Mt. Qayumunissa vs Rashidul Malik on 13 October, 1950

Equivalent citations: AIR1952ALL200, AIR 1952 ALLAHABAD 200

JUDGMENT

Chandiramani, J.

1. This is an application in revision against the decree of the learned District Judge, Lucknow, dated 11-13.1948.

2. The applicant Mt. Qaiyum-in-nisa was owner of grove No. 412 in qasba Malhiabad known as Terhwa grove. She mortgaged it without possession with Mt. Hamid Jehan Begam on 8-9-1923, for Rs. 2000, with interest at 10 per cent. per annum. On 11-9-1923, she created a further charge on the property by borrowing another sum of Rs. 500 from Mt. Hamid Jehan Begam, the rate of interest being 10 per cent. per annum.

3. Mt. Hamid Jehan Begam sold all her rights in the grove under the mortgage and the charge to Mt. Bahali Begam on 27-2-1925. After some negotiations carried on by Maqbul Ahmad, son of the mortgagor applicant, the present opposite party, Rashidul Malik, bought all the rights of Mt. Bahali Begam for RS. 2600 on 8-11-1927. The applicant then apparently found it difficult to pay up the interest stipulated in the mortgage and the charge and made no payment of interest. Some negotiations started in September 1929, when Rashidul Malik demanded the return of his money and on 18-6-1930, was executed a sale-deed Ex. 5 by the applicant in favour of the opposite party.

4. From the recital in the sale-deed it appears that the amount due under the mortgage and charge of September 1923, was calculated and accounts were made up and Rs. 3251 were found due to the mortgagee Rashidul Malik. Parties agreed that only Rs. 3200 shall be paid; Rs. 2560 on the mortgage and Rs. 610 on the charge. Rupees 70 had been paid in cash to the mortgagor before execution of the sale-deed. The mortgaged grove was sold for RS. 3270 to the mortgagee. A condition was inserted in the sale-deed that if the applicant vendor paid back the entire sum of RS. 3270 at any time between 1941 and 1950, the vendee would recovery the property to her, but if the sum was not paid by 1950, then the right to demand reconveyance would be lost. It was also provided that if there was any claim to the grove, and in consequence the whole or any portion of it were lost to the vendee, he would be entitled to compensation from the vendor. On 26-5-1941, the applicant applied under Section 12, Agriculturists' Belief Act, for redemption alleging that the transaction dated 18-6-1930, was not really a sale but was in fact a mortgage by conditional sale. She alleged that she was an agriculturist and the opposite party had made money by selling mango profits and had caused her loss by cutting several trees from the grove and further the profits from the grove were large and entire mortgage money had been paid off from the usufruct of the property. She, therefore, claimed redemption and delivery of possession without having to pay anything.

5. Her claim was resisted. It was said that the transaction was an absolute sale with a right of repurchase and not a mortgage by conditional sale. It was admitted that she is an agriculturist. It was denied that any income was derived from the sale of mango grafts or that any trees had been out or damaged. It was alleged that even if the transaction be one of mortgage, the income from the grove was much less than the interest payable at 4 1/2 per cent. It was also said that if the accounts could legally be reopened then the principal should be Rs. 2600 which he actually paid at the request of the applicant and that the transaction of 8-11-1927, by which he stepped into the shoes of Mt. Pahali Begam, the then mortgagee, was in substance a loan of Rs. 2.600 to the applicant.

6. The trial Court held that the transaction was a mortgage by conditional sale, that the transaction of 8-11-1927, was not an advance to the applicant, that the account would be reopened from the date of the first mortgage in 1923, that no income was derived by the opposite party from the sale of mango grafts, that the opposite party by cutting of certain trees of the grove had caused a loss of RS. 350 to the applicant and that the annual profits from the grove after payment of the land revenue and cesees and after deducting 10 per cent. as costs of collection were Rs. 198. On an account being taken, it was found by the trial Court that on the date of application under Section 12, Agriculturists' Belief Act nothing was due to the opposite party. The suit was accordingly decreed.

7. On appeal by the opposite party it was held that the transaction of 1930 was in fact a sale and not a mortgage by conditional sale, that if it were a mortgage, then the accounts would be taken from 8-11-1927, treating RS. 2,600 as principal, as in substance the transaction of 8-11-1927, was an advance to the applicant, that the annual profits were Rs. 125 minus 10 per cent. costs of collection, i.e. Rs. 1128/- that the interest on RS. 2,600 at 4 1/2 per cent. was slightly more than the annual profits, but in effect both interest and profits may be treated as equal and that therefore the opposite party was entitled to recover Rs. 2,600, but he must make good the loss of Rs. 350 caused by him to the mortgagor by cutting off trees. However, as be held that the transaction was in fact a sale, the suit for redemption was dismissed.

8. The applicant has now come up in revision before us and it is contended on her behalf that the transaction of 18-6-1930, is in fact a mortgage by conditional sale and the learned lower appellate Court has, by holding the contrary view erroneously, failed to exercise a jurisdiction vested in it and that the accounts should be reopened from 1923 and not from 1927 and the decree of the trial Court should be restored. We have heard the learned Counsel at considerable length and see NO reason to interfere.

9. There was considerable controversy before us as to whether a revision lies in this case. For the applicant reliance was placed on Lachman v. Ali Bux, 1947 Oudh, W.N. 362, and on a recent decision of the Privy Council in Joy Chand Lal v. Kamalaksha Chaudhury, 76 Ind. App. 131, which prima facie show that the application under Section 115, Civil P. C. does lie. On the other hand, the learned Counsel for the opposite party contends that the ruling in Joy Chand Lal v. Kamalaksha Chaudhury, is inconsistent with another ruling of their Lordships of the Privy Council in Venkatagiri Ayyanqar v. Hindu Religious Endowments Board, Madras, 76 Ind. App. 67 (P. C.) It is, however, quite unnecessary for us to decide whether a revision does lie because, even assuming that a revision lies, we are of the opinion that the learned lower Court has rightly held that the transaction in

question here is a Bale with a condition of repurchase and so no interference is called for.

10. The main point now for consideration is whether the transaction evidenced by Ex. 5, dated 18-6-1930, is an out-and-out sale with a condition of repurchase or a mortgage by conditional sale. Mortgage by a conditional sale is defined in Section 53(c) T. P. Act as follows:

> "Where the mortgagor ostensibly sells the mortgaged property. Oil 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 a 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 of purports to effect the sale".
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> "Sale" is defined in Section 54, T P. Act as follows:
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> " 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised".

Mortgage is defined in Section 58(a) as follows:

> "A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability, The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any) by which the transfer is effected is called a mortgage deed".

It is, therefore clear that the question must be decided in the light of the requirements of the law stated above.

11. The applicant desires us to hold that the transaction is a mortgage by conditional sale. He must, therefore, satisfy us that on the record there is evidence to prove that the transaction is in fact a mortgage.

12. The effect of the proviso added to Section 58(c) is to restrict the inference to be drawn in favour of a mortgage only to cases where the condition of repurchase is embodied in one document which effects or purports to effect a sale: see Kuppa krishna v. Mhaste Goli, A. I. R. (18) 1931 Bom. 371, Shambhu Singh v. Jagdish Bakhsh Singh A. I. R. (28) 1941 Oudh. 582, Jagannath v. Butto Krishto, A. I. R. (34) 1947 Pat. 345, Venkata Subbarao v. Veeraswami, A. I. R. (33) 1946 Mad. 456 and Nerimal v. Mt Sharifan, A. I. R. (36). 1949 ALL. 194. The proviso does not mean that if the

conditions are embodied in the same document the transaction will necessarily be a mortgage : see Shambhu Singh v. Jagdish Bakhsh Singh It will still depend upon the intention of the parties as gathered from the contents of the document itself and the surrounding circumstances whether the particular transaction is a mortgage by conditional sale or a sale with a condition of repurchase: see Shambhu Singh v. Jagdish Baksh Singh, A. I. R. (28) 1941 Oudh. 582, Takra Singh v. Sheo Nath Singh, A. I. R. (27) 1940 ALL. 227; Fazal Ahmad v. Afaqul Rahman, A. I. R. (25) 1988 Oudh. 57 and Bishan Lal v. Banwari Lal, A. I. R. (26) 1939 ALL. 713.

13. We have now to consider the contents of the document itself and the extrinsic evidence of the surrounding circumstances to ascertain the intention of the parties. No oral evidence of intention is admissible. In both the Courts below attention was directed to documents which passed between Rashidul Malik, the opposite party, and Maqbul Ahmad, the son of the applicant, during a period of a few months before the execution of Ex. 5, the deed now in dispute. It was argued by the learned Counsel for the applicant that this evidence of negotiations is not admissible and he relied on Abdullah Khan v. Basharat Husain, 40 Ind. App. 31 (P.c.), wherein it was held that "Where there is an express and unambiguous stipulation in the mortgage deed that the profits of the mortgaged property shall belong to the mortgagee in lieu of interest it cannot he varied or contradicted by reference to preliminary negotiation". Under the Evidence Act effect must be given to it and the mortgage cannot be treated as usufructuary only in form."

It is obvious that the authority has no application to the facts of this case. Here the document itself is of such a nature that the intention has to be ascertained, and it has been laid down by their Lordships of the Privy Council in Balkishen Das v. W. F. Legga, 27 Ind. App. 58 that as between the parties to the document or documents, the intention of treating the transaction as an out-and-out sale, or a mortgage, must be determined on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the documents is related to existing facts. It is only in this light that the evidence afforded by the previous correspondence hag to be examined.

14. It is the admitted case of the parties that the grove in dispute was first mortgaged in 1923 for Rs. 2000 with Mt. Hamid Jehan Begam at 10 per cent. per annum and a few days later a further charge of Rs. 500 at 10 per cent. per annum was created and these rights of Mt. Hamid Jehan Begam were sold by her to Mt. Bahali Begam in 1925 and Mt. Bahali Begam in her turn sold her rights to the opposite-party, Rashidul Malik for RS. 2,600 on 8-11-1927. It is also in evidence that Rashidul Malik came into the picture on the active efforts of Maqbul Ahmad son of the applicant. In his letter Ex. 6 dated 1-9-1929, Rashidul Malik makes a grievance of the fact that be was given to understand that the grove was worth Rs. 4,000 whereas it was hardly worth Rs. 3,000 and it was also deteriorating in value. He expressed his anxiety about his money. Maqbul Ahmad thereupon sent a reply Ex. 8, dated 12-9-1929, regret-ting that due to his illness ha had not been able to pay any interest. He stated that he had come to know from the brother of Rashidul Malik that Rashidul Malik was not willing to buy the grove for more than Rs. 2,700. Maqbul Ahmad suggested that he wanted to preserve the grove for himself and so he was willing to give Rashidul Malik either a theka or a possessory mortgage. Exhibit 9 dated 17-9-1929, is a reply of Rashidul Malik declining the two offers and saying that the grove cannot yield Rs. 250, the annual interest at 10 per cent. on the existing

mortgage but nevertheless be was willing to take a usufructuary mortgage for 20 years provided accounting was done, and if the money due were not paid at the end of 20 years, the mortgage would amount to a sale. This offer was not accepted by Maqbul Ahmad and on 28-9-1929. Rashidul Malik wrote Ex. 11 to Maqbul Ahmad saying that he could not understand Maqbul Ahmad's refusal. There was further correspondence. On 19-1-1930, Rashidul Malik wrote that he did not wish to buy the grove for more than what was due to him. Then on 26-1-1930, Maqbul Ahmad sent a reply Ex-A8 which contained three offers in the alternative. Maqbul Ahmad was willing--(1) to give a usufructuary mortgage for 20 years as proposed but the rate of interest should be 6 per cent., or (2) to sell the grove outright provided Rashidul Malik paid him Rs. 500 over and above what was due on the mortgage and the charge, or (3) to sell the grove for the amount due provided the property was re-sold to him at the same price when the amount due was paid. In his reply Ex. 18 dated 6-2-1930 Rashidul Malik rejected offers (2) and (3) but was prepared to accept (1) of the usufructuary mortgage provided he was paid 8 per cent. as interest. Maqbul Ahmad did not accept the counter offer and on 23-2-1930, Rashidul Malik wrote in his letter Ex. All that he had withdrawn all offers. Thereafter Rashidul Malik served a notice for his money whereupon Maqbul Ahmad wrote Ex. A12 on 5-3-1930 saying that he would be prepared to sell his grove on certain conditions. On 11-4-1930, Rashidul Malik informed him by Ex. 20 that he was anxious to get back his money and be bad entrusted the matter to his legal adviser and Maqbul Ahmad should got into touch with him. Maqbul Ahmad again made some other offer and Rashidul Malik asked him by his letter Ex. 21 dated 22-4-1930, to go to Malihabad. On 8-3-1930 Maqbul Ahmad wrote Ex. 23 for himself and on behalf of his mother, the applicant, agreeing to make a usufrctuary mortgage at 8 per cent. on the terms offered in the letter EX. 9 dated 17-9-1929. He stated therein that the fruits of the grove that year had been sold for Rs. 125. On 20-5-1930, Rashidul Malik informed Maqbul Ahmad that he was going to Malihabad and the matter would be finally settled there. There is evidence of Rashidul Malik that thereafter there were oral negotiations which eventually resulted in the transaction of 18-6-1930.

15. The documentary evidence referred to above gives us but an incomplete picture of the background in which the present transaction was entered into. It, however, indicates that further talks were to take place on the tentative proposal of Maqbul Ahmad in respect of the usufructuary mortgage for 20 years with interest at 8 per cent. It further shows that proposal for sale had been considered and Rashidul Malik thought that the price should be about Rs. 2,700 while Maqbul Ahmad thought that it should be Rs. 600 over and above the money due on the mortgage and the charge. Accordingly to Ex. 5 the amount so due was settled at Rs. 3,200 so that the sale price required by Maqbul Ahmad was Rs. 3,700. Exhibit 5, which on the face of it is a sale deed, fixed the price at Rs. 3,370 which is slightly above the mean of the two prices Rs. 2,700, 3,700, that is Rs. 8,200. There is thus evidence of bargaining and also evidence that the price is a fair one. There is also the further evidence that in 1930 the year when Ex. 5 was executed, the fruits of the grove had been sold for only RS. 125. The annual interest earned at 10 per cent., the stipulated rate in the deeds of mortgage and charge, was Rs. 250. The profits thus at the time Ex. 5 was executed were exactly half the interest payable.

16. Now we come to the document EX. 5 itself. A perusal thereof shows that it is a Bale deed with a condition of repurchase. The deed purports to transfer the property absolutely. The vendee gets

complete ownership of property from the date of sale and the vendor guarantees the title of the vendee and undertakes to make good any loss that the vendee may suffer by any portion of the property going out of his possession on the claim of another person. The vendor undertakes be get the vendee's name mutated in the papers and in default autherises him to obtain mutation. The condition of repurchase is as follows :

> "It has been decided between the parties that if I, the executant, or my heirs, after 10 years, from 1941 to 1950, pay in a lamp sum is cash the entire consideration money of this deed of Rs. 3270 to the vendee or his heirs then the sold property shall be returned to ma or my heirs and the vendee or his heirs shall have no objection in taking the consideration money and executing the sale deed; of course after 1960. I, the Executant, or my heirs shall have no right for payment of the consideration money and taking back the sold property."

17. One will search in vain for any indication in the document itself that a relation of lender land borrower, which is so essential in a mortgage, has been created. There is no indication that the property was being given merely as security for a loan. There is no provision for payment of interest. It is to be remembered that the rate of interest in the mortgage and charge was 10 per cent. while in the tentative proposal made about six weeks before execution of Ex. 5 the rate was 8 per cent. Even at 8 per cent. interest on the originally secured sum of Rs. 2,500 would be Rs. 200 whereas according to Maqbul Ahmad the grove yielded only Rs. 125 in 1930. If the transaction had been a mortgage with possession, then clearly Rashidul Malik could not get even his annual interest from the property and Ex. 6 does not provide for recovery of anything more than Rs. 3,270, the amount actually paid to get the sale-deed. It has already been pointed out that the amount of consideration for the transfer represents the fair price of the property and was arrived at after some bargaining. It is true that the property was not required to be resold before the expiry of ten years, but at the same time there was the neutralising provision that if the money were not repaid between 1941 to 1960, the vendor, that is the applicant, will lose her option to recover the property. The document nowhere imposes any obligation on the vendor to recover the property on payment of the price but gives her only the option to do so. These are some of the tests which have to be applied in determining the nature of the transaction (See Narasingerji Gyanagerji v. Parthasaradki, 51 Ind. App. 305 (P.c.); Ahmad Husain Rizvi v. Azhar Ali, A.I.R. (31) 1944 Oudh 305 and Shambhu Singh v. Jag-dish Bakhsh Singh, A. I. R. (28) 1941 Oudh 282).

18. It was urged on behalf of the applicant that the opposite party is a lawyer and must have been aware of the proviso added to Section 68(c), and so when the condition of repurchase was included in the sale-deed itself, it is an indication that the parties intended the transaction to be a mortgage. This is certainly a circumstance worthy of consideration, but, as has already been pointed out, is not conclusive. The other circumstances pointed out by us far outweigh this circumstance and we have no hesitation in holding that the transaction in the present case is an oat and out sale with the condition of re purchase and not a mortgage by conditional sale. The view of the learned District Judge was therefore clearly correct.

19. Another point raised in this revision application was that the learned District Judge was in error in saying that if the transaction was a mortgage it could be reopened only from 8-11-1927, when Rashidul Malik stepped into the shoes of Mt. Bahali Begam from whom he bought her mortgagee rights and not from the day of the mortgage in 1923. Learned counsel for the opposite party concedes that the view taken by the learned District Judge is erroneous and we have no doubt that it is erroneous.

20. In view of the fact that the transaction is a sale, no question of redemption arises and so it is unnecessary to consider the question of profits and the amount, if any, on payment of which redemption can be ordered.

21. The result is that this application for revision fails. It is accordingly dismissed with costs.