant No. 1 transferred the suit land to the appellant (defendant No. 2) for Rs.30,000/-, therefore, he, as a

subsequent transferee of the suit land, has now steped into the shoes of original defendant No. 1(respondent Nos.6-11).

37) Yet another effect of the decree is that the transaction of sale of suit land between defendant No. 1 and defendant No. 2 vide sale deed dated 25.09.1986 is declared bad in law and stands nullified. As a consequence thereof, defendant No. 2 (appellant herein), who had paid a sum of Rs. 30,000/- towards sale consideration to defendant No. 1 for purchase of the suit land has become entitled to receive back the entire sum from defendant No. 1 in the absence of any contract to the contrary in this behalf between the parties. The reason being that once the sale is declared bad, the transaction of sale fails and, therefore, the seller (defendant No. 1) has no right to retain the sale consideration to himself and has to refund the sale consideration to the buyer (defendant No. 2)[**See Section 65 of the Indian Contract Act]**.

38) The question arose before this Court in the case of **Durga Prasad & Anr. vs Deep Chand & Ors.**, AIR 1954 SC 75 as to what form of decree should be passed in the case of specific performance of contract where the suit property is sold by the defendant, i.e., the owner of the suit property to another person and later he suffers a decree for specific performance of contract directing him to transfer the suit property to the plaintiff in term of contract.

39) The learned Judge-Vivian Bose, J. examined this issue and speaking for the Bench in his inimitable style of writing, held as under:

> **"Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase-money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone.**

A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee."

40) We, therefore, consider it just and proper and with a view to end this litigation between the parties which is pending since 1969 and also to balance the equities amongst the parties that defendant No. 1 through his legal representatives (Respondent Nos.1-5) would return a sum of Rs.30,000/- to defendant No. 2 (appellant herein). This direction we give by taking recourse to our powers under Article 142 of the Constitution of India to do complete justice between the parties to the *lis* because we do not want another round of litigation to go on for years in future between the defendants inter se for recovery of this amount.

41) In the light of foregoing discussion, the appeals are disposed of by modifying the judgment and decree as under:

1. The plaintiff (respondent Nos.1-5) Shall deposit a sum of Rs.1500/- in the executing Court for being paid to the defendant (Respondent Nos.6-11) within 3 months as an outer limit.

2. Defendant No.1 (Respondent nos.6-11) shall deposit in the executing Court a sum of Rs.30,000/- for being paid to the appellant (defendant No. 2) within 3 months as an outer limit

3. Defendant No.1(Respondent Nos.6-11) and the appellant(Defendant No.2) will jointly execute the sale deed in plaintiffs' (respondent Nos.1-5) favour and hand over the possession of the suit land to the plaintiffs (Respondent Nos.1-5) simultaneously and then will withdraw the money deposited for them in Court.

42) The executing Court will ensure completion of proceedings within the time fixed and will record due satisfaction of the decree in accordance with law. In case of any default, the parties will be entitled to put the decree in execution for enforcement of the terms of the decree of this Court amongst the defaulting parties.

43) In view of foregoing discussion, the appeals stand disposed of.

.....J.
[R.K. AGRAWAL]

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.....J.
[ABHAY MANOHAR SAPRE]

New Delhi;
April 25, 2017