

A PATEL RAVJIBHAI BHULABHAI (D) THR. LRS.

v.

RAHEMANBHAI M. SHAIKH (D) THR. LRS. & ORS.

(Civil Appeal No. 4683 of 2016)

B MAY 02, 2016

[**RANJAN GOGOI AND PRAFULLA C. PANT, JJ.**]

Transfer of Property Act, 1882 – ss.58(c), 60 – Execution of deed between parties – Interpretation of – Mortgage by conditional sale or sale with option to repurchase – Held: There was a condition in the deed that if plaintiffs-respondents make repayment of Rs. 10,000/- within a period of five years, defendants would handover the possession of proeprty in suit back to plaintiffs – Condition reflects that the actual transaction between the parties was of a loan, and the relationship of debtor and creditor existed – Thus, the High Court rightly held that the deed is a mortgage by way of conditional sale – Decree passed in favour of the plaintiffs does not call for interference.

Dismissing the appeal, the Court

HELD: The condition in the deed that if the plaintiffs (respondents) make repayment of Rs.10,000/- within a period of five years, the defendants shall handover the possession of property in suit back to the plaintiffs and in the same manner respondents shall have no right to ask back the same after expiry of the time limit, reflects that the actual transaction between the parties was of a loan, and the relationship was of debtor and creditor existed, as such, the High Court rightly held that the deed is a mortgage by way of conditional sale and the decree passed in favour of the plaintiffs does not require to be interfered with. Since the possession of the land was handed over to the mortgagee, no interest was charged. The defendants leased the land to third parties, after possession was given by the plaintiffs in 1960. In the circumstances, after perusal of the evidence on record, the view taken by the High Court is accepted. [Para 14] [1007-D-G]

Tulsi and Others vs. Chandrika Prasad and Others
(2006) 8 SCC 322; *P.L. Bapuswami vs. N. Pattay Gounde*
AIR 1966 SC 902; 1966 SCR 918; *Vishwanath*

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Dadoba Karale vs. Parisa Shantappa Upadhya (2008) 11 SCC 504: 2008 (4) SCR 993 ; *C. Cheriathan vs. P. Narayanan Embranthiri (2009)* 2 SCC 673:2008 (17) SCR 1239 – referred to. A
Mulla's Transfer of Property Act (11th Edition) – referred to. B

Case Law Reference

(2006) 8 SCC 322 referred to Para 10
1966 SCR 918 referred to Para 11
2008 (4) SCR 993 referred to Para 12
2008 (17)-SCR 1239 referred to Para 13 C

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4683 of 2016.

From the Judgment and Order dated 20/21/24.09.2012 of the High Court of Gujarat at Ahmedabad in Second Appeal No. 107 of 1994. D

Hareesh Raichura, Ms. Saroj Raichura, Kalp Raichura, Rajat Vats, Advs. for the Appellants.

Purvish Jitendra Malkan, Jitendra Malkan, Ms. Dharita Malkan S. Arora, A. Singh, Advs. for the the Respondents.

The Judgment of the Court was delivered by E

PRAFULLA C. PANT, J. 1. Leave granted.

2. This appeal is directed against judgment and decree dated 20/21/24-09-2012, passed by High Court of Gujarat at Ahmedabad, whereby Second Appeal No. 107 of 1994 is allowed, and dismissal of suit by trial court as affirmed by First Appellate Court is reversed. The suit of the respondents/plaintiffs for redemption of suit property is decreed by High Court on the payment of Rs.10,000/- within a period of six months by the plaintiffs from the date of the decree. F

3. We have heard learned counsel for the parties and perused the papers on record. G

4. Brief facts of the case are that original plaintiffs Shaikh Rahemanbhai Mohamadbhai (since died) and Shaikh Ismailbhai Moahamadbhai, executed a deed dated 30.12.1960 in favor of defendant nos. 1 and 2, namely, Patel Ravjibhai Bhulabhai (since died) and Patel Dahyabhai Bhudarbai, which was titled as conditional sale, for a sum H

A of Rs.10,000/- providing therein that if the repayment is made within a period of five years, the defendants shall give back the property in suit with possession to the plaintiffs with further stipulation that the plaintiffs would have no right to get back the property after the expiry of the period of five years. The plaintiffs instituted Civil Suit No. 156 of 1984 before Civil Judge, Junior Division, Dakor, for redemption of property in question (i.e. Survey No. 148, admeasuring 3 acres 29 guntas situated in Village Rustampura, Taluk Thasra) on repayment of the mortgage money under the deed dated 30.12.1960, and further sought to recover the possession of the property with mesne profits. The plaintiffs pleaded that the deed in question was a mortgage deed, and as such they have right to redeem the same.

5. The defendants contested the suit, and pleaded that deed dated 30.12.1960 is not a mortgage transaction but a conditional sale with stipulation of repurchase within a period of five years. Denying that the plaintiffs have any right to redeem the property, it is stated by the defendants that the land was purchased by the defendants for a consideration of Rs.10,000/- and possession was delivered to them in 1960 along with execution of the deed.

6. The trial court after framing issues, and recording of evidence, held that plaintiffs have failed to prove that the transaction was a mortgage. The trial court further held that suit is barred by time, and, as such, dismissed the suit on 27.11.1987. The First Appellate Court (2nd Joint District Judge, Nadiad) affirmed the decree of dismissal of suit passed by the trial court, vide its judgment and order dated 30.09.1993. The plaintiffs preferred Second Appeal (S.A. No. 107 of 1994) before the High Court, and the High Court after hearing the parties reversed the decree passed by the two courts below. Hence the defendants are in appeal before this Court.

7. At the outset we may state that issue of limitation is not pressed before us as Article 60(a) of Limitation Act, 1963 provides thirty years period for filing the suit for redemption. The question before us is that whether document Exh. 23, in its true interpretation, is mortgage by conditional sale, as interpreted by High Court, or the sale with option to repurchase as held by the two courts subordinate to it.

8. Section 58 (c) of The Transfer of Property Act, 1882 defines mortgage by conditional sale, and reads as under:-

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“(c) **Mortgage by conditional sale.**—Where, the mortgagor A
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 B

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 C
mortgage, unless the condition is embodied in the document which
effects or purports to effect the sale.”

Section 60 of The Transfer of Property Act, 1882 provides right
of mortgagor to redeem the property.

9. Distinguishing features between ‘mortgage by conditional sale’ D
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 E
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 F
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 G
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 H

A 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.”

B 10. In **Tulsi and Others vs. Chandrika Prasad and Others**¹, this Court explaining difference between mortgage by conditional sale or sale with condition to repurchase has observed as under:

C “15. A distinction exists between a mortgage by way of conditional sale and a sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby”.

D 11. In **P.L. Bapuswami vs. N. Pattay Gounder**², it is held that:
 “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 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”.

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 G 12. In **Vishwanath Dadoba Karale vs. Parisa Shantappa Upadhya**³, the facts of the case were somewhat similar to the present case, and as is evident from paragraph 2 in said case, the Court held the deed was a mortgage by conditional sale, and upheld the decree of redemption for mortgage.

¹ (2006) 8 SCC 322

² AIR 1966 SC 902

H ³ (2008) 11 SCC 504

13. In **C.Cheriathan vs. P. Narayanan Embranthiri**⁴, the principle relating to interpreting of document as to whether the sale is mortgage by conditional sale or sale with a condition to repurchase was discussed, and this Court held as under: ... A

“12. A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefor circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question. For the said purpose, it is essential that all parts of the deed should be read in their entirety”... B C

14. In the case at hand the document in question (Exh. 23) contains the condition as under: -

“In this deed condition is that the said amount of Rs.10,000.00 when we pay back to you within five years from today, you shall give back the said property to us with possession. And in the same manner, we shall have no right to ask back the same after expiry of the time limit.” D

The above condition in Exh.23 that if the plaintiffs (respondents) make repayment of Rs.10,000/- within a period of five years, the defendants shall handover the possession of property in suit back to the plaintiffs, reflects that the actual transaction between the parties was of a loan, and the relationship was of debtor and creditor existed, as such, we are of the view that the High Court has rightly held that the deed in question Exh.23 read with Exh. 37 is a mortgage by way of conditional sale and the decree passed in favour of the plaintiffs does not require to be interfered with. Needless to say, since the possession of the land was handed over to the mortgagee, no interest was charged. It has also come on record that the defendants leased the land to third parties, after possession was given by the plaintiffs in 1960. In the circumstances, after perusal of the evidence on record, we agree with the view taken by the High Court. E F

15. For the reasons as discussed above, we find no force in this appeal. Accordingly, the appeal is dismissed with no order as to costs. G

Nidhi Jain

Appeal dismissed.

⁴ (2009) 2 SCC 673