

Supreme Court of India

S. MOHAN AND G. N. RAY, JJ.

Tamboli Ramanlal Motilal (dead) by L.Rs v.Ghanchi Chimanlal Keshavlal (dead) by L.Rs.

Civil Appeal No. 1128 of 1976

5th March, 1992.

Transfer of Property Act,, 1882, Section 58(c) - Mortgage or conditional sale - Clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the documents were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well settled in law that the right of redemption and foreclosure are coextensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale - Pandit Chunchun Jha v Sheikh Ebadat Ali (1955) 1 SCR 174 (AIR 1954 SC 345), distinguished.

JUDGMENT

S. MOHAN, J.:-The facts leading to this civil appeal lie in a short compass.

2. The appellant filed Civil Suit No. 1621 of 1966 on the file of the Court of Civil Judge (J.D.) at Baroda. The suit was for redemption of the properties mortgaged under registered document dated 11th December, 1950. The mortgage was executed by the plaintiff in favour of the first defendant by way of conditional sale. The period of redemption was fixed at five years from the date of transaction. The consideration was a sum of Rs. 5,000/-. The first defendant (the first respondent herein) sold a portion of the suit property in favour of the second defendant (the second respondent herein). The appellant had executed a rent note agreeing to pay an annual rent of Rs. 330/- for the premises which represented interest at 6% per annum. The first defendant had made alterations and changes in the property to the detriment of the plaintiff. In spite of the offer of the mortgage amount, the first defendant refused to accept the same and refused to allow the redemption of the properties. Hence the suit.

3. The first defendant filed the written statement to the effect that it was not a mortgage by conditional sale. On the contrary, it was a sale with an option to repurchase within a period of five years. The house in 1958 had fallen down. Thereafter, it was reconstructed by incurring an expenditure of Rs. 13,000/-. In so far as the Option to repurchase had not been exercised within five years, that right was barred and the first defendant had become the owner.

4. The second defendant averred in his written statement that the sale in his favour was with the knowledge of the plaintiff. After he purchased the property he has spent a sum of Rs. 16,000/- over the two houses. The suit was misconceived.

5. The learned trial Judge held that the transaction was a mortgage by conditional sale in view of the fact that initially there was a relationship of debtor and creditor. Further, title did not pass on the execution of the document in question. Accordingly, he passed a preliminary decree for redemption. However, he directed that the cost of improvement be paid by the plaintiff before redemption. In so far as the plaintiff was directed to pay the cost of the improvement, he preferred Civil Appeal No. 345 of 1970 to the District Court at Baroda, while the respondents aggrieved by the preliminary decree for redemption preferred Civil Appeal No. 351 of 1970.

6. Both the appeals were heard together. By common judgment dated 19-4-71 he dismissed Civil Appeal No. 351 of 1970. In the result, he confirmed the finding that the document in question dated 11-12-1950 was only a mortgage by conditional sale.

7. In view of the above, the respondents took up the matter to the High Court of Gujarat in Second Appeal No. 359 of 1971. By judgment dated 10-12-1975 the High Court set aside the concurrent findings of the courts below holding that Ex. 26 was not a mortgage by conditional sale; on the contrary a sale with an option to repurchase. In the result, the suit was dismissed.

8. Thereafter, the special leave petition was moved by the petitioner on 13-7-1976. Leave was granted on 6-10-1976. However, the first respondent, Ghanchi Chimanlal Keshavlal died on 9-10-1980 and his legal heirs were brought on record on 23-3-1984. The sole appellant died on 6-12-1990 and his legal representatives were allowed to be substituted.

9. Mr. P. K. Goswami, learned counsel after taking us through Ex. 26 would urge that the High Court erred in holding the document to be a sale with an option to repurchase. First of all, there was a prior relationship of debtor and the creditor.

10. Secondly, the High Court was wrong in concluding that the accounts between the parties had been completely settled ignoring the fact that there was Ex. 39, the accounts evidencing that such a relationship continued. The next submission of the learned counsel is that merely because of the rights including the right to passage and the right to discharge water are conveyed, that does not militate against the transaction being a mortgage. It follows when it is a case of a mortgage by conditional sale possession should be delivered, having regard to the fact that it is an ostensible sale. The important clause in the document that in the event of the executant failing to repay the full amount, he shall have no right to take back the property is consistent with the transaction being a mortgage. The learned counsel urged that this squarely falls under Section 58(c) of the Transfer of Property Act, 1882 and Condition No. (1) as stipulated for a mortgage by conditional sale.

11. In support of these submissions reliance is placed on **Pandit Chunchun Jha v. Sheikh Ebadat Ali, (1955) 1 SCR 174: (AIR 1954 SC 345)**. The document in the reported case contained identical clauses. Therefore, if such a document could be construed as a

mortgage by conditional sale, all the more so, in the present case.

12. The learned counsel for the respondents would urge that there is nothing to indicate by reading a document that there is any relationship of the debtor and the creditor. What the executant of the document did was in discharge of the prior debts he sold the property for a sum of Rs. 5,000/-. The fact that there was a previous relationship of the debtor and the creditor will have no bearing in construing the document.

13. The attendant circumstances could be looked into only to gather the intention. Such an intention, if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. If, therefore, there is no relationship of the debtor and the creditor, the question of it being a mortgage by conditional sale does not arise.

14. On the date of the execution the title is transferred. The option for repurchase is to be exercised within a period of five years. Upon such payment there will be reconveyance in favour of the executant of the document. But strangely, there is no corresponding right for the mortgagee to foreclose the right of redemption. These were the points held in favour of this respondent, and each one of the reasons is valid.

15. The decision in **Pandit Chunchun Jha's case, (AIR 1954 SC 345) (supra)**, has no application because that was a case in which the transferor did not mention anything about title passing to the transferee, nor about the reconveyance of the title. That makes all the difference.

16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex. 26 dated 11-12-1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real, intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter.

17. What does the executant do under the document? He takes a sum of Rs. 5,000/- in cash. The particulars are (a) Rs. 2,499/- i.e. Rs. 899/- by mortgage of his house on 27-1-1944 and (b) Rs. 1,600/- by a further mortgage on 31-5-1947 totalling to Rs. 2,499/-. Thereafter, an amount of Rs. 2,501 / - in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs.5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs. 5,000/- with the conditional sale is executed, we are unable to see how the relationship of the debtor and the creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the

parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction.

18. The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state “therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right.” - (Emphasis supplied)

It is this distinguishing point which has to be borne in mind because an argument was levelled that in **Chunchun Jha’s case, (AIR 1954 SC 345)** (supra), also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference.

19. The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the documents were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well settled in law that the right of redemption and foreclosure are coextensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale.

20. The last important clause is after the period of five years the transferee will have a right to get the municipal records mutated in his name and pay tax. Thereafter, the transferee will have an absolute right to mortgage, sell, or gift the suit property. Neither executant nor any one else could dispute the title. All the above clauses are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. Ex. 39 was pressed into service. But we do not think much assistance can be derived by the appellants. That only shows there were dealings between the parties. Further’ it also contains account relating to betel leaves. That has nothing to do with the suit transaction.

21. We may now turn to **Chunchun Jha’s case, (1955 (1) SCR 174 : AIR 1954 SC 345)** (supra). Apart from the distinguishing feature which we have pointed out in relation to possession earlier, another distinguishing feature is what occurs at page 180 (of SCR) : (at p. 347 of AIR) of the report which is as under:

“The deed purports to be a sale and has the outward form of one but at the same time it calls itself a “conditional sale”. It has, however, 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 of us, the executants”. That is clear about the possession but is silent about the title. In the context we can only take these words to mean that if there is payment within the specified time, then the title will continue to reside in the executants; for what else can a right of exclusive possession import in these circumstances?”

22. The position here, as explained above, is entirely different. For these reasons, we hold

that no exception could be taken to the judgment of the High Court. The civil appeal fails and the same is dismissed. However, there shall be no order as to costs.