

Transfer of Property Act, 1882, Section 58(c) - Ostensible sale - Conditional Sale - Mortgage - plaintiff's suit for redemption was dismissed by the High Court but appeal allowed by this court reading the deed as mortgage. The question examined was whether a given transaction is a conditional sale or a sale outright with a condition of 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. But certain broad principles were stated. The Court found that the document had no clause for retransfer and instead says (clause 6) that if the executants pay the money within two years, the property shall come in exclusive possession and occupation with the transferors. The document had no clause for retransfer. In these circumstances, this Court held as under:

"10. The next step is to see whether the document is covered by Section 58(c) of the Transfer of Property Act, for, if it is not, then it cannot be a mortgage by conditional sale. The first point there is to see whether there is an "ostensible sale". That means a transaction which takes the outward form of a sale, for the essence of a mortgage by conditional sale is that though in substance it is a mortgage it is couched in the form of a sale with certain conditions attached. The executants clearly purported to sell the property in clause (5) because they say so, therefore, if the transaction is not in substance a mortgage, it is unquestionably a sale: an actual sale and not merely an ostensible one. But if it is a mortgage, then the condition about an "ostensible sale" is fulfilled.

11. We next turn to the Conditions. The ones relevant to the present purpose are contained in clauses (6) and (7). Both are ambiguous, but we have already said that on a fair construction clause (6) means that if the money is paid within the two years then the possession will revert to the executants with the result that the title which is already in them will continue to reside there. The necessary consequence of that is that the ostensible sale becomes void. Similarly, clause (7), though clumsily worded, can only mean that if the money is not paid, then the sale shall become absolute. Those are not the actual words used but, in our opinion, that is a fair construction of their meaning when the document is read as a whole. If that is what they mean, as we hold they do, then the matter falls squarely within the ambit of Section 58(c).

18.It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustices with whom he was dealing and that he would not have agreed to account for the profits: indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt and the value of the property as it ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under Section 58 (c) of the Transfer of Property Act.."

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