

CASE DETAILS

PRAKASH (DEAD) BY LR.

v.

G. ARADHYA AND ORS.

(Civil Appeal No. 706 of 2015)

AUGUST 18, 2023

[HIMA KOHLI AND RAJESH BINDAL, JJ.]

HEADNOTES

Issue for consideration: Transaction between the parties whether an absolute sale of the property or a mortgage.

Transfer of Property Act, 1882 – s.58(c) – Two documents executed on same day, Sale Deed and Reconveyance Deed/agreement of buy back deed, transaction if mortgage or absolute sale of the property:

Held: Proviso to sub-section (c) of s.58 provides that no transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale – In the present case, admittedly, there are two separate documents – Sale Deed was an absolute sale for a total sale consideration of ₹ 5,000/- required by the vendor to meet domestic expenses and to meet education expenses of his minor son (appellant) and to discharge some debts – Possession of the property was to be delivered on registration of the Sale Deed – The vendee was entitled to get the mutation entered in her name and enjoy the property by paying the taxes, if any – She would become an absolute owner thereof from generation to generation – There were no encumbrances attached to the property – Further, the agreement of buy back mentioned that after registration of the Sale Deed, the vendor had requested the vendee to resell the property within the time given – The vendee granted him five years' time to repurchase the property in case sale consideration of ₹ 5000/- was paid – It was agreed that the agreement shall cease immediately after expiry of 5 years – Thus, in terms of the Sale Deed and the Reconveyance Deed, reconsidered in the light of the enunciation of law, the same cannot be held to be a transaction of mortgage of property – Sale of property initially, was

absolute – By way of execution of Reconveyance Deed on the same day, the only right given to the appellants was to repurchase the property – No error in the judgment of the High Court upholding the decree of the trial Court by which the suit filed by the appellant for redemption of mortgage was dismissed.

Transfer of Property Act, 1882 – s.58(c) – Scope:

Held: The proviso was added in s.58(c) so as to put at rest the conflicting decisions on the issue – A deeming fiction was added in the negative that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale.

LIST OF CITATIONS AND OTHER REFERENCES

Bishwanath Prasad Singh v. Rajendra Prasad and another (2006) 4 SCC 432: [2006] 2 SCR 566 – relied on.

Indira Kaur (Smt.) and others v. Sheo Lal Kapoor (1988) 2 SCC 488; *Sunil Kumar and another v. Ram Parkash and others* (1988) 2 SCC 77: [1988] 2 SCR 623; *Ramlal and another v. Phagua and others* (2006) 1 SCC 168: [2005] 4 Suppl. SCR 331; *Ahilyabai and others v. Shantabai (Dead) and others* (2001) 10 SCC 583; *Pandit Chunchun Jha v. Sk. Ebadat Ali* [1955] 1 SCR 174; *Mushir Mohd. Khan v. Sajeda Bano* (2000) 3 SCC 536: [2000] 2 SCR 65; *Umabai v. Nilkanth Dhondiba Chavan* (2005) 6 SCC 243: [2005] 3 SCR 521 – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 706 of 2015.

From the Judgment and Order dated 09.12.2009 of the High Court of Karnataka at Bangalore in RFA No.969 of 2000.

Appearances:

Mrs. Kiran Suri, Sr. Adv., Mrs. T S Shanthi, Narendra Kumar, Sanjeev Kumar, Advs. for the Appellant.

Aditya Sondhi, Sr. Adv., Chandan S. Rao, Ms. Rashi Rampal, Ms. Meghana TM, Vikas Mehta, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT**JUDGMENT****RAJESH BINDAL, J.**

1. The appellant has filed the present appeal before this Court impugning the judgment¹ of the High Court of Karnataka at Bangalore by which the Appeal² filed by the appellant against the judgment and decree of the trial Court was upheld.

FACTS

2. The facts, as evident from the record, are that on 16.10.1963 a property measuring 30 ft. x 60 ft. was purchased by the father of the appellant, Gangaramaiah, in the name of the appellant, who was minor at that time. On 24.12.1973 the father of the appellant, Gangaramaiah sold the aforesaid property to one Rudramma for a sum of ₹ 5000/- (Rupees Five Thousand). The age of the appellant, who claimed himself to be minor at that time, was mentioned as 13 years. On the same day, another unregistered document was executed between the parties claiming to be Reconveyance Deed in terms of which on the request of the vendor, the vendee had agreed to re-transfer the property back within five years of the Sale Deed in case the sale consideration of ₹ 5000/- (Rupees Five Thousand) is paid.

3. A notice dated 24.11.1978 was got issued by the father of the appellant to the vendee seeking execution of the Conveyance Deed back in favour of the vendor in terms of the Reconveyance Deed executed on 24.12.1973. The same was replied to by the vendee-Rudramma through her counsel on 02.12.1978 stating that the Sale Deed dated 24.12.1973 was not a mortgage by conditional sale. It was an outright sale of the property. It was admitted that on the same date, an agreement of reconveyance was entered into. On 24.07.1978, a suit³ was filed by Rudramma seeking eviction of the Gangaramaiah in terms of the Lease Agreement dated 24.12.1973 as he had not been paid the rent. While reserving her rights in the aforesaid suit, Rudramma stated in the reply to the notice that she is ready and willing to

1 Dated 09.12.2009 in RFA No.969/2000

2 O.S. No.3752/1987 dated 23.08.2000

3 SC No.3608/78 before the Small Cause Court, Bangalore.

get the Conveyance Deed executed on receipt of ₹ 7000/- (Rupees Seven Thousand).

4. A suit was filed by Ganagaramaiah seeking permission from the Court to mortgage the property of the minor. A public notice was issued inviting objections. *Vide* order dated 27.09.1978 permission was granted to execute fresh Mortgage Deed in order to discharge the earlier mortgage for a sum of ₹ 7000/- (Rupees Seven Thousand). On 26.03.1987, the legal heirs of Rudramma sold the property in-question in favour of defendant no.4 in the suit, namely, N. Shashidar. Gangaramaiah died on 30.04.1987.

5. A suit² was filed by the appellant praying for various reliefs, which was dismissed by the trial Court. The judgment of the trial Court was upheld by the High Court.

APPELLANT'S ARGUMENTS

6. In the aforesaid factual matrix, Mrs. Kiran Suri, learned senior counsel appearing for the appellant, submitted that the finding recorded by the courts below, that the suit filed by the appellant-plaintiff was time barred, is totally erroneous. The prayer in the suit was for redemption of the mortgage. On interpretation of the documents, it is clearly made out that the intention of the vendor was to mortgage the property. On the very same date, the Reconveyance Deed was executed though separately, in terms of which the vendee had agreed to re-transfer the property on returning back the consideration money within a period of five years from the date of execution of the Sale Deed. The terms mentioned in the document need to be interpreted. It can be very well made out that, it was a mortgage and not an agreement for re-purchase of the property. It was submitted that even if under Section 58(c) of the 1882 Act⁴, it is provided that clauses to treat the transaction of sale as a mortgage have to be in a single document, it is not a pre-condition, as the intention of the parties can be inferred from two separate documents executed on the same date.

7. The finding recorded by the trial Court, as upheld by the High Court regarding the suit being time barred, is totally erroneous. The case of the appellant will not fall under Article 60 of the Schedule attached to the 1963

⁴ The Transfer of Property Act, 1882

Act⁵. Rather, it will fall under Article 61 thereof. It was not a simplicitor case of challenging the Sale Deed executed by the guardian of the appellant when at the relevant point of time, he was a minor. Rather it was a case of redemption of mortgage for which limitation prescribed was 30 years.

8. It was further submitted that the appellant was the absolute owner of the property for which the Sale Deed was got registered by his father when he was a minor. Considering his age at that time, it could not be established that purpose of the sale of property was for the benefit of the minor. Even otherwise, the onus to prove the same was on the alienee of the property, which he had failed to discharge. A sale of property belonging to a minor being without any legal necessity, deserved to be set aside.

9. Further, argument raised is that a suit for possession filed by the vendee in the year 1978, shows that the possession of the property always remained with the vendor. This clearly establishes that it was not an outright sale, rather it was a mortgage, which the father of the appellant could get redeemed within a period of five years. The intention of the vendee is evident from the fact that she started demanding ₹ 7,000/- as against ₹ 5,000/- as is mentioned in the document at the time of execution of the Reconveyance Deed. It was not disputed that the property in-question is a vacant plot and the property tax thereof was not being paid by the appellant.

10. Learned Senior counsel appearing for the appellant placed reliance on the judgments of this Court in **Indira Kaur (Smt.) and others v. Sheo Lal Kapoor, (1988) 2 SCC 488; Sunil Kumar and another v. Ram Parkash and others, (1988) 2 SCC 77; Ramlal and another v. Phagua and others, (2006) 1 SCC 168; and Ahilyabai and others v. Shantabai (Dead) and others, (2001) 10 SCC 583** in support of her arguments.

RESPONDENTS' ARGUMENTS

11. On the other hand, Mr. Aditya Sondhi, learned Senior counsel, appearing for the respondents, submitted that the argument raised by the learned counsel for the appellant that it is a case of mortgage, is not made out from the record. Section 58(c) of the 1882 Act⁴ clearly provides that it can be inferred from the document, in case it is a single document and the

⁵ The Limitation Act, 1963

clauses are contained therein. In the case in hand, admittedly two separate documents were executed. The prayer in the suit was not to declare that the transaction between the parties was a mortgage. In the absence thereof, no relief for redemption could be claimed directly. The suit filed by the appellant is clearly barred by limitation. Though exact date of birth of the appellant has not come on the record, however, his mother while appearing as PW-1, in her cross-examination stated that he was born in December 1962. Meaning thereby that he had attained the age of majority in the year 1980. The suit having been filed in the year 1987 challenging the Sale Deed of 1973, was thus, clearly time-barred. It was further submitted that the appellant or his father who was the guardian had failed to avail of any appropriate remedy in case, the vendee had refused to get the Sale Deed registered back in terms of the Reconveyance Deed. Nothing hinges on the permission taken by the father of the appellant for re-mortgaging the property in-question as it is not disputed that at the time of sale of the property, permission was not taken.

12. A suit was filed by the vendee seeking possession from the father of the appellant and also payment of rent in terms of the Lease Deed dated 24.12.1973. The same was decreed in favour of the vendee. Though it transpired at the time of the hearing that, further proceeding was taken by the father of the appellant against the judgment in the aforesaid suit, however, none of the parties was aware of the status thereof. The possession of the property was delivered to the vendee at the time of execution of the Sale Deed, as is even mentioned therein. The house tax was also being paid by the vendee. The judgments relied upon by the appellant are distinguishable. Reliance was placed upon the judgment of this Court in **Bishwanath Prasad Singh v. Rajendra Prasad and another, (2006) 4 SCC 432** wherein earlier judgment of this Court in **Ramlal's (Supra)**, was distinguished.

13. We have heard learned counsel for the parties and perused the material available on record and referred to at the time of hearing.

DISCUSSIONS

14. At the very outset, before we deal with the arguments raised by the parties, it may not be out of place if not mentioned here that some of the relevant documents were not produced by the parties in evidence. Primarily, onus thereof certainly falls on the appellant, who was the plaintiff as he had to stand on his own legs. Some of these documents are, the Sale Deed

dated 16.10.1963 by which the property in-question was purchased by his father in his name; the notice got issued by the father of the appellant on 24.11.1978 to the vendee *qua* execution of the Sale Deed in terms of the Reconveyance Deed and the Lease Deed which was allegedly executed by the vendee in favour of the father of the appellant on 24.12.1973 regarding the property in-question.

15. Insofar as the age of the appellant is concerned, though certain dispute was raised by the appellant claiming that he was 3 years of age when the Sale Deed was got registered by his father in favour of Rudramma on 24.12.1973, however, the fact is otherwise. It came in the cross-examination of the mother of the appellant who appeared as PW-1, that the appellant was born in December 1962. That means that he attained the age of majority in the year 1980. This fact is further corroborated from the suit filed by the appellant in the year 1987 wherein he claimed himself to be 24 years of age.

16. In the civil suit, though N. Shashidar was impleaded as defendant no.4, however, the Sale Deed executed by Rudramma in his favour was not challenged. The following prayers were made in the suit:

“Wherefore the plaintiff prays for judgment and decree against the defendants:

- a) declaring that the document dated 24-12-73 styled as a sale deed executed by late Gangaramaiah in favour of late Rudramma conveying the schedule property in her favour and registered as No.3266/73-74 at pages 172 to 174 in volume No.400 of Book-I in the office of the Sub-Registrar, Sreerampuram-Bangalore, is null and void and not binding on the plaintiff and does not convey any right, title or interest in respect of the schedule property to the defendants herein claiming through late Smt. Rudramma;
- b) alternatively, declaring that the plaintiff is entitled to redeem the Mortgage of the schedule property under the above-mentioned sale deed coupled with the agreement of Reconveyance on payment of Rs.5,000/- to the defendants; on receipt of this sum, the defendants shall execute the deed of redemption and return all the documents of title of the schedule property in their custody.

- c) a decree for permanent injunction restraining the defendants, or any other person or persons claiming through them from interfering in any manner with the peaceful possession and enjoyment of the schedule property by the plaintiff; and
- d) a decree for costs of this suit and grant other relief/relief's as this Hon'ble Court deems fit to grant in the circumstances of the case, in the interests of justice and equity."

17. A perusal of the prayers made in the suit shows that the same was filed by the appellant against the legal heirs of late Rudramma (vendee) and N. Shashidar in whose favour legal heirs of Rudramma executed the Sale Deed in-question on 26.03.1987. The first prayer was for declaring the document dated 24.12.1973, styled as a Sale Deed executed by late Gangaramaiah in favour of late Rudramma being null and void and not binding on the appellant. In the alternative, prayer was made for declaring that the appellant is entitled to redeem the mortgage of the scheduled property in terms of the Sale Deed and the agreement of reconveyance on payment of ₹ 5,000/- . Further prayer was made for protecting the possession of the appellant-plaintiff. The trial Court initially framed the following issues:

- “1. Does Plaintiff prove his title to the suit property?
2. Does plaintiff further prove that his father Sri Gangaramaiah was not competent to execute the Sale Deed dt.24.12.73 in favour of Smt. Rudramma?
3. Does plaintiff further prove that there was no legal necessity for Gangaramaiah to sell the suit property in favour of Smt. Rudramma?
4. Does plaintiff prove that the transaction as per the Sale Deed dt.24.12.73 was in the nature of mortgage?
5. Does plaintiff prove his lawful possession of the suit property?
6. Is plaintiff entitled for declaration of declaring of Sale Deed dt. 24.12.73 executed by Gangaramaiah in favour of Smt. Rudramma as null and void and not binding on the plaintiff?
7. Is plaintiff entitled to redeem the mortgage of the suit property?

8. Is plaintiff entitled for permanent injunction sought for?

9. What order or decree?"

17.1. Following additional issue was framed by the trial Court on 27.11.1993:

"Whether the suit is barred by limitation?"

17.2. Thereafter, following additional issues were framed by the trial Court on 16.08.1994 :

"1. Do the defendants prove that the defence in regard to the benami nature of the transaction between late Gangaramaiah and late Smt. Rudramma is not hit by Section 4 of the Benami Transaction (Prohibition) Act, 1988?

2. Do the defendants prove that the transaction between late Gangaramiah and late Smt. Rudramma is an absolute sale and is valid according to Sec.8 of the Hindu Minority & Guardianship Act, 1956?"

18. The findings on the above issues recorded by the trial Court, as mentioned in para 20 of the judgment, are as under:

"20. By findings on the above issues are

Issue No. 1	-	Negative
Issue No. 2	-	Negative
Issue No. 3	-	Negative
Issue No. 4	-	Negative
Issue No. 5	-	Negative
Issue No. 6	-	Negative
Issue No. 7	-	Negative
Issue No. 8	-	Negative
Addl. Issue dt. 27.11.93	-	Affirmative
Addl. Issue No.1 dt. 16.08.94	-	Doesn't arise
Addl. Issue No.2 dt. 16.8.94	-	Affirmative"

19. In the appeal filed by the appellant against the judgment and decree of the trial Court, following two questions were framed by the High Court:

- “1. Whether the trial Court was justified in holding the document dated 20.12.1973 [registered on 24.12.1973] as sale deed and consequently rejecting the claim of the plaintiff that the said sale deed if read along with the agreement of buy back dated 24.12.1973 would not constitute mortgage of suit schedule property in favour of Smt. Rudramma?.
2. Whether the trial Court was justified in dismissing the suit holding that the documents dated 20.12.1973 [registered on 24.12.1973] as absolute sale deed and consequently rejecting the prayer of the plaintiff for redemption of mortgage?”

20. Both the aforesaid questions were decided against the appellant by the High Court.

21. A perusal of the aforesaid questions framed by the High Court shows that, these are co-related. The core issue was as to whether the transaction between the parties was an absolute sale of the property or it was a mortgage. The issue of limitation, with reference to the challenge to the Sale Deed having been decided against the appellant by the trial Court, was not raised before the High Court, as is evident from the questions framed. Hence, this aspect could not be addressed before this Court.

22. The argument raised by Mrs. Kiran Suri, learned Senior counsel for the appellants, on the aforesaid issue was that on a perusal of the documents the Court can always opine as to whether the intention of the party was to get an absolute Sale Deed registered or it was a mortgage. The submission was that, both the documents were executed on the same day. Reconveyance of the property in favour of the vendor, father of the appellant, on the payment of the same amount of consideration within five years, would clearly lead to an inference that the said transaction was a Mortgage Deed. Coupled with the fact that possession of the property had always remained with the appellant, otherwise the same would have been delivered to the vendee.

23. Before we appreciate the arguments raised at the Bar, we may refer to Section 58 of the 1882 Act⁴wherein the terms: “mortgage”, “mortgagor”

and “mortgagee” etc. have been defined. Sub-section (c) which deals with “mortgage by conditional sale” relevant for the point in issue, are extracted below:

“58. “Mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed” defined.-

(a) xxx xxx xxx

(b) xxx xxx xxx

(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.”

24. A perusal of the aforesaid proviso to sub-section (c) of Section 58 of the 1882 Act⁴ provides that no transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. It is the undisputed case in hand that it was not a single document, the conditions contained wherein have to be considered by this Court to opine that the transaction was not a sale, but a mortgage. Admittedly, there are two separate documents.

25. Similar argument, where two separate documents were executed, came up for consideration before this Court in **Bishwanath Prasad Singh’s case (supra)**. One was the Sale Deed and the second was the agreement for sale. Both were executed on the same date. It was opined therein that to appreciate a document its contents are to be read in entirety and the intention

of the parties is to be gathered from the language used therein. Para 16 of the aforesaid judgment is referred to for ready reference:

“16. A deed as is well known must be construed having regard to the language used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors.”

25.1. Further, in the aforesaid judgment, this Court while interpreting the terms of the agreement executed along with the Sale Deed and opined that the same cannot be treated to be a mortgage as the expression used therein were ‘vendor’, ‘vendee’, ‘sold’ and ‘consideration’. Fixed period was granted for execution of the Sale Deed.

25.2. The scope of Section 58(c) of the 1882 Act⁴ was considered in detail in paras 27 to 33 thereof which are extracted below:

“27. A bare perusal of the said provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of retransfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal right to the purchaser (*sic* seller), and such a personal right would be lost, unless the same is exercised within the stipulated time.

28. In *Pandit Chunchun Jha v. Sk. Ebadat Ali* [(1955) 1 SCR 174 : AIR 1954 SC 345] this Court clearly held: (SCR p. 177)

“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.”

29. Yet again in *Mushir Mohd. Khan v. Sajeda Bano* [(2000) 3 SCC 536] this Court upon construing Section 58(c) of the Transfer of Property Act opined: (SCC pp. 541-42, para 9)

“9. The proviso to this clause was added by Act 20 of 1929 so as to set at rest the conflict of decisions on the question whether the conditions, specially the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed. The legislature enacted that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale.”

30. Referring to *Chunchun Jha* [(1955) 1 SCR 174: AIR 1954 SC 345] it was held: (SCC p. 544, para 14)

“14. Applying the principles laid down above, the two documents read together would not constitute a ‘mortgage’ as the condition of repurchase is not contained in the same documents by which the property was sold. The proviso to clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a ‘mortgage by conditional sale’.”

31. In *Umabai v. Nilkanth Dhondiba Chavan* [(2005) 6 SCC 243] wherein one of us was a party, this Court held: (SCC p. 254, para 21)

“21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See: *Pandit Chunchun Jha v. Sk. Ebadat Ali* [(1955) 1

SCR 174 : AIR 1954 SC 345] , *Bhaskar Waman Joshi v. Narayan Rambilas Agarwal* [(1960) 2 SCR 117 : AIR 1960 SC 301] , *K. Simrathmull v. S. Nanjalingiah Gowder* [1962 Supp (3) SCR 476 : AIR 1963 SC 1182] , *Mushir Mohd. Khan* [(2000) 3 SCC 536] and *Tamboli Ramanlal Motilal* [*Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal*, 1993 Supp (1) SCC 295] .)”

32. The High Court relied upon *Indira Kaur v. Sheo Lal Kapoor* [(1988) 2 SCC 488 : AIR 1988 SC 1074]. Therein the Court took into consideration the factors adumbrated therein, particularly, a long stipulated period of 10 years for conveying the property and the vendee was prohibited from selling and parting with his right, title and interest for 10 years. The vendor was allowed to occupy the property as a tenant on payment of Rs 80 per month. No order of mutation was passed in his favour. It was held:

“6. ... In the present case having regard to the facts and circumstances highlighted in the course of the discussion pertaining to the question as to whether or not the transaction was a transaction of mortgage having regard to the real intention of the parties it would be difficult to hold that the agreement to sell executed by the defendant in favour of the plaintiff was by way of a ‘concession’. It was a transaction entered into by the defendant who was a hard-headed businessman and the documents in question have been carefully framed in legal terminology taking into account the relevant provisions of law. The transaction also discloses the awareness of the defendant about Section 58(c) of the Transfer of Property Act as is evident from the fact that the reconveyance clause is not embodied in the sale deed itself. In the agreement to sell, no reference has been made to the transaction of sale though it has been executed contemporaneously. The defendant who has permitted the plaintiff to continue in possession on payment of rent equivalent to about 13½ per cent interest and was evidently aware of all the dimensions of the matter would not have granted any concession or executed the agreement by way of a concession. The agreement was executed evidently because the plaintiff would not have executed the sale deed unless an agreement to sell by a contemporaneous document

was also executed to enable the plaintiff to enforce specific performance within ten years. It was therefore a transaction entered into with open eyes by the defendant and there was no question of granting any concession.”

33. In the instant case, as noticed hereinbefore, the transfer is complete and not partial, no stipulation has been made that the appellant cannot transfer the property. Not only that, the appellant was put in possession of the land, his name was also mutated.”

25.3. A perusal of the aforesaid paras of the judgment shows that the proviso was added in Section 58(c) of the Act⁴ vide Act No.20 of 1929, so as to put at rest the conflicting decisions on the issue. A deeming fiction was added in the negative that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale.

25.4. The judgment of this Court in **Umabai v. Nilkanth Dhondiba Chavan, (2005) 6 SCC 243**, has also been referred to, which defines the distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with condition of repurchase is not a lending and borrowing arrangement. Proviso to Section 58(c) of the 1882 Act⁴ was referred to in the aforesaid judgment to hold that if the condition for re-transfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. The judgment of this Court in **Ramlal's case (supra)**, relied upon by learned Senior counsel for the appellant, was specifically dealt with and distinguished in paras 34 and 35 thereof in **Bishwanath Prasad Case (supra)** and the same are extracted below:

“34. In **Ramlal v. Phagua** this Court having regard to the peculiar fact situation obtaining therein opined: (SCC p. 173, para 18)

“18. In our opinion, agreement to reconvey the property will not *ipso facto* lead to the conclusion that the sale is nominal and in view of the stand of Defendant 8, as also of the fact that the property worth Rs 700 has been purportedly sold for Rs 400, we are of the considered opinion that the sale deed dated 1-12-1965 did not convey any title to Defendant 8. It is well settled by a

catena of decisions that the vendor cannot convey to the vendee better title than she herself has.”

35. As of fact, it was held therein that the sale deed in question was not a real sale deed but was by way of a surety. In that case, furthermore, the defendant categorically admitted that the plaintiff had taken loan. It is in that situation, the transaction was held to be a mortgage. Apart from it, there were other circumstances which led the court to arrive at the said conclusion. The said decision, therefore, cannot have any application in the instant case.”

26. Before we proceed to consider the legal effect thereof, we find it appropriate to extract the contents of the two documents. The contents of the Sale Deed are extracted below:

“On this 24th day of December, 1973 I, Gangaramaiah, S/o. late Kambaiah, residing at No.62, Hosaguddadahalli, Mysore Road, Bangalore City on behalf of minor son Prakashaiah, aged about 13 years as his guardian and father is executing this Absolute Sale Deed in favour of Smt. Rudramma, W/o. Sri Gangappa, aged about 48 years, residing at No. 68, Nehru Road, Hosaguddadahalli, Mysore Road, Bangalore City as follows:-

The schedule property mentioned below was acquired by us from Smt. Sharadamma, S/o P.V. Raghavendra Naidu and her children under a registered sale dated 16-10-1963 registered as Document No. 5676 of Book-1 in Volume No. 2332 at pages 238-241 registered at the office of the Sub-Registrar, Bangalore North Taluk and ever since the possession of the property is with us. In order to meet domestic expenses and to meet the education of the minor son and also to discharge some of the petty debts the schedule property is sold for a sale consideration of Rs.5,000/- . I have received a sum of Rs.3,000/- in the presence of the witnesses and also agreed to receive the remaining sale consideration of Rs.2,000/- at the time of the registration of this sale deed in the presence of the Sub- Registrar. Thus, total sale consideration of Rs.5,000/- is paid to me. Therefore, on this day of the registration the possession of the schedule property is delivered to you. Here afterwards you can change Katha in respect of the schedule site in your name and you are at liberty to enjoy all such resources available/

standing over the schedule site by paying tax, cess etc., and you shall enjoy the schedule site as the absolute owner thereof from generation to generation. There are no other claimants, legal heirs and there is no charge such as the payment of maintenance, Shreedhan rights, minor disputes, court decrees, attachment etc. In the event of any dispute, I will undertake to resolve them at my cost. I have handed over the sale deed dated 16-10-1963 and the Survey Endorsement, Tax paid receipts, Katha Endorsements.”

27. The contents of the reconveyance/agreement of buy back deed dated 24.12.1973 are extracted below:

“On this 24th day of December, 1973 I, Smt. Rudramma, W/o. Sri Gangappa residing at No. 68, Nehru Road, Hosaguddadahalli, Mysore Road, Bangalore City is executing this Reconveyance Agreement in favour of Sri. Gangaramaiah, S/o. late Kambaiah, residing at No.62, Hosaguddadahalli, Mysore Road, Bangalore City as follows:-

You are aware that the property mentioned under the schedule given below was sold and registered by you in my name for a sum of Rs.5,000/- at the office of the Sub-Registrar, Srirampuram, Bangalore City on 24-12-1973 which is registered as Document No. 3265, in Book-1. Since you requested me to resell the schedule property but I permitted you to repurchase the schedule property within a given time, I am granting you 5 years of time for you to repurchase the same. In the event, you pay me the sale consideration of Rs.5,000/-, I will reconvey the schedule property in your favour. This agreement shall cease on the next day of the expiry of 5 years. At the time of repurchase you must bear the registration charges.”

28. In the case in hand, the specific term used in the document is “reconveyance agreement” executed by Rudramma in favour of Gangaramaiah. It is clearly mentioned therein that the property in-question had already been sold and registered in the name of Rudramma. On a request made by Gangaramaiah, the right to purchase the property was given within a period of five years on payment of sale consideration of ₹ 5,000/- (Rupees Five Thousand). The agreement states that it shall cease to have effect on expiry of a period of five years.

29. A perusal of the contents of the Sale Deed shows that it is clearly mentioned therein that the same was an absolute sale for a total sale consideration of ₹ 5,000/- (Rupees Five Thousand) required by the vendor to meet domestic expenses and to meet education expenses of his minor son and to discharge some debts. Total sale consideration was ₹ 5,000/- (Rupees Five Thousand). Out of this amount, a sum of ₹ 3,000/- (Rupees Three Thousand) was received earlier and ₹ 2,000/- (Rupees Two Thousand) was to be received in the presence of the Sub-Registrar at the time of the registration of the Sale Deed. Possession of the property was to be delivered on registration of the Sale Deed. The vendee was entitled to get the mutation entered in her name and enjoy the property by paying the taxes, if any. She would become an absolute owner thereof from generation to generation. There were no encumbrances attached to the property.

30. The agreement of buy back dated 24.12.1973 mentioned, that after registration of the Sale Deed, the vendor had requested the vendee to resell the property within the time given. The vendee granted him five years' time to repurchase the property in case sale consideration of ₹ 5000/- (Rupees Five Thousand) is paid. It was agreed that the agreement shall cease immediately after expiry of 5 years. It further mentions that at the time of repurchase, registration expenses are to be borne by the father of the appellant, who had to get the Sale Deed registered back.

31. In terms of the Sale Deed and the Reconveyance Deed, reconsidered in the light of the enunciation of law, as referred to above, in our opinion, the same cannot be held to be a transaction of mortgage of property. Sale of property initially, was absolute. By way of execution of Reconveyance Deed, namely, on the same day, the only right given to the appellants was to repurchase the property.

32. For the aforementioned reasons, we do not find any error in the judgment and order of the High Court. The appeal is accordingly dismissed. There shall be no order as to costs.