

the Courts below, had it been the intention of the parties to sell the property, the parties would not have agreed for return of the land on payment of Rs.5000/- by 14.06.1973. [Para 7][747-C-E] A

1.2 The Courts below had also recorded a concurrent finding of fact that Exhibit D/1 Sale Deed was executed only as a security for the loan and it was never the intention of the 1st respondent-plaintiff to convey the suit property. Since 1st respondent-plaintiff had paid back the loan amount i.e. Rs.6,700/- as is evident from the subsequent Agreement Exhibit P/2 dated 05.06.1974, the Courts below rightly recorded the concurrent findings of fact that Exhibit D/1 Sale Deed was not binding on the 1st respondent-plaintiff. Once repayment was made, the 1st respondent-plaintiff was entitled to the declaration as prayed for. [Para 10][748-E, F] B C

1.3 The inadequacy of the sale consideration stated in Exhibit D/1 Sale Deed was yet another circumstance to indicate that the 1st respondent-plaintiff could not have intended to sell the property to the appellants-defendants. [Para 11][749-A] D

Bhaskar Waman Joshi (D) and Ors. v. Shrinarayan Rambilas Agarwal (D) and Ors. AIR 1960 SC 301 : 1960 SCR 117 – relied on.

Bishwanath Prasad Singh v. Rajendra Prasad and Anr. (2006) 4 SCC 432 : 2006 (2) SCR 566; *Raj Kishore (Dead) by LRs. v. Prem Singh and Ors.* (2011) 1 SCC 657 : 2010 (14) SCR 1019; *Gauri Shankar Prasad and Ors. v. Brahma Nand Singh* (2008) 8 SCC 287 : 2008 (10) SCR 839 – referred to. E

Case Law Reference F

2006 (2) SCR 566	referred to	Para 3
2008 (10) SCR 839	referred to	Para 3
1960 SCR 117	relied on	Para 5
2010 (14) SCR 1019	referred to	Para 8

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2078 of 2008.

From the Judgment and Order dated 22.06.2005 of the High Court H

A of Madhya Pradesh, Bench at Gwalior, in Second Appeal No. 374 of 1998.

Puneet Jain, Manu Maheshwari, Ms. Chhaya Kirti, Abhinav Gupta and Ms. Pratibha, Advs. for the appellants.

B Rajesh, Adv. for the respondent.

The Judgment of the Court was delivered by

C **R. BANUMATHI, J.** 1. The present appeal arises out of the judgment of the High Court of Judicature of Madhya Pradesh, Jabalpur Bench at Gwalior in Second Appeal No.374 of 1998 dated 22.06.2005; confirming the findings of the Courts below that the Sale Deed executed in favour of the appellants-defendants was only a mortgage as a security for repayment of the loan taken by the 1st respondent-plaintiff.

D 2. It is not necessary for us to refer to the pleadings of the 1st respondent-plaintiff and the appellants-defendants as they are referred in detail in the judgments of the Courts below.

E 3. Challenging the concurrent findings of the Courts below, the learned counsel for the appellants-defendants Mr. Puneet Jain submitted that whenever a conveyance of the property by a Sale Deed is accompanied by a separate document, it has to be taken as re-conveyance and it was not a mortgage and the Courts below erred in holding that the Sale Deed dated 14.06.1972 in favour of the appellants-defendants was a security for the loan taken by the 1st respondent-plaintiff. Learned counsel further submitted that the Sale Deed was accompanied by an Agreement Exhibit P/1 dated 14.06.1972 under which the 1st respondent-plaintiff had agreed to pay an amount of Rs.5000/- by 14.06.1973, which
F the 1st respondent-plaintiff did not comply with, and subsequent Agreement Exhibit P/2 dated 05.06.1974 was executed under which the 1st respondent-plaintiff paid an amount of Rs.6700/-; and after a lapse of about 17 years, the 1st respondent-plaintiff filed the suit for declaration that the Sale Deed was null and void. It was further submitted that in
G the absence of a prayer for cancellation of the Sale Deed dated 14.06.1972, the suit filed by the 1st respondent-plaintiff ought to have been dismissed, more so, when the suit was filed nearly after a gap of 17 years from the date of execution of the Sale Deed i.e. 14.06.1972. In support of his contention, learned counsel placed reliance on a number of judgments of this Court reported as *Bishwanath Prasad Singh v.*

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Rajendra Prasad and Anr. - (2006) 4 SCC 432, *Raj Kishore (Dead) by LRs. v. Prem Singh and Ors.* - (2011) 1 SCC 657 and *Gauri Shankar Prasad and Ors. v. Brahma Nand Singh* - (2008) 8 SCC 287. A

4. On the other hand, taking us through the judgments of the Courts below, learned counsel for the 1st respondent-plaintiff submitted that based on the oral and documentary evidence, the Courts below rightly recorded concurrent findings of fact that Exhibit D/1 Sale Deed dated 14.06.1972 was executed as security for the loan taken by the 1st respondent-plaintiff. Learned counsel for the 1st respondent-plaintiff has drawn our attention to the finding of the trial Court to submit that at the relevant point of time, the value of the land under the Sale Deed dated 14.06.1972 would have been more than Rs.15000/- and an inadequate consideration of Rs.3000/-, as stated in Exhibit D/1 Sale Deed by itself would show that it was executed only as a security for the loan and it was never the intention of the parties to sell the land. It was submitted that the concurrent findings recorded by the Courts below do not suffer from infirmity warranting any interference. B C D

5. We have carefully considered the rival submissions and perused the impugned judgment and the material on record. In the decision relied upon by the learned counsel for the 1st respondent-plaintiff reported as *Bhaskar Waman Joshi (D) and Ors. v. Shrinarayan Rambilas Agarwal (D) and Ors.* - AIR 1960 SC 301, this Court has succinctly considered the question as to whether a transaction ostensibly of a sale may be regarded as a mortgage and held that it is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. E

6. We can usefully refer to the relevant portion of the judgment which reads as under: F

“7.The proviso to this clause was added by Act XX 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 G

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A 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 circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the 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. What distinguishes 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 definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanagerji v. P. Parthasaradhi*, 51 Ind App 305: (AIR 1924 PC 226), the circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence 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 deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language

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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. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.”

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7. In the light of the above well settled principles, we may now consider Exhibit D/1 Sale Deed and Exhibit P/1 Agreement both dated 14.06.1972. In Exhibit D/1 Sale Deed no condition is incorporated indicating that it would constitute mortgage by that conditional sale. It is clear that the 1st respondent-plaintiff had never intended to sell the property to the appellants-defendants. As rightly pointed out by the Courts below, in Exhibit P/1 Agreement dated 14.06.1972, it is clearly stated that if 1st respondent-plaintiff pay back Rs.5000/- by 14.06.1973, then the Sale Deed would be cancelled and 1st respondent-plaintiff would get back the land sold to the appellants-defendants. As held by the Courts below, had it been the intention of the parties to sell the property, the parties would not have agreed for return of the land on payment of Rs.5000/- by 14.06.1973.

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8. The judgments cited by learned counsel for the appellants hold that for a transaction to constitute mortgage by conditional sale, it is necessary that the condition is embodied in the document that purports to effect the sale deed. In *Raj Kishore (Dead) by LRs. v. Prem Singh and Ors.* - (2011) 1 SCC 657, it was held as under:

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“15. A bare reading of the above would show that for a transaction to constitute mortgage by conditional sale it is necessary that the condition is embodied in the document that purports to effect the sale. That requirement is stipulated by the proviso which admits of no exceptions.

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A 18. This Court in *K. Simrathmull case* observed: (AIR p.1183, para 4)

B “4. The sale deed, the deed of reconveyance Ext.A-1 and the rent note Ext.B-1 were undoubtedly parts of the same transaction. The plea of the plaintiff that the sale deed Ext.A-1 constituted a transaction of mortgage by conditional sale is inadmissible, because the sale deed and the covenant for reconveyance are contained in separate documents.”

C 19. The finding of the High Court as to the legal effect of the transaction of sale followed by an agreement for retransfer of the property is not, therefore, legally sound.”

D 9. As pointed out earlier, Exhibit D/1 Sale Deed executed by the 1st respondent-plaintiff in the instant case does not embody any condition as stipulated in Section 58 (e) of the Transfer of Property Act, 1882. On facts and evidence, Courts below rightly held that Exhibit D/1 Sale Deed would not constitute a mortgage by conditional sale.

E 10. On the basis of oral and documentary evidence, the Courts below recorded that Exhibit D/1 Sale Deed dated 14.06.1972 and Exhibit P/1 Agreement dated 14.06.1972 having been executed on the same day and both ought to be read together. The Courts below have also recorded a concurrent finding of fact that Exhibit D/1 Sale Deed was executed only as a security for the loan and it was never the intention of the 1st respondent-plaintiff to convey the suit property. Since 1st respondent-plaintiff has paid back the loan amount i.e. Rs.6,700/- as is evident from the subsequent Agreement Exhibit P/2 dated 05.06.1974, F the Courts below rightly recorded the concurrent findings of fact that Exhibit D/1 Sale Deed is not binding on the 1st respondent-plaintiff. Once repayment was made, the 1st respondent-plaintiff was entitled to the declaration as prayed for.

G 11. Yet another reason could be pointed out for affirming the impugned judgment of the High Court. It has been held by the trial Court that at the time of selling the suit property the extent was more than 10 Bighas i.e. 1/3rd share of 1st respondent-plaintiff in 2.856 hectares of the total land. Referring to the oral and documentary evidence of 1st respondent-plaintiff’s witness Ajay Singh, the trial Court recorded a finding that at the time of sale of the land in 1972, the market value of H the land in Padariya was Rs.2000/- per Bigha and at the time of the sale,

the value of the property would have been not less than Rs.15000/-. The inadequacy of the sale consideration stated in Exhibit D/1 Sale Deed is yet another circumstance to indicate that the 1st respondent-plaintiff could not have intended to sell the property to the appellants-defendants. A

12. Having regard to the concurrent findings of the Courts below, we do not find any reason to interfere with the impugned judgment. B

13. Accordingly, the appeal is dismissed. The parties shall bear their own costs.

Divya Pandey

Appeal dismissed.