Debi Singh And Ors. vs Jagdish Saran Singh And Ors. on 29 January, 1952

Equivalent citations: AIR1952ALL716, AIR 1952 ALLAHABAD 716

JUDGMENT

S.B. Chandiramani, J.

1. It appears that on the 10th April, 1934, Debi Singh, one of the appellants, executed a deed described as a deed of conditional sale in favour of one Atbal Singh (predecessor of some of the respondents) in respect of a one-third share of mahal Chaudhri Harpal Singh in village Bangarmau, District Unnao. Debi Singh applied under Section 4 of the Encumbered Estates Act showing the property covered thereby as his own. He claimed that the transaction evidenced by the sale-deed of 1934 was in fact a mortgage by conditional sale. Atbal Singh objected saying that it was an out and out sale subject to a condition of repurchase within a specified time. The Special Judge held that Section 58(c) of the Transfer of Property Act when correctly construed does not indicate that every deed of sale containing a condition for repurchase operated only as a deed of mortgage and the true test still is the intention of the parties which may be gathered from the language of the deed and the surrounding circumstances at the time of execution. On the facts and circumstances of the case he held that the transaction was an out and out sale with the condition of repurchase and not a mortgage by conditional sale. In the circumstances the property in dispute was held to be the property of Atbal Singh and not of the landlord applicant Debi Singh.

2. Debi Singh has filed an appeal in this Court contending that the transaction is really a mortgage by conditional sale and he relied on the express terms of Section 58(c) itself.

3. The matter came up before a Bench of this Court consisting of M. H. Kidwai and C. B. Agarwala JJ. These learned Judges pointed out that there was considerable authority for the view of construction of Section 58(c) adopted by the Special Judge as was clear from 'SHAM-BHU SINGH v. JAGDISH BAKHSH SINGH', 17 Luck 198: (AIR 1941 Oudh 582); 'BISHAN LAL v. BANWARI LAL', AIR 1937 All 724, which was affirmed in appeal in 'BISHAN LAL v. BANWARI LAL', AIR 1939 All 713 and THAKRA SINGH v. SHEO NATH SINGH', A I R 1940 All 227, but they thought that 'AIR 1940 All 227' showed that there are authorities also to the contrary and they observed:

> "Further it appears to us that the plain meaning of Section 58(c) is that, if a deed purporting to be a deed of sale, contains any one of the three conditions mentioned in that section, it is to be construed as a mortgage by conditional sale."

Having regard to the importance of the question involved, and the difference of opinion which according to them existed, they referred the matter to a Full Bench for an authoritative decision. The

matter has accordingly come before us.

4. We consider that the scope of this reference is limited to the interpretation of Section 58(c) and the whole appeal is not before us for decision.

5. The question before us has not been formulated in specific words, but I apprehend the question to be as follows:

> "If a deed effecting or purporting to effect a sale after the amendment in Clause (c) of Section 58 of the Transfer of Property Act came into force, contains any one of the three conditions mentioned in that clause, is it in every case a deed of mortgage by conditional sale." ' A reference to Section 58 of the Transfer of Property Act will show that it defines a "mortgage", "mortgagor", "mortgage money", "mortgagee" & at the same time defines and enumerates the various forms of mortgages in Sub-sections (b), (c), (d), (e), (f) and (g). We are concerned in this case with a mortgage by conditional sale as defined in Sub-section (c). Sub-section (c) lays down the statutory requirements which must be fulfilled before a transaction can be considered to be a mortgage by conditional sale. As the real transaction as opposed to the ostensible transaction described in the sub-section is a mortgage, the parties involved are referred to as "mortgagor" and "mortgagee" and the money is referred to as the "mortgage money" and the security as "mortgaged property". The relationship of mortgagor and mortgagee arises directly from the transaction and is not antecedent to it or independent of it. This view is supported by a decision of the Full Bench of the Madras High Court in 'MUTHUVELU MUDALIAR v. VYTHI-LINGA MUDLIAR', 42 Mad 407 (FB), wherein Willis C. J. has stated at p. 418 with respect to Section 58 as follows:
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> "The section begins with a definition of the terms 'mortgage', 'mortgagor' and 'mortgagee' and proceeds, as pointed out by Napier J. to describe or define the different sorts of mortgages which are met within India. Sub-section (c) deals with mortgages by conditional sale, in which the transaction is ostensibly a sale or transfer of ownership in ex-.change for a price (Section 34), but is really intended to be a mortgage or transfer of an interest in specific immovable property for the purpose of securing the payment of money (Section 53(e)). As the transaction is really a mortgage- and only ostensibly a sale, Sub-section (c) refers to the transferor as the mortgagor, and speaks of the ostensible sale of the mortgaged property subject to certain conditions as to the payment of the mortgage money."

This interpretation was accepted by the other two learned Judges who constituted with the learned Chief Justice the Full Bench.

6. Section 58(c) requires first that there should be a sale subject to one of the three conditions mentioned in the sub-section. It then lays down that it is only ostensibly a sale but not really a sale, then it is a mortgage by conditional sale. The proviso then lays down the test to show when the

transaction is not a mortgage by conditional sale.

7. It may be pointed out that the proviso was added by Section 19 of the Transfer of Property (Amendment) Act XX of 1929 and; by Section 63 of that Amendment Act, the amendments were expressly stated not to be retrospective. Retrospective effect cannot, therefore, be given to the amendment embodied in the proviso. This was also the view expressed in 'MA SEIN NYO v. MAUNG SAN PE', AIR 1935 Rang 212 and 'JAGGARNATH SINGH v. BUTTO KRISHTO RAY', AIR 1947 Pat 345. The proviso in these circumstances prescribes therefore a statutory test which is applicable only to transactions after the amendment.

8. Before the amendment the law was settled that given a transaction of sale subject to one of the conditions prescribed in Section 58(c) the transaction is not necessarily a mortgage by conditional sale and the conclusive test in such cases was the intention of the parties which itself was to fee gathered from the language of the document or documents with such extrinsic evidence of surrounding circumstances as might be required to show the relation of the written language to existing fact 'NAR-SINGERJI v. PARTHASARADHI RAYANIM GARU', AIR 1924 PC 226. The same test applies even to transactions entered into before the Transfer of Property Act came into force (see 'SITHUL PURSHAD' v. LUCHMI PUR-SHAD', 10 Cal 30 (PC); 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC); 'BALKI-SHEN DAS v. W. F. LEGGE', 22 All 149 (PC); 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC) and 'MUTHUVELU MUDALIAR v. VYTHILINGA MUDALIAR', 42 Mad 407 (FB)). In 'BALKISHEN DAS v. W. F. LEGGE', 22 All 149 (PC), their Lordships of the Privy Council observed that it might be assumed that the framers of the Transfer of Property Act intended in Section 58 to state the existing law and practice in India. The cases cited above are all cases where sale was evidenced by one document and the condition by another document. In all cases except 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC), the two documents were of the same date. If two documents were of the same date it was considered "to be" a strong presumption that they formed one single transaction, but the true nature of the transaction had yet to be determined by the intention (See 'MATHURA KURMI v. JAGDEO SINGH', AIR 1927 All 321). In cases where sale and condition of repurchase were contained in one and the same document, the presumpion that the transaction was a mortgage was considered stronger but that fact was not considered conclusive and the intention had still to be ascertained. (See 'MAN SINGH v. GUMAN SINGH', AIR 1929 All 619); and 'RAM DHANI RAM v. RAM RIKH SINGH', AIR 1931 All 548. The fact, therefore, whether a condition of the kind referred to in Section 58(c) was contained in the document of sale itself or jn another was treated as one of the circumstances to be considered in ascertaining the intention, but this circumstance was never considered conclusive of the matter.

9. It will thus be clear that the cases divide themselves into two classes: (1) those cases in which the sale and the condition appear in one document; and (2) those in which they appear in separate documents. In either case intention is the sole test for determining whether the transaction is a sale or a mortgage.

10. The law was amended on the 1st April 1930, by the addition of the proviso that: "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." One effect of the proviso is that in the second

class of cases referred to above, those in which the transaction is evidenced by separate documents, will not be considered to Be cases of mortgages by conditional sale. (See 'MA SEIN NYO v. MAUNG SAN PE', AIR 1935 Rang 212; 'JAGGARNATH SINGH v. BUTTO KRISTO ROY', AIR 1947 Pat 345 and 'MERI MAL v. MT. SHARIFAN', AIR 1949 All 194).

11. It is contended for the respondents that the test laid down in the proviso is not conclusive in the first class of cases i.e. where the transaction is embodied in one document, and reliance has been placed on the following cases: KUPPA KRISHNA v. MHASTI GOLI NAIK', AIR 1931 Bom 371; 'RAMNARAYAN RAMRA-KH v. RAMRATAN RADHAKISHEN', AIR 1934 Nag 18; 'BISHAN LAL v. BANWARI LAL', AIR 1937 All 724; which was affirmed in appeal in 'BISHAN LAL v. BANWARI LAL', AIR 1939 All 713; 'SHAMBHU SINGH v. JAGDISH BAKHSH SINGH', AIR 1941 Oudh 582; 'FAZAL AHMAD v AFAQUL RAHMAN', AIR 1938 Oudh 57 and 'MT. QAIYUMUNNISA v. RASHI-DUL MALIK', Appln. No. 9 of 1949, 13th October 1950: (AIR 1952 All 200), by a Bench of this Court of which one of us was a member. It is pointed out for the respondents that there is so far no decided case to the contrary.

12. I have now carefully considered the language of the proviso and have come to the conclusion that the test provided in the proviso is a conclusive test for finding out when the transaction is a mortgage by conditional sale.

13. The proviso contains two negatives "no" and "unless" and it is our experience that the positive is very often expressed by two negatives. "Unless" as defined in the dictionary means "if not" or "except when". If we employ "if not" for "unless" in the proviso, the proviso would read thus:

> "Provided that no such transaction shall be deemed to be a mortgage if the condition is not embodied in the document which effects or purports to effect the sale."

This emphasises the negative aspect of the proviso showing when a transaction is not a mortgage. Now if we employ the words "except when" for the word "unless" the proviso reads as follows:

> "Provided that no such transaction shall be deemed to be a mortgage except when the condition is embodied in the document which effects or purports to effect the sale."

This emphasises both the negative and the positive aspects and shows that if the transaction is embodied in one document it is a mortgage, but if it is not, it is not a mortgage.

14. The language employed in the proviso is thus clearly ambiguous and in the circumstances it is necessary to ascertain the true intention of the legislature in adding the proviso. For this purpose we have been referred by the learned counsel for the appellant to the report of the Special Select Committee. This is permissible. In the 'EASTMAN PHOTOGRAPHIC MATERIALS CO. LTD. v. THE COMPTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS', (1898) AC 571, the House of Lords held that the report of the Trade Marks Commissioner as Ho the defect sought to be removed by legislation was the best source of information. In 'A. K. GO-PALAN v. STATE OF MADRAS', AIR 1950 SC 27 at p. 38, para 17, Kania C. J. said:

'Our attention was drawn to the debates & reports of the drafting Committee of the Constituent Assembly in respect of the wording of this clause. The report may be read not to control the meaning of the Article, but may be seen in case of ambiguity."

This is what the Special Committee stated:

"Section 58(c) contains the definition of a mortgage by conditional sale. 'It is with the greatest difficulty in many cases that such mortgages can be distinguished from sales with a condition for repurchase. As Clause (c) of Section 58 indicates, the real point of difference between the two kinds of transactions is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale, it is real. 'The ostensible or real nature of transaction can, however, be only determined by finding out the intention of the parties.' In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee, and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale. Since the decision of the Privy Council in 'BALKISHEN DAS v. LEG-GE', 22 All 149 (PC), it has been a well-settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must, therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and Courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. 'In order to avoid the difficulties indicated above, we think it desirable to lay down a statutory test by which the intention' is to be gathered. We, therefore, propose that no transaction should be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which operates or purports to effect the sale."

15. It will be seen that the intention is to avoid the application of different criteria and to lay down one clear statutory test to distinguish between a sale and a mortgage. It must be emphasised that the question of distinction arises only when one transaction is capable of being treated either as a sale or as a mortgage, and if the test eliminates a sale, it necessarily leaves behind a mortgage and vice versa. Thus in my opinion the test shows not only what is not a mortgage by conditional sale but also shows what is such a mortgage. The proviso therefore in my opinion lays down the positive test for what is a mortgage by conditional sale. The cases already referred to which say that only a negative test has been laid down by the proviso 'KUPPA KRISHNA HEGDE v. MHASTI GOLI NAIK', AIR 1931 Bom 371; 'BISHAN LAL v. BANWARI LAL', AIR 1937 All 724; 'SHAMBHU SINGH v. JAG-DISH BAKSH SINGH', AIR 1941 Oudh 582 etc. have if I may say so with all respect, clearly lost sight of the positive aspect of effect of the proviso.

16. For the reasons given above I agree with my learned brother Agarwala J. that after the amendment of Section 58(c) by the addition of the proviso, if a sale and one of the conditions mentioned in Section 58(c) are embodied in one document, the transaction is necessarily a

mortgage by conditional sale. Accordingly I answer the question in the affirmative.

17. AGARWALA J.: On the 10th April, 1934, Debi Singh appellant executed a deed calling it a deed of conditional sale in favour of Ch. Atbal Singh, now dead and represented by the respondents, his heirs. The consideration of the deed was Rs. 9901/- of which only Rs. 67/- was paid in cash--and the balance was set off against an earlier mortgage-deed. One of the conditions of the deed embodied in it was as follows:

> "I, the executant, keeping in view the fact that the property being the ancestral property of my family, want that if I, at any time within 15 years, am able to pay the entire consideration money to the vendee then he after the receipt of the consideration money, shall execute a sale-deed in favour of me the executant in respect of the property sold.
>
> Wherefore, this deed by way of conditional sale-deed has been executed to serve as an authority and be of use when required."

18. Debi Singh applied under Section 4 of the Encumbered Estates Act. After proceedings which it is not necessary to detail here, the property covered by this deed was published in the gazette as property belonging to Debi Singh. Ch. Atbal Singh filed objections claiming the property to belong to him on the ground that the deed was a deed of sale. On the other hand, Debi Singh's case was that the deed was a deed of mortgage by a conditional sale and that the property vested in him.

19. The learned Special Judge considered the intention of the parties as deducible from the circumstances of the case and came to the conclusion that the deed was a deed of sale and not a mortgage by a conditional sale. He was of the opinion that Clause (c) of Section 58, correctly construed, did not indicate that every deed of sale containing a condition for re-purchase operated only as a deed of mortgage. Against this decree Debi Singh, his sons and grand-sons appealed to this Court.

20. The appeal at first came up before a Bench of this Court. As there was conflict of Judicial authority upon the question of law, involved in this appeal, the Bench referred the matter to a larger Bench.

21. Both parties agreed before us that this Bench need only decide the question of law on which there is a conflict of judicial authority and leave the other questions to be decided by the Bench.

22. This question of law may be formulated as follows:

> "If a deed effecting or purporting to effect a sale after the amendment in Clause (c) of Section 58 of the Transfer of Property Act came into force, contains any one of the three conditions mentioned in that clause, is it in every case a deed of mortgage by conditional sale?"

23. Before its amendment by Act XX of 1929, Section 58(c) stood as follows:

> "Where the mortgagor ostensibly sells the mortgaged property-
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> 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 a mortgage by conditional sale and mortgagee, a mortgagee by conditional sale."

Section 19 of Act XX of 1929 added the following proviso to this clause:

> "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. It will be observed that the section deals with one transaction which it calls a mortgage by conditional sale. It does not deal with two separate transactions, one of absolute sale and the other of an agreement of reconveyance of the property sold.

25. There is a vital difference between a transaction of conditional sale on the one hand and two separate transactions--one of absolute sale and the other of an agreement of reconveyance of the property sold--on the other. In the former the condition of the purchase is a condition of the sale itself. The seller offers to the buyer property on a certain condition. The buyer accepts the offer containing the condition. In the latter the seller offers to sell the property absolutely but later requests the buyer to agree to retransfer the property to him within certain time as an act of grace or favour. The vendee out of compassion accedes to the request of the vendor but makes it clear that the sale is absolute and is unconditional. The former case may or may not be construed as a mortgage and may or may not, fall under Clause (c) of Section 58, but the latter can in no event be a mortgage by conditional sale and can never fall under Clause (c) of Section 58.

26. In order to evade the provisions of Clause (c) of Section 58, one transaction of a conditional sale as mentioned in the said clause may be given the form of an absolute sale and a separate transaction of an agreement of repurchase. This would normally be done by executing two documents, one of absolute and unconditional sale and the other containing the agreement of repurchase. In such an event, a question will always arise whether the two documents form part of one transaction of a conditional sale or they are in fact two separate contracts, one of an unconditional sale and the other of an agreement of repurchase. There has never been any doubt that this question must be answered by reference to the intention of the parties. When, however, there is one transaction of a conditional sale, whether evidenced by one document or by two documents, "the question arises when is it to be construed as a mortgage by conditional sale and when as a sale though subject to a condition?

27. Under the English law, it would seem that the rule is that the document or documents evidencing a transaction or transactions must be considered according to their tenor. But the contrary can be proved by proof of intention or of fraud, accident or mistake. In proof of intention

oral evidence is admissible Thus in Fisher on Mortgage (7th Edition, p. 11) it is stated:

> "When a legal mortgage might be made in the form of an absolute conveyance of the property, it was sometimes doubtful on the terms of the instrument, whether it was really a mortgage or an absolute conveyance....But while the Courts protect a bona fide purchaser, and will not lightly infer an intention to make a mere security, if none is expressed, they will give effect to an intention, if proved, to create a security, and will also take care that a borrower shall not suffer from the omission by fraud, mistake or accident, of the usual requisites of a mortgage. Although in certain cases conveyances, apparently absolute, may be construed as mortgages, an absolute conveyance with an agreement for repurchase, or that the conveyance shall be void upon payment of a certain sum at a fixed time will create a mere right of repurchase to be exercised according to the strict terms of the power, and not such a right of redemption as is incidental to a mortgage; unless it is proved that the transaction was in the nature of a mortgage security, and that the grantor and grantee were intended to have mutual and reciprocal rights to insist upon reconveyance of the estate and repayment of the consideration."

28. Different results follow by construing the transactions as a mortgage or as a sale. If it is a sale, the time fixed for the repurchase of the property is of the essence of the contract, and if it has elapsed, the sale becomes absolute and the property thereafter could not be repurchased by the seller. If, however, it is a mortgage, time is, not of the essence of the contract and the property can be redeemed even after the expiry of the time limited under the contract.

29. The Indian law as the Britishers found it when they came to this country and before they reformed it by regulations was different from the English law in two respects: (a) A transaction of conditional sale, was treated as a mortgage and (b) time was considered to be of the essence of the contract even in a mortgage, with the result that after the expiry of the time fixed under the contract, property could not be redeemed by the mortgagor or the ostensible seller. No question of discovering the intention of the parties, therefore, arose under the Indian law. Once the sale was a conditional sale, whether it was a mortgage or a sale, it made no difference as to the right of redemption. The reason why the Indian Law considered a transaction of a conditional sale to be a mortgage was that in this country mortgages used to be taken both amongst the Hindus and Mohammadans in the form of a conditional sale known under the names of 'Katka-bala', 'Muddatakriyam' or 'Gahan Lahan' or bye-ul-wafa' or 'bye-bil-wafa'. The Mohammadans introduced this form of mortgage in order to defeat the precept of Mohammadan Law prohibiting usury. The lender, by stipulating for the usufruct or for the payment of a price of the re-sale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law.

30. This view is supported by reference to the decisions of the Indian Courts as well as of the Privy Council.

31. The different forms of mortgages by conditional sale prevalent in India were described by Chief Justice Sir Charles A. Turner in 'RAMASAMI SASTRIGAL v. SAMIYAPPA-NAYAKAN', 4 Mad 179 at p. 183, as follows:

> "This form of Hindu mortgage under the names of 'Katkabala', 'Muddatakriyam' and 'Gahan Lahan' obtains commonly throughout British India, though its incidents may vary. It is generally, though not universally, accompanied by the delivery of possession to the mortgagee with permission to enjoy the usufruct either in lieu of, or in part payment of, the interest, and, while ordinarily it involves no personal obligation on the part of the mortgagor for repayment of the debt (Macpherson on Mortgages II), it may, by special agreement or local custom, confer on the mortgagee the option of recovering the money from the mortgagor personally or of availing himself of the sale. Although there is no precise form of words necessary to constitute such a mortgage, it ordinarily differs from the 'bye-ul-wafa' or 'Bye-bil-wafa' of the Muhammadans in this, that, in the Hindu form, there is a preliminary mortgage with a condition for future sale, while in the Muhammadan form there is at once an absolute sale with a counter-agreement for re-sale which may be contained in the original sale-deed or in a separate contemporaneous instrument. The origin and nature of this form of mortgage among the Muhammadans is explained in Baillie's Muhammadan Law of Sale, page 301. It was introduced or adopted in order to defeat the precept of Muhammadan Law prohibiting usury. The lender by stipulating for the usufruct or for the payment of a price on the re-sale higher than he paid, secured the same advantage as would have accrued to him from placing his money at interest, while the transaction in form did not violate the law."

Baillie thus describes the Mohammadan form:

> "The sale which is in use among men in our times as a contrivance for 'reba' and to which they have given the name of 'Bye-ul-wafa', is in fact a pledge, and the thing sold is in the hands of the purchaser as a pledge in the hands of the pawnee; he is not its proprietor nor is he free to make use of it without the permission of its owner; he is responsible if he eat or destroy the fruit of a tree so sold to him, and his debt when the 'wafa' is for a debt, is extinguished if the thing should perish in his hands; but he is not responsible for the loss or an increase if it should perish without his act; and the seller may reclaim the thing when he pays his debt. According to us, there is no difference between this transaction and a pledge in any of its effects or consequences. Thus in the 'Fusool-al-Amadeeah.' To this effect, decisions have been given by the Siyyid Aboo Shoojaa of Samarchand, and the Qazee Alee As So-ghdee in Bokhara, and many other learned men. 'So in the Moheet.' And the form of the transaction is this; the seller says to the purchaser, I have sold you this thing for the debt due to you by me, on condition that when I pay the debt the thing is mine; or thus-- 'I have sold you this for so much, on condition that when I give up to you the price, you will give up to me the thing.' 'So in the Buhar-oor-Raik."

32. In 'PATTABHIRAMIER v. VENCATA-ROW NICKEN', 13 Moo Ind App 560 (P C), their Lordships of the Privy Council observed: "That this form of security has long beep common in India is notorious. The fact is stated in the preamble to the Beng. Reg. I of 1798. That such contracts were recognized and enforced according to their letter by the ancient Hindu Law appears from several passages in Colebrooke's Digest (Vol. 1, pages 183, 187, 188 and 193). That they I were equally recognized and enforced between Mohammedans is shown by Mr. Bail-lie in his introduction to his learned work on the Muhammadan Law of sale."

33. In 'THUMBUSWAMY MOODELLY v. HOSSAIN ROWTHEN', 1 Mad 1, the Privy Council, affirming their previous decision in 'PATTABHIRAMIER v. VENCATA ROW, 13 Moo Ind App 560 (PC), stated:

> ".....that the contract of mortgage by conditional sale is a form of security known under various names throughout India; that according to the ancient law of India it was enforceable according to its letter; and that, whether it was embodied in one instrument or in two separate instruments, and whether or not the transaction appeared on the face of the instrument to be in its inception a mortgage; and further that this law must be taken to prevail in every part of India in which it had not been modified either by actual legislation or by established practice."

34. The inequity of the debtor losing the property if he did not pay the amount whether described as a loan or as purchase money within the time fixed by the contract of sale was obvious. In Bengal the inequity was sought to be cured by Regulations I of 1798, 34 of 1803 and comprehensively by Regulation 17 of 1806. Later on these Regulations were extended to the province of Banaras. The preamble to Regulation 17 of 1806 stated:

> "It is further requisite for the purpose of preventing inprovident and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid within a stated period (which description of mortgage is common throughout the country under deeds of 'bai-bil-wafa, kat-kabala' and other similar designations), that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period on payment of the principal sum lent, with interest thereupon if the mortgagee shall not have been put in possession."

This Regulation was not extended to Madras or Bombay, but the Madras and the Bombay High Courts applied the equitable principle of 'once a mortgage always a mortgage' to such transactions' and allowed redemption of such mortgages after the expiry of the time limited by the contract, and though in the year 1870 the Privy Council, in 13 M. I. A. 560, stated that this was not permissible, the practice was not given up by the Courts. The Privy Council, therefore, again reaffirmed its previous decision in 'THUMBUSWAMY v. HOSSAIN ROWTHEN', 1 Mad 1 (PC). In some of the Madras and Bombay cases a distinction was drawn between a mortgage by conditional sale and a sale with a condition of repurchase by reference to the intention of the parties. On this point the Privy Council observed (in the above case) that:

> "Again, the distinction between sales with a condition for repurchase, and mortgages by conditional sale, is made to depend upon the intention of the parties to the original transaction proveable, if need be, by oral evidence. This seems to open a wide field of litigation and to leave much to the discretion of the Judge in each particular case."

35. In a Full Bench case of the Allahabad High Court four learned Judges were of opinion that once it was established that there was a right given to the ostensible seller of property to recover the property on payment of the price it was a case of a mortgage with a right of redemption, vide 'RAM SARAN LAL v. AMRITAKUAR', 3 All 369 (FB).

36. This is clear that when a transaction was of a conditional sale under the Indian Law, it was considered to be a mortgage and there was no question of discovering the intention of the parties whether they intended the transaction to be a mortgage or a sale. The effect of the Bengal Regulations, XVII of 1806, was that the Indian Law was modified to this extent that in such a case the period of redemption was not limited to the period stipulated between the parties, but the ostensible seller could recover his property within the period limited by law.

37. When, however, there were two documents, one of an absolute sale and the other of a separate agreement for reconveyance, there was always the question of intention to be gone into. In order to find whether there was a transaction of a conditional sale or not, the test was to discover whether the parties intended that the relation of a mortgagor and mortgagee should arise between the parties. If the parties so intended, the two documents were in reality evidence of a transaction of a mortgage by conditional sale; if this was not the intention, there were two separate transactions of an unconditional sale and of an agreement of resale. Before the enactment of the Transfer of Property Act, in all the cases that went up to the Privy Council, the test of the intention of the parties was applied, only when there were two separate documents, one of absolute sale and the other of an agreement of resale. See 'SITUL PURSHAD v. LACHMI PURSHAD', 10 Cal 30 (PC) and 'BHAGWAN SAHAI v. BHAG-WAN DIN', 12 All 387 (PC).

38. The observations of the Privy Council in 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC), to the effect that the laws of India and England were the same had reference to a case in which apparently there were two transactions embodied in two documents and could not possibly have reference to the case of a single transaction of a conditional sale embodied in one document.

39. In 'BALKISHEN DAS v. N. F. LEGGE', 22 All 149, again there were two documents executed before the Transfer of Property Act came into force. It was contended by the respondents in that case that "A conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned (Regulation 1 of 1798 and Regulation XVII of 1806) independently of any indications in the document that it is intended to be a mortgage."

Their Lordships of the Privy Council observed:

> "This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties"

and held that the intention indicated that the transaction was of a mortgage by conditional sale. Their Lordships, therefore, did not decide the question which falls to be determined in the present case, though it was directly raised before them. But their Lordships observed:

> "The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section (Section 58(c)) intended to state the existing law and practice of India."

There is nothing in the subsequent Privy Council cases, 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC); 'NARSINGERJI v. PAR-

THASARADHI RAYANIN GARU', A I R 1924 PC 226 and 'RAMDHANDAS v. RAMKISON-DAS', AIR 1946 PC 178, to the contrary. These were cases of two documents and not of a single document.

40. If Section 58(c) embodied the previously existing law and practice of India, there can be no doubt that the section lays down a statutory rule about a transaction of an ostensible sale with a condition mentioned in the section to be a mortgage by conditional sale in all cases and no question of the discovery of the intention of the parties arises. It follows, therefore, that when there is one document, the transaction can be no other than that of a mortgage by conditional sale. The form of Clause (c) of Section 58 is no doubt ambiguous. The use of the words 'mortgagor', 'mortgagee', 'mortgaged property' and 'mortgage money' tends, to create an ambiguity, but if the clause is taken in conjunction with the other parts of Section 58, it appears to me that this was a most appropriate form in which the definition of a mortgage by conditional sale could have been given. Section 58(a) defines a mortgage, a mortgagor, a mortgagee and mortgage money. The definition is an extraction of the principles that underlie the various particular forms of mortgages described thereafter. The abstract principles embodied in Clause (a) are quite apparent in the particular mortgages defined in Clauses (c), (d), (e) and (f). They are not apparent in the particular mortgage defined in Clause (c), because here the mortgage takes the form of an ostensible sale, but the substance of the mortgage in such a form is that the property is recovered by the ostensible vendor on payment of the ostensible sale price, and when he ostensibly sells it subject to this condition, he is, in effect, saying to the ostensible vendee, "I have a right to get this property back if I pay the amount back to you." The sale price in such a case is not in substance different from a loan or a debt. The words 'mortgagor' and 'mortgagee' etc., as used in Clause (c) are in harmony with the scheme of the whole section. The same form is employed in the other kinds of mortgages. It would not be appropriate to use the words 'transferor', 'transferee' and 'transferred property' in Clause (c) in the context in which Clause (c) occurs in Section 58. The relation of a mortgagor and a mortgagee arises as a result of the transaction embodied in Section 58(c), and, therefore, the ostensible seller becomes a mortgagor and the ostensible vendee becomes a mortgagee, and it is for that reason that Section 58(c) is worded as it is.

41. The word 'ostensible' used in Clause (c) has also led to a certain amount of confusion. It is contended that it means a sale in form only and not a genuine sale and that, therefore, in every case one has to discover the intention of the parties whether they intended a genuine sale or a mortgage. To my mind, this contention has no force. The word 'ostensible' has two meanings:

> (a) that the object bears a certain form or appearance without suggesting that it is or is not that of which it has the superficial appearance; and
>
> (b) that the object bears a certain appearance but is not really that of which it bears the appearance.

The word 'ostensible' is used in the section in both senses and not in one only. As every transaction of sale subject to conditions mentioned in the clause is deemed to be a mortgage by conditional sale, the form has no legal effect and in this sense it may be said that the form does not bear out the true legal import of the transaction. On the other hand whether the conditional sale is intended to be a sale or a mortgage is immaterial. Once you find that the transaction is expressed in the form of a conditional sale, you have to construe it as a mortgage by conditional sale. No question of intention arises. Before the amendment of Clause (c) of Section 58 by the addition of the proviso by Act XX of 1929, the question of intention should be said to arise when there were two documents and on the face of them there was no conditional sale and the documents evidenced an ostensible unconditional sale and a separate agreement of reconveyance.

42. This was the view taken in 'MOHINDRA MAN SINGH v. MAHARAJ SINGH', AIR 1923 All 48; 'JAGANNATH v. GAURI SHANKER', AIR 1926 All 670; 'MATHURA KURMI v. JAG-DEO SINGH', AIR 1927 All 321 (Per Sulaiman J.); 'MUTHUVELU MUDALIAR v. VYTHI-LINGA MUDALIAR', 42 Mad 407 (FB) (Per Seshagiri Ayyar J.). This was the view expressed by Sir Lal Gopal Mukerji in his commentary on the Transfer of Property Act, pp. 140 to 142. The matter was considered by a Division Bench of the Allahabad High Court in 'PRAG DATT v. HARI BAHADUR', AIR 1947 All 334, and an opinion was expressed in conformity with the above opinion without definitely deciding the question.

43. On the other hand, a contrary view was expressed in the leading Full Bench decision of the Madras High Court in 'MUTHUVELU MUDALIAR v. YYTHILINGA MUDALIAR'. 42 Mad 407 (FB), which was followed in later case.

44. Once the criterion of the intention of the parties cease to be recognised as the true criterion of judging whether a transaction was that of a mortgage by conditional sale or of a sale, it was extended to the case of a single document which on the face of it was a deed of conditional sale, vide 'BISHAMBHAR NATH v. MUHAMMAD UBAID ULLAH KHAN', AIR 1923 All 586; 'MT. MUMTAZ BEGAM v. MT. LACHMF, AIR 1929 All 174 and 'MOHAMMAD ZAKI BEG v. ABDUL GHANI BEG', AIR 1930 Oudh 6.

45. There is no case of the Privy Council of a single document of conditional sale having been construed as a sale and not a mortgage by conditional sale, as all the cases that went up to the Privy

Council were of two documents, vide 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC); 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC); 'NARASIN-GERJI v. PARTHASARADHI', AIR 1924 P C 226; 'RAMDHANDAS v. RAMKISHONDAS', AIR 1946 P C 178. In none of the cases did the Privy Council state in so many words that the two documents constituted one transaction. It must be conceded, how-ever, that the preponderance of opinion was in favour of the view that, whether there was one document or there were two documents, intention of the parties was to be the test of finding whether there was a mortgage by conditional sale or a sale with an agreement of "repurchase. The circumstances which afforded a criterion for judging the intention of the parties were differently construed by different Judges and it can be truly said that the decision changed with the foot of each individual Judge. In these circumstances the Legislature stepped in and amended Section 58(c) by the addition of the proviso, already quoted, by Act XX of 1929.

46. The addition of the proviso by Act XX of 1929 did not resolve the conflict. The effect of the proviso was differently construed by different Judges. In some cases it was held that the proviso merely provided a rule of evidence that it merely shifted the burden of proof and its effect was to say that when the transaction was embodied in two documents the presumption would be that it was a sale, but when it was embodied in one document, the presumption would be that it was a mortgage by conditional sale but that the matter, in either event, will have to be decided upon the intention of the parties; vide 'KUPPA KRISHNA v. MHASTI GOLI NAIK', AIR 1931 Bom 371; 'RAMNARAYAN RAMRAKH v. RAMRATAN RADHAKISHAN', AIR 1934 Nag 18; 'PARSRAM GIDANDAS v. TARACHAND AMARDINOMAL', AIR 1936 Sind 209 and 'SAHEBA DEOCHAND v. JAGANNATH GUNDHARILAL', AIR 1940 Nag 84. In another set of cases the view taken was that the proviso laid down a statutory rule of intention when the transaction was embodied in more than one document, but that it did not lay down any test of intention when the transaction was embodied in one document; vide 'MA SEIN NYO v. MAUNG SAN PE', AIR 1935 Rang 212; FA-ZAL AHMAD v. AFAQUL RAHMAN', AIR 1938 Oudh 57; 'BISHAN LAL v. LALA BAN-WARI LAL', AIR 1939 All 713; 'THAKRA SINGH v. SHEO NATH SINGH', AIR 1940 All 227; 'SHAMBHU SINGH v. JAGDISH BAKSH SINGH', AIR 1941 Oudh 582; 'AHMAD HUS-AIN RIZVI v. AZHAR ALI, AIR 1944 Oudh 305; 'VENKATA SUBBARAO v. VEERASWAMI', AIR 1946 Mad 456; 'JAGANNATH SINGH v. BUTTO KRISHTO RAY', AIR 1947 Pat 345; 'MERI LAL v. MT. SHARIFAN', AIR 1949 All 194 and 'BHAIYA LAL v. KISHORI LAL', AIR 1950 Nag 198. It is remarkable that in none of these cases was the proviso taken to lay down a statutory and conclusive test of intention when the document was one, namely that the transaction was a mortgage by conditional sale. The appellant's contention is that such indeed is the effect of the proviso and I am of opinion that the contention of the appellant is sound.

47. As the proviso is ambiguously worded in that it does not in express words lay down that where the transaction is embodied in one document it will be construed as a mortgage by conditional sale, it is permissible to have recourse to the well-recognised sources of aids to the construction of statute.

48. In 'HEYDON'S CASE', 76 ER 637, the rules for interpretation of an ambiguous enactment were laid down as follows:

(a) Find out what was the law before the making of the Act?

(b) What was the mischief and defect for which the previous law did not provide?

(c) What remedy the Legislature has resolved and appointed to cure the disease of the Commonwealth?

(d) What is the true reason of the remedy?

The case was followed by the House of Lords in 'EASTMAN PHOTOGRAPHIC MATERIALS CO. LTD. v. COMPTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE-MARK'. (1898) AC 571. The Earl of Halsbury observed:

> "Among the things which have passed into canons of construction recorded in 'HEYDON'S CASE', we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy."

In considering the Patents, Designs, and Trade Marks Act, 1883, their Lordships referred to the report of the Commissioners.

49. The mischief which the Legislature wanted to remedy and the remedy proposed by the legislature are well set out in the report of the Law Commissioner, which is to the following effect:

> "Section 58(c) contains the definition of a mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished from sales with a condition for repurchase. As Clause (c) of Section 58 indicates, the real point of difference between the two kinds of transactions is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas in the case of an out and out sale it is real. The ostensible or real nature of the transaction can, however, be only determined by finding out the intention of the parties. In order to escape the liability of accounting for the profits of the property and other liabilities imposed on a mortgagee, and also to escape the provisions of some of the local laws enacted for the benefit of agriculturists, creditors resort to the mode of having a mortgage which is in form an out and out sale. Since the decision of the Privy Council in 'BALKISHEN DAS v. LEGGE', 22 All 149 (PC), it has been a well-settled rule that it is not open to Courts to allow any extraneous evidence in order to find out the intention of the parties. Such intention must, therefore, be gathered from the document itself which purports to effect the transaction. These transactions have given rise to a great deal of litigation and Courts are compelled to enumerate and consider all the various criteria which have been laid down for the purpose of determining whether a transaction is a mortgage or an out and out sale. 'In order to avoid the difficulties indicated above, we think it desirable to lay down a statutory test by which the intention is to be gathered.' We, therefore, propose that no transaction should be deemed to be a

> mortgage by conditional sale unless the condition is embodied in the document which effects or purports to effect the sale."

The legislature, therefore, intended to lay down a statutory test by which intention is to be gathered in order to suppress the prevailing mischief. In the amendment two negatives are used. They have not merely the negative effect of declaring that if the condition is embodied in a separate document, the transaction is not a mortgage by conditional sale, but also have the positive effect of saying by necessary implication that a transaction shall be a mortgage by conditional sale if the condition is embodied in the same document which effects or purports to effect the sale.

50. The expression of a positive by the use of two negatives is a very common mode of expression. It has the advantage of laying down both the negative as well as the positive in a short sentence. Otherwise two sentences would be required, one stating the negative and the other stating the positive, for instance, in Article 31 of the constitution the expression used is, "(1) no person shall be deprived of his property save by the authority of Law, (2) no property, movable or immovable, shall be taken possession of or acquired for public purposes.....unless the law provides for the compensation for the property taken possession of or acquired..."

It cannot reasonably be maintained that this Article merely negatives the right of the State to acquire property without authority of law or without payment of compensation and that it does not postulate the positive right of the State to acquire property under the conditions mentioned therein. The Article has also the positive effect of authorising the State to acquire property on certain conditions, vide 'SUR-YAPAL SINGH v. U. P. GOVERNMENT', AIR 1951 All 674 at p. 690, para 80 (FB).

51. Interpreting Clause (1) of Article 31, Das J. in 'CHIRANJIT LAL v. UNION OF INDIA', AIR 1951 SC 41 at p. 63, observed:

> "I think Clause (1) enunciates the general principle that no person shall be deprived of his property except by authority of law, which, put in a 'positive form, implies that a person may be deprived of his property, provided he 'is so deprived by authority of Law."

52. To construe the proviso as referring merely to the negative aspect would be to remedy the mischief in part and not in whole. There would still be left open the question whether a transaction in which the condition is embodied in the document which effects or purports to effect the sale is a mortgage by conditional sale or not. There could be no point in the legislature suppressing part of the mischief and not the whole and in riot laying down a statutory test of intention when the transaction was evidenced by one document. The intention of the legislation is to protect helpless debtors, because creditors require no protection. The limited interpretation sought to be given to the proviso would turn out to be for the benefit of the creditor and of no benefit to the debtor, because while a transaction of conditional sale evidenced by two documents would be construed as a sale, in the case of one document only, it would still be open to the creditor to show that the intention was not to effect a mortgage by conditional sale but a sale out and out with a condition of repurchase.

53. The above view is further fortified by the words, "which effects or purports to effect the sale." These words obviously contemplate two kinds of documents (a) documents which really effect the sale and (b) those which merely purport to effect the sale. The former refer to cases of genuine sales and the latter refer merely to ostensible sales. In both cases the transaction is not deemed to be a mortgage unless the condition is embodied in the very document which is either in reality a sale or which is merely on the face of it a sale and not in reality a sale. Impliedly the proviso means that if the condition is contained in the same document which effects or purports to effect the sale, the question of intention whether the sale was real or unreal is immaterial. The words "ostensible sale" in the section must, therefore cover both cases, that of a real sale and that of an unreal sale. And if it means that, then no question of intention remains to be considered.

54. I am, therefore, of opinion that a transaction of sale with a condition of repurchase embodied in one document must always be treated as a mortgage by conditional sale.

55. I would, therefore, answer the question formulated above in the affirmative.

Beg, J.

56. An important question of law relating to the interpretation and effect of the proviso added to Section 58(c) of the Transfer of Property Act (No. IV of 1882) has arisen in this first appeal. The facts giving rise to the question are stated below:

57. On August, 12, 1929, one Debi Singh, am appellant in this appeal executed a possessory mortgage in favour of Atbal Singh, the predecessor-in-interest of the present respondents Nos. 1/1, 1/2 and 1/3 for a sum of Rs. 9,150/-The mortgaged property consisted of five annas four pies share in mahal Harpal Singh, par-gana Bangarmau, tehsil Safipur, District Unnao. On April 10, 1934, Debi Singh executed another deed in respect of the same property in favour of Atbal Singh for a consideration of Rs. 9901/-. This deed is Ex. 8 and it is the transaction embodied in this document that has given rise to the present controversy. It purports to be a deed of conditional sale and is styled by the parties as "bainama shartia" and not "bai-bil-wafa." At its close, there occurs a passage which runs as follows:

> "In consideration of the fact that the property is ancestral family property, the executant desires that if he could find it possible at any time within 15 years to pay back the entire sale consideration, the vendee may ("kar dewe") after receipt of sale consideration execute a sale-deed of the property sold in favour of the executant."

In 1936 Debi Singh made an application under Section 4 of the Encumbered Estates Act. He did not show the property comprised in Ex.. 8 as his property in proceedings before the Special Judge. After the said proceedings were transferred to the Liquidation Officer, he applied to take possession of this property in spite of the fact that he had not shown the same as his property before the Special Judge. This led to an objection under Section 11 of the said Act by Atbal Singh before the Special Judge. Atbal Singh asserted that the transaction in question was a sale with a condition of repurchase. Debi Singh on the other hand set up the case that the transaction embodied in Ex. 8 was

really a mortgage by conditional sale; and that he had by mistake or over-sight omitted to claim it as his property previously.

58-59. The Special Judge took the view that in spite of the fact that the transaction was embodied in one document, the intention of the parties had to be ascertained with a view to determine the question whether the transaction was a mortgage. He, therefore, examined the circumstances of the case and summed up his final conclusion thus:

> "It is absurd on the part of Debi Singh to suggest that he omitted to mention the properties due to oversight or mistake. Having given my best and prolonged consideration to the facts of the present case, I cannot resist the conclusion that Ex. 8 is not a deed of mortgage by conditional sale but is a deed of out and out sale with a condition of repurchase."

He accordingly allowed the objection made by Atbal Singh.

60. Debi Singh and others filed an appeal against the said judgment. The appeal came up for hearing before a Bench of this Court; and as the question involved in it was one of importance, it has been referred to a larger Bench. The case has accordingly come up for hearing before us.

61. The learned counsel for the appellant has argued that the effect of the proviso added toy the Amendment Act of 1929 has been to provide a conclusive test for determining the question whether a transaction is a mortgage or sale. According to him, if the condition referred to in Section 58(c) of the Transfer of Property Act is embodied in the document which effects or purports to effect the sale, the Court must hold such a transaction to be a mortgage regardless of the intention of the parties. In other words, according to him, once the transaction is comprised in one document the inquiry into the question of intention becomes irrelevant and unnecessary; and, by force of the proviso itself, the transaction must necessarily be held to be a mortgage even though parties might not have intended it to be so.

62. On the other hand, the learned counsel for the respondent has argued that even after the amendment effected by the proviso, an enquiry into the intention of the parties to the transaction is necessary, and the effect of the proviso has been merely to limit the scope of the enquiry into the question whether the transaction is a mortgage to cases in which the condition is embodied in the document itself. In other words, an enquiry into the question of intention is still relevant and necessary, but can be embarked upon only in cases where the condition is embodied in the document which effects or purports to effect the sale.

63. In the light of the above arguments and in order to bring out the point at issues more clearly, the question before us may be formulated thus:

> "If in a transaction after the Transfer of Property (Amendment) Act, 1929 any of the conditions specified in Section 58(c) of the Transfer of Property Act (IV of 1882) is embodied in the document which effects or purports to effect the sale, does the

> transaction necessarily become a mortgage by conditional sale irrespective of the intention of the parties to such transaction?"

64. Before discussing the legal position as it emerges from a reference to the rulings on the subject, it would clarify the position if an examination is made of the bare provisions of the Act itself in order to find an answer to the above mentioned question. The law relating to the subject contained in Chapter IV of the Transfer of Property Act under the heading "of Mortgages of Immovable Property and Charges." The portion relating to mortgages in the said Chapter starts with Section 58 and ends with Section 98. Section 58 therefore is the very first section of the Chapter and consists of seven clauses. Section 58 opens with a definition of the terms "mortgage", "mortgagor"

> "mortgagee", "mortgage money" and "mortgage deed." This is contained in Clause (a) of Section 58 and it runs thus:
>
> "Section 58(a). 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."

65. The words "for the purpose of securing the payment of money" in Clause (a) quoted above and underlined (here in single quotation) by me clearly bring out the fact that the essence of a mortgage transaction consists in the "purpose" or intention of the transfer. Where the purpose or intention is not the one defined in this clause, the transaction cannot, therefore, be a mortgage. This purpose or intention is defined as "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 existence of this purpose or intention, is therefore, the foundation of transaction known as mortgage in law; and in the absence of this purpose, the transaction ceases to be a transaction of mortgage. The second paragraph of the above clause read in the context of the preceding paragraph clearly shows that it is only when the transferor transfers the property with the aforesaid purpose or intention that he is called a "mortgagor", and it is only if the transferee takes a transfer with the aforesaid purpose or intention that he is termed a "mortgagee". The principal money and interest payment of which it is the purpose or intention of the transaction to secure is called the mortgage-money" and the instrument which effectuates this purpose or intention is called a "mortgage-deed". It is further evident from a perusal of this clause that the Legislature wanted to differentiate between the terms "transferor" and "mortgagor" both of which are mentioned in Clause (a). Clause (a) shows that every transferor is not a mortgagor, though every mortgagor is a transferor. The word "mortgagor" as distinct from "transferor" is limited only to such transferors as make the transfer for the purpose or with the intention mentioned in the said clause. Similarly the said clause makes a difference between a "transferee" and a "mortgagee", for every transferee is not

a mortgagee though every mortgagee is a transferee. According to the clause, only such a transferee as takes the transfer for the aforesaid purpose that can be termed a "mortgagee". The existence of the same purpose also determines the question whether the "principal and interest" can be styled "mortgage money", and the deed of transfer containing it called a "mortgage-deed". It is, therefore, quite clear that the purpose or intention permeates the entire transaction which in law is termed a mortgage and constitutes its very essence.

66. Having defined these terms in Clause (a), the Statute goes on to indicate the various forms which the transaction of mortgage might take. The remaining clauses are reproduced below:

> "(b) SIMPLE MORTGAGE: Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-

money the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

> "(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 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 or purports to effect the sale;
>
> "(d) USUFRUCTUARY MORTGAGE: Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage money, the transaction is called an usufructuary mortgage and the mortgagee an usu-fructuary mortgagee.
>
> "(e) ENGLISH MORTGAGE: Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor 'upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

"(f) MORTGAGE BY DEPOSIT OF TITLE-DEEDS: Where a person in any of the following towns, namely, the towns of Calcutta, Madras and Bombay, and in any other town which the Provincial Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon the transaction is called a mortgage by deposit of title deeds.

"(g) ANOMALOUS MORTGAGE: A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

67. Thus Clauses (b) to (g) define the various kinds of mortgages. Clause (b) defines a simple mortgage and uses the terms "mortgagor", "mortgage-money", "mortgaged property" and "mortgagee" all of which are defined in Clause (a). In this clause which immediately follows Clause (a), the terms "mortgagor", "mortgage-money", "mortgagee", "mortgaged property" and "mortgage-deed" must, therefore, be interpreted according to the definition of these terms given in Clause (a). Similarly Clauses (c) to (g) repeat the same words in defining the various forms of mortgage and these words must also be interpreted in the light of the definition of the same given in Clause (a). It is significant that Clause (f), which was subsequently added by the Amendment Act of 1929 and which instead of using the word "mortgagor" used in the preceding clauses uses the words "a person" qualifying the same words "with intent to create a security thereon". The obvious reason for adding the words "with intent to create a security thereon" is to clarify the position resulting from the omission of the word "mortgagor" and its substitution by the word "person" and to indicate that by using the word "person", the Legislature did not wish to eliminate the question of intention from the conception of mortgage. The words "with intent to create a security thereon" are absent from the preceding Clauses (b) to (e) because the use of the term "mortgagor", which is defined in Clause (a) is by itself sufficient to emphasise the aspect of purpose or intention which is the essence of the transaction of mortgage according to the definition of the same as contained in Clause (a). Clauses (b) to (f) seem to specify various elemental forms of mortgages with their, own special characteristics. Clause (g) specifies a composite form of mortgage which seems to combine within itself the characteristics of the various kinds of mortgages enumerated in Clauses (b) to (f).

68. Thus Section 58 is divisible into two portions. The first portion consists of Clause (a) which defines the transaction of mortgage and postulates the common or essential ingredient of all mortgages. The second portion consists of Clauses (b) to (g), which merely contain various species of the genus defined in Clause (a) and which, therefore, must embody within them the essential characterstics contained in Clause (a). In addition to the ingredients given in Clause (a) the various forms given in Clauses (b) to (g) might possess some additional features of their own which give to them their peculiar form and character. These various forms are termed as simple mortgage in Clause (b), mortgage by conditional sale in Clause (c), usufructuary mortgage in Clause (d), English mortgage in Clause (e), mortgage by deposit of title deeds in Clause (f) and anomalous mortgage in Clause (g). In this connection it is significant also to note the use of the words "is called" in Clauses (b) to (g). This means that these clauses do not declare what a mortgage is but merely name the

various forms in which they are classified. The above procedure was quite natural for the draftsman to adopt since prior to the Transfer of Property Act there were various kinds of transactions which were held as mortgages with various incidents attaching to them. The obvious thing to do was first to lay down the essential characterstics of every mortgage. This preliminary step was taken in Section 58(a). This is indicated by the use of the word "is" in Section 58(a). Having defined or declared what the mortgage transaction really "is" the draftsman proceeds to specify what its various forms are called. A transaction has to come under Clause (a) before it can come under Clauses (b) to (g) Thus it would be correct to say that Clause (a) forms the, foundation of Clauses (b) to (g). Clause (a) is, therefore, the interpretation clause of Section 58, and the definition of the terms "mortgagor", "mortgagee", "mortgage money" and "mortgage deed" given therein provides, as it were, a dictionary defining the meaning of the same words used in the subsequent clauses. It would in my opinion be erroneous to construe any of Clauses (b) to (g) independently of Clause (a).

69. Once this position is accepted, the conclusion is forced on one's mind that the description of various types of mortgages given in Clauses (b) to (g) of Section 58 cannot be divorced from the conception of purpose or intention of the transaction as emphasised and brought out in the defining Clause (a) of the same section.

70. The same conclusion is reached by concentrating our attention on the Clause (c) itself which is the specific clause in question in this case. Clause (c) deals with the special kind of mortgage called mortgage by conditional sale. According to it, the following conditions must exist in order to constitute a mortgage by conditional sale:

1. There must be a mortgagor.

2. There must be a mortgaged property.

3. There must be an ostensible sale of the mortgaged property on any of the conditions mentioned therein, which conditions relate to the payment of mortgage money.

71. So far as the first condition is concerned, it is significant that the Legislature has used the word "mortgagor" and not the word "transferor." The effect of the use of this word is to import the definition of the word "mortgagor" given in Clause (a) into Clause (c) and further to make the intention prescribed in Clause (a), viz., "the purpose of securing the payment of money" as the condition precedent of the said transaction. As to the second condition it is again significant that the Legislature has not used the words "transferred property" but has used the words "mortgaged property" which according to Clause (a) would be the immovable property transferred for the purpose of or with the intention of securing the payment of money. As regards the third condition mentioned above, the use of the words "ostensibly" and "mortgage money" is again significant. The words "ostensibly sells" in Sub-clause (c) clearly indicate that there should be an apparent sale as opposed to a real sale. In other words, the form of transaction should be that of sale but the substance of transaction must be that of a mortgage. This would be only another way of saying that in the transaction of mortgage by conditional sale the real nature of the transaction as disclosed by

the intention of parties supersedes the form or the garb which the parties choose to give to the transaction. As to the consideration of the transaction, it is again noteworthy that the word used is not "price" but "mortgage money" which again takes us back to Clause (a), according to which "mortgage money" is the money the payment of which it is the purpose or intention of the parties to secure. An analysis therefore of the general scheme of Section 58 as well as of the specific clause in question goes to show that intention constitutes the crucial test of mortgage by conditional sale as defined in Clause (c) of Section 58 as of every transaction of mortgage.

72. A historical retrospect of the development of law of mortgages by conditional sale with special reference to the rulings of their Lordships of the Privy Council seems to strengthen the conclusions arrived at above. The transaction called mortgage by conditional sale was well-known in India prior to the. advent of the British. A mortgage by conditional sale was known in Bengal as 'kutkabala', in Madras, as 'muddatakriyan' in Bombay, as 'Gahan Lahan' and in Allahabad and Central Provinces as 'bai bil wafa'.

73. This form of mortgage was introduced by the Mahomedans whose religion did not allow the taking of interest on a loan. By resorting to this form of mortgage the lender got his principal and interest in the shape of an enhanced price of repayment, and at the same time his money as well as his conscience was safe. This form of mortgage, commonly known as 'bai-bil-wafa' was given legal recognition in the Bengal Regulation I of 1798, which provided that in case of the lender refusing to receive the money on the day named the borrower was empowered to deposit the amount due on or before the stipulated date in the Court. But the borrower had to labour under this hardship, that if he failed to pay the money on the stipulated date, either to the lender or in Court the property automatically passed to the mortgagee without any further action on his part or the intervention of the Court. The mortgagor had then no right of redemption and the transaction once closed could not be reopened. This hardship was removed by the Bengal Regulation XVII of 1806 under which the mortgagee had to make an application for forceclosure and to give notice to the mortgagor, and had to obtain an order of the District Judge foreclosing the mortgage, before he could obtain an absolute title to the property. If the property was not in his possession he had to bring a suit for possession. On the other hand, the Regulation gave the mortgagor a right of redemption within one year from the time of the service of the above notice in the foreclosure proceedings instituted by the mortgagee. These rules of procedure are no longer of any importance since the present Act will now govern the procedure even though the mortgage might have been created before the passing of this Act.

74. The salient features of this form of mortgage prior to the Transfer of Property Act are described by their Lordships of the Privy Council in 'PATTABHIRAMIER v. VENCATAROW NAICKEN', 13 Moo Ind App 560 at p. 568 (PC), thus:

> "The transaction then was one of the mortgage by 'Bye-bil-wufa' or 'Kut-kabala' usufructuary; the usufruct of the property to be taken in lieu of interest. And the first question suggests itself is, was there any rule of law to prevent the Court from giving effect to such a contract according to the intent and meaning of the parties plainly expressed by its language?

> That this form of security has long been common in India is notorious. The fact is stated in the preamble to the Bengal Regulation I of 1798. That such contracts were recognised and enforced according to their letter by the ancient Hindoo law appears from several passages in Colebrook's Digest (Vol. I, pp. 183, 187, 188 and 193). That they were equally recognised and enforced between Mahommedans is shown by Mr. Bail-lie in his introduction to his learned work on the Mahommedan law of sale. If the ancient law of the country has been modified by any later rule, having the force of law, that rule must be founded either on positive legislation, or on established practice."

The doctrine of the equity of redemption was akin to the ancient law of India. In that connection their Lordships made the following observations at pages 571-572 of the same volume:

> "What is known in the law of England as 'the equity of redemption', depends on the doctrine established by Courts of Equity, that the time stipulated in the mortgage deed is not of the essence of the contract. Such a doctrine was unknown to the ancient law of India; and if it could have been introduced by the decisions of the Courts of the East Indian Company, their Lordships can find no such course of decision."

75. In 'THUMBUSWAMY MOODELLY v. HOSSAIN ROWTHEN', 1 Mad 1 (PC), their Lordships considered their previous decision in 'PAT-TABHIRAMIER v. VENCATAROW NAICKEN', 13 Moo Ind App 560 (PC), and held that the contract of mortgage by conditional sale is a form of security known throughout India, and which by the ancient law of India which must be taken to prevail in every part of India where it has not been modified by actual legislation or established practice, is enforceable according to its letter.

76. In 'SITUL PURSHAD v. LUCHMI PUR-SHAD', 10 Cal 30 (PC), their Lordships of the Privy Council, faced with the question whether two documents constituted a mortgage or a sale, held that the transaction in question amounted to a sale and laid down that the crucial test for determining the question was the real intention of the parties and surrounding circumstances.

77. In 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC), their Lordships had again to construe a transaction alleged to be a mortgage by conditional sale. In determining the question whether the transaction was a mortgage or a sale their Lordships quoted with approval the important principle enunciated by Lord Chancellor Cranworth in the famous case of 'ALDERSON v. WHITE', (1858) 2 De Cox & J 97 at page 105. The relevant extract quoted from the judgment of the Lord Chancellor is given at pp. 390-391 of the said judgment, and runs as follows:

> "That deeds taken together do not on the face of them constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense; that 'prima facie' an absolute conveyance containing nothing to show that the

> relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase."

Their Lordships held the transaction to be one of sale on the ground that the "vendors did not stipulate that they should have a right to repurchase, but the vendee, as a matter of grace and kindness, stipulated that they should have that right."

According to their Lordships, in every case the question would be what upon a fair construction is the meaning of the instruments? The crucial question as their Lordships framed it is "what, then, is there to show that it was intended to be a mere mortgage?" Thus intention was again laid down as the test for the determination of the question whether the transaction is a mortgage.

78. In the famous case of 'BALKISHAN DAS v. LEGGE', 22 All 149 (PC), again two documents came up for construction before their Lordships of the Privy Council. In deciding the question their Lordships laid down the law on the subject as follows:

> "The case must therefore be decided on a consideration of the contents of the documents themselves with such intrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts."

There again, according to their Lordships, intention of the parties had to be gathered from surrounding circumstances as prescribed by them. The form of such a transaction is always likely to be misleading and deceptive and deliberately devised to conceal the real substance and purpose of the parties. The reason for that is given by their Lordships at p. 159 in these words:

> "Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammedans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would as far as possible be made to assume the appearance of a sale."

Thus the very origin of the transaction shows that it was devised to hide the true state of affairs by throwing a cloak of mortality around what would otherwise be regarded as sinful. In its nature, therefore, intention in this form of mortgage would be concealed, and it will be the duty of the Court to tear off the thin curtain that divides the one from the other and see the reality. From this standpoint, therefore, the aspect of intention has a greater importance in this particular form of mortgage than in any other. It is also very important to note that although their Lordships were laying down the above law with reference to a transaction prior to the Transfer of Property Act, their judgment clearly indicates that the same law is applicable to transaction after the Transfer of Property Act came into force. In fact while laying down the law they referred to Section 58(c) of the Transfer of Property Act and observe that:

> "the Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice in India."

79. In the well-known case of 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC), another transaction was in controversy before their Lordships of the Privy Council; and in deciding the case their Lordships laid down the same test as in the previous case of 'BALKISHAN DAS v. W. F. LEGGE', 22 All 149 PC, in words which admit of no doubt. Their weighty pronouncement on the point runs as follows:

> "It was not disputed that the test in such cases is the intention of the parties to the instruments. That intention, however, must be gathered from the language of the documents themselves viewed in the light of surrounding circumstances."

While noting the principle laid down by Lord Cranworth in 'ALDERSON v. WHITE', (1858) 2 De Gex & J 97, they quoted another passage from the same judgment thus:

> "There is one other remark of Lord Cranworth's in 'ALDERSON v. WHITE', which is particularly applicable to the present case. He said:
>
> 'I think a Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be'."

80. In 'NARSINGERJI v. PARTHASARA-DHI', 51 Ind App 305 (PC), their Lordships of the Privy Council again referred to the deceptive appearance of these transactions and the studious manner in which parties deliberately attempt to conceal reality. Their pronouncement on this point, which should serve as a warning to Courts in such cases, is contained at p. 316 and is as follows:

> "Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of repurchase in the vendor. This appearance, indeed is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of repurchase bear the appearance of rights in relation to the exercise of which time is of the essence.
>
> "But a closer examination of the documents discloses their real character."

Their Lordships then go on to examine the various terms of the document in relation to and the circumstances of the case in reference to those terms; and finally come to the conclusion that the appearance of sale was merely a device calculated to hide the real purpose of the parties which was to effectuate a transaction of mortgage; and hold that the transaction in question was one of mortgage and not of sale. It may be noted that the remarks of their Lordships in this case again indicate beyond doubt that the word "ostensible" in Section 58 is used to indicate the meaning that superficial appearance is riot in consonance with reality, and not the other meaning suggesting that

superficial appearance corresponds to reality. I shall have to advert to this point again later on in my judgment. It is also important to note that in this case their Lordships were dealing with a transaction of the year 1908, that is, after the Transfer of Property Act had come into force, and yet their Lordships were of the view that intention continued to remain the test of the transaction of mortgage as laid down by them in the previous cases relating to transactions prior to the Transfer of Property Act.

81. In 'MONTREAL TRUST CO. v. BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LTD.', AIR 1936 PC 65, their Lordships again emphasised the crucial nature of the question of intention in such cases in the following words:

> "On the other hand it Is true that strong evidence is required to establish the contention that a conveyance in form absolute ought to be treated as a mortgage, since the contention requires that the written document should be in some sense modified or added to for the purpose of carrying out the true intent of both parties to it."

82. In the latest case of the Privy Council in 'RAMDHANDAS JHANJARIA v. RAMKISONDAS DALMIA', AIR 1946 PC 178, their Lordships have while again emphasising the danger of Courts being misled by the form of such transactions observed thus:

> "This does not mean, that, when the question is whether a transaction is a sale or a mortgage, form is to be preferred to substance. It is an inviolable rule that upon such a question the Court must find the substance behind the form. But where the oral evidence is unreliably and contradictory the Court cannot safely depart from the written evidence of the document."

83. The above is a brief summary of the entire law on the subject as laid down by their Lordships of the Privy Council. To avoid the salient principles involved in the question at issue being clouded by a mass of case-law, I have deliberately avoided any mention at this stage of any decisions on the subject by the High Courts in India, as in my opinion the law has been so clearly laid down in the said judgments that without reference to any Indian authority it is possible on the basis of the Privy Council decisions mentioned above, to postulate the following propositions of law:

> 1. That in determining whether a transaction is a mortgage by conditional sale or a sale with a condition of repurchase the vital question that should be considered is the question of the intention of the parties.
>
> 2. That this intention of the parties must be decided on a consideration of the contents of the documents with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

> 3. That the transaction in question being ostensibly a sale, the Court should try to ascertain the reality and not be misled by the appearance of the transaction.
>
> 4. That the said law was applicable to transactions prior to the Transfer of Property Act and continues to apply to transactions after the Transfer of Property Act. The said Act merely states the pre-existing law and does not effect any change in the previous law on this point.
>
> 5. That the general tenor of the document being that of sale, it is the duty of the person who pleads that reality is not in consonance with appearance to adduce evidence of special circumstances to prove his case. In other words the onus is on the party alleging that a transaction apparently in the form of a sale is in reality a mortgage.

84. I have clearly stated the above five propositions of law because I am of opinion that if they are steadily borne in mind, then the question that has been referred to this Bench is capable of being answered without any difficulty.

85. In view of the above law as expounded by their Lordships of the Privy Council it is not necessary to refer in detail to the mass of case law that has clustered round this point in India. I may however refer to some of the! Indian rulings which have been relied upon by the parties.

86. In support of his contention the respondents' learned counsel has strongly relied on a Full Bench ruling of the Madras High Court reported in 'MUTHUVELU MUDALIAR v. VYTHILINGA MUDALIAR', 42 Mad 407. The question referred to the Full Bench in that case was "Whether where in one and the same transaction land is sold absolutely but with a right of repurchase to be exercised before a certain date, the transaction necessarily becomes by virtue of Section 58 of the Transfer of Property Act, a mortgage by conditional sale, whatever the intention of the parties might have been."

The leading judgment in the case was delivered by Wallis C. J., who expressed himself in the following words:

> "It is in my opinion not open to us to answer the question referred to us in the affirmative consistently with the decisions of the Privy Council in 'PATABHIRAMIER v. VANCAT-ROW NAICKEN', 13 Moo Ind App 560 (PC), THUMBUSWAMI MOODELLY v. HOSSAIN ROWTHEN', 2 Ind App 241 (PC); 'SITUL PURSHAD v. LUCHMI PURSHAD', 10 Ind App 129 (PC); 'BHAGWAN SAHAI v. BHAG-WAN DIN', 17 Ind App 98 (PC); 'BALKISHAN DAS v. W. F. LEGGE', 27 Ind App 58 (PC) and 'JHANDA SINGH v. WAHID-UD-DIN', 43 Ind App 284 (PC)."

He goes on to state his considered view on the point thus:

> "There is in my opinion, nothing in the definition in Section 58(c) which favours the view that wherever the sale-deed and the agreement to reconvey form one

> transaction, it must necessarily be a mortgage and not a sale. On the other hand, both in 'SITUL, PURSHAD v. LUCHMI PURSHAD', and 'BHAGWAN SAHAI v. BHAGWAN DIN', there was clearly only one transaction and it was nonetheless held by the Privy Council to be a sale and not a mortgage."

Seshagiri Aiyar J.. another member of the same Bench expressed his agreement with the opinion of Napier J. in the following words:

> "I agree with Napier J., that the use of the word mortgage is not per incuriam. Clause (c), speaks of a mortgagor ostensibly selling the mortgaged property.' That language implies that there must be in reality a mortgage and that the sale must be merely a cloak. A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports. In other words there must be evidence to show that the parties intended a mortgage although they used expressions which prima facie connote a sale. I am therefore of opinion that the question referred to us must be answered in the negative."

The above decision is in the line with the catena of Privy Council decisions mentioned above. It again shows that the word 'ostensibly' in Section 58 connotes the meaning suggesting the appearance to be different from reality.

87. In 'MURUTHAI GOUNDAN v. DASAP-'PA GOUNDAN', 31 Mad LJ 375, Napier J. while disagreeing with the contention similar to that advanced on behalf of the appellants in this case observed as follows:

> "Mr. Seshachariar wishes us to construe this sub-section as intending to lay down that sales with agreements to re-sell are presumably mortgages. If that had been the intention, I think it would have been perfectly easy for the Legislature to provide that, where there was a sale, and, either contemporaneously or so shortly afterwards as to be part of the same transaction, an agreement to re-sell that transaction should in fact be a mortgage. But the Legislature has not used any words which are at all apt to any such construction. On the contrary the words 'mortgagor' and 'mortgaged property' are used in the sub-section. Now it is obvious that, in construing Sub-clause (c) containing these words, we must look back to the earlier part of the section and ascertain what is meant by 'mortgagor' and what is meant by 'mortgaged property', and it is not permissible to do what I think Mr. Seshachariar's argument really tends to namely, to scratch out the word 'mortgagor' and insert 'transferor' and scratch out the word 'mortgaged' and insert 'transferred.' If that could be done, we should get the language, "where the transferor ostensibly sells the transferred property", and some argument might then be based on the fact that the nature of the transaction was already stated but we must give weight to these two words with the result that the section assumes that these conditions will only apply where there is, in fact a

> mortgagor and where there is in fact a mortgaged property and we cannot transliterate them into 'transferor' and 'transferred property.' It necessarily follows, therefore, that what the sub-section is doing is not so much defining the circumstances that create a mortgage as providing that, where there is something which is in essence a mortgage, it shall not become or be treated as a sale merely by reason of the fact that it is ostensibly a sale, and that to my mind is the real meaning of this section. It begins by assuming a mortgage, in which it is essential that there should be payment of money advanced and transfer of an interest by way of security and where these two conditions do exist and they must necessarily exist if we wish to give a proper meaning to the words 'mortgagor' and 'mortgaged'--then the transaction does not become a sale by reason of the form. If that be so, then the language of the Act goes a great deal further than the original principles which are laid down in 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC). The person who seeks to make the transaction a mortgage must begin by showing that there is a mortgagor and mortgaged property within the meaning of Section 58(a). For that purpose we must construe the document and look to what was the intention of the parties and once it is shown that there is no real purchase money but only money advanced etc. and the transfer is intended to be for the purpose of securing payment etc., the form becomes immaterial and the transaction becomes a mortgage. I agree with my learned brother on the facts of this case that there is nothing to show any intention to create a mortgage and that the transaction is an out right sale. There is nothing to show that, at the time when the document which is on the face of it a sale was brought into existence, there was a person who could be called by virtue of that document a mortgagor or that document together with the counter part, intended to create a mortgage of the property."

Bakewell J. the other member of the Bench stated in his judgment "I entirely agree with my learned brother in his construction of Section 58 of the Transfer of Property Act."

88. In 'BISHAMBHAR NATH v. MUHAMMAD UBAID ULLAH KHAN', AIR 1923 All 586, their Lordships held the transaction in question to be a sale even "though it was embodied in only one document. They laid down the same law in the following manner:

> "The repetition of the terms 'payment of the mortgage money' or 'such payment' in each clause of the definition makes it clear that before a document can be a mortgage by conditional sale it must first be a mortgage, i.e., the property must be transferred as security for a debt. The definition of a mortgage is given in Clause (a) of the section and the subsequent clauses are merely particular cases of this definition. The neglect of this obvious fact has in some cases led to serious confusion. The full view suggested by Dr. Sen was rejected by a Full Bench of the Madras High Court in 'MUTHUVELU MUDALIAR v. VYTHILINGA MUDALIAR', 42 Mad 407 (FB).
>
> In determining the intention of the parties as expressed in the deed two principles have been laid down for the guidance of the Courts. The first is that the intention of

> the parties must be gathered from the terms of the deed itself and the surrounding circumstances. Oral evidence is excluded by Section 92 of the Evidence Act. This was laid down by the Privy Council in 'BALKISHAN DAS v. LEGGE', 27 Ind App 58 (PC). The second is that where a deed is attacked after a long period of years the burden of proving that it is not what it purports to be lies heavily on the person attacking it. This rule was originally laid down by Lord Cranworth in the case of 'ALDERSON v. WHITE', 6 WR 242 (Eng) and has been followed and approved by the Privy Council both in 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC) & in 'JHANDA SINGH v. WAHID-UD-DIN', 38 All 570 (PC)."

89. In 'MUMTAZ BEGAM v. MT. LACHHMI', AIR 1929 All 174, Boys J. stated his opinion as to the interpretation of Section 58(c) thus:

> "I will proceed to state the view which I hold of the proper scope and interpretation of this Clause (c). Section 58(c) does not by itself (nor do the Clauses (b), (d) or (e) by themselves) declare any transaction whatever to be a mortgage. It is Section 58(a) which declares what transactions are mortgages. Before Clauses (b), (c), (d) and (e) are looked at all it is necessary to determine whether there is a mortgage at all. It appears to me manifest that if reference is first made to Clause (c) before considering Clause (a) pause must instantly be made before being able to apply Clause (c) at all to 'the mortgagor.' Is there 'a mortgage?' The question must first be determined and can only be determined by reference to Section 58(a)."

It may be mentioned that the judgment of the learned Judge was upset in the Letters Patent Appeal reported in 'MUMTAZ BEGAM v. LACHHMI', AIR 1931 All 196, on another point, but the view expressed by him as to the interpretation of Section 58(c) was not dissented from.

90. In 'MOHAMMAD ZAKI BEG v. AB-

DUL GHANI BEG', AIR 1930 Oudh 6, a Bench of the late Chief Court of Oudh relying on the Privy Council cases reported in 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (P C) and 'JHANDA SINGH v. WAHID-UD-DIN', AIR 1916 PC 49, held that "prima facie an absolute conveyance in which there is nothing to show that the relation of debtor and creditor should exist between the parties does not cease to be a conveyance so as to be converted into a mortgage merely because there is a right to repurchase the property. The Court ought not to cut down rights of the purchaser unless it can see its way clearly to his having the right of a creditor."

91. In 'MEHDI HUSSAIN v. MOHAMMAD JAWAD', AIR 1941 Oudh 479, a bench of the late Chief Court of Oudh after considering the leading cases on the question of interpretation of such transactions laid down that the crucial test in such cases is the intention of the parties. (92) In 'S. AHMAD HUSSAIN v. CH. AZHAR ALI, AIR 1944 Oudh 305, another Bench of the late Chief Court of Oudh following the Full Bench case reported in 'MUTHU VELU MUDALIAR v. VYTHILINGA', 42 Mad 407 (FB) held that, "Where a transaction is apparently a sale, the onus of showing that it is a mortgage lies on the person who contends against the tenor of the deed."

Relying on the Privy Council cases reported in 'JHANDA SINGH v. WAHIDUDDIN', AIR 1916 PC 49 and 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC), they further laid down that:

> "In considering whether a transaction is a sale with a condition of repurchase or a mortgage by conditional sale the form in which the transaction is clothed is not the only or the final test. The true intention of the parties must be determined from the language of the deed in question with such aid as may be available from the surrounding circumstances."

92a. In 'THAKUR DASS v. TEK CHAND'. AIR 1944 Lah 175, Mahajan J. (now Judge of the Supreme Court of India), laid down that:

> "The question whether a transaction embodied in a deed is a mortgage by conditional sale or an out and out sale depends upon the intention of the parties. Oral evidence of intention is not admissible for the purpose of construing the deed or ascertaining the intention of the parties, as it is excluded by Section 92, Evidence Act. The case has to be decided on a consideration of the contents of the document with such extrinsic evidence of surrounding circumstances as might be required to show in what manner the language of the document was related to the existing facts."

93. On behalf of the appellants their learned counsel argued that the mere resemblance of the document with the form prescribed in Section 58(c) must necessarily lead to the conclusion that the transaction in question was a mortgage irrespective of the question of intention of the parties. In support of his argument, he placed strong reliance on the following passage in para. 125 of Mukherji's law of Transfer of Property Inter Vivos in British India:

> "But when there is a sale, and there is a condition attached 'at the time of the execution of the sale-deed' that, on a refund of the price, the property would be re-conveyed, how can we call the sale a real sale? The transaction ought to and must come under the definition of mortgage by conditional sale, 'cf.' 'MOHINDRA MAN SINGH v. MAHARAJ SINGH', 20 All LJ 810."

If this passage is taken literally then even if the vendee out of his own grace and favour and as a mere act of indulgence on his part at the time of the execution of the deed allowed the vendor to repurchase the property and even if the parties intended the transaction to be a sale and not a mortgage, the transaction would necessarily have to be construed to be a mortgage merely because the aforesaid condition was agreed to at the time of the execution of the sale-deed. In view of the decision of their Lordships of the Privy Council in 'BHAGWAN SAHAI v. BHAGWAN DIN', 12 All 387 (PC), and other cases regarding the interpretation of Section 58(c) mentioned above, it is not possible to accept the proposition of law as enunciated by the learned author in this wide and unqualified form.

94. Learned counsel for the appellants has further relied on 'MOHINDAR MAN SINGH v. MAHARAJ SINGH', 20 All LJ 810, which has been referred to by Mukarji in support of the

above-mentioned proposition. A reference to '20 All LJ 810', however, shows that the proposition of law is not laid down in the said judgment in the sweeping form in which it is stated in Mukerji's commentary. As a matter of fact Sulaiman, J., who delivered the judgment in that case went on to say that, "There can be no doubt that unless it be shown that the intention was to the contrary, the transaction comes within the definition of Clause (c) of Section 58 of the Transfer of Property Act. Here there is ostensibly an out and out sale, but there is also a condition that 'on such payment being made the buyer shall transfer the property to the seller'. Prima facie therefore the deed falls within the definition of a mortgage by conditional sale as given in Section 58."

Later on in the same judgment he observed, "In the present case it is the same document which effects the transfer and also contains the stipulation as to reconveyance. We have therefore to see if there is anything in the document or in the contemporaneous acts and conduct of the parties which would go to show that the real intention of the parties was to execute a sale-deed, and that there was an independent agreement that the property would be retransferred in case the whole amount is paid within the fixed period."

At the most the judgment can be said to lay down that certain facts might lead to an irresistible presumption in favour of transaction being a mortgage but a presumption does not cease to be a presumption merely because it is irresistible. It has merely the effect of shifting the burden of proof of intention and not of excluding it altogether. It would therefore be incorrect to say that according to the said judgment the question of intention would be irrelevant and that the mere fact that the condition was agreed to "at the time of the execution of the sale deed" must convert an ostensible sale into a mortgage.

95. The next case that was relied on by the learned counsel for the appellants is reported in 'MATHURA KURMI v. JAGDEO SINGH', AIR 1927 All 321. In support of his contention the learned counsel for the appellants placed strong reliance on the following passage in the judgment of Sulaiman J., in which after referring to the Full Bench case of the Madras High Court reported in 'MUTHUVELU MUDALIAR v. VYTHILINGA', 42 Mad 407 (FB), the learned Judge observed that:

> "It may perhaps be possible to conceive of a rare case in which the sale and the agreement to retransfer though part and parcel of the same transaction, are yet independent in the sense that the sale is not subject to that condition and that the parties intend that the transaction should remain a sale and not a mortgage. Without definitely saying that such a thing is possible, I am prepared to assume that it is so and that the singleness of the transaction, though a strong test is yet not an absolutely conclusive test that the transaction was a mortgage and that in spite of the single transaction it may nevertheless be shown that the intention of the parties was otherwise. In most cases however the circumstances that the sale by the transferor and the agreement by the transferee are both part and parcel of the same transaction would undoubtedly justify the inference that the sale was subject to the condition of repurchase. "The cases before their Lordships of the Privy Council, except the Madras one, were cases of deeds not governed by the Transfer of Property Act. In 'SITUL PURSHAD'S CASE', 10 Cal 30 PC, though the documents were of the same date, full

> price had been paid. In 'BHAGWAN SAHAI'S CASE', 12 All 387 PC, the suit was brought more than fifty years after when the burden lay heavily on the person alleging that the transaction was not what on the face of it, it appeared to be."

It is clear that in this passage the learned Judge was only dealing with the question as to how far the singleness of transaction can lead to the presumption whether the transaction is a mortgage or a sale. Even on this point his conclusion is not quite definite and he has held that it is possible that inspite of the singleness of transaction, it may nevertheless be shown that the intention of the parties was otherwise and the transaction was a sale. Later on in his judgment the same learned Judge after referring to the Privy Council case of 'JHANDA SINGH v. WAHID-UD-DIN', AIR 1916 PC 49, goes on to state as follows:

> "The identity of the date however is by no means absolutely conclusive as is clearly shown by the remarks of their Lordships of the Privy Council in the same case, 'JHANDA SINGH v. WAHID-UD-DIN'."

After this the learned Judge made a detailed examination of the entire circumstances of the case with a view to determine the intention of the parties and observed that, "Coming to the facts of this case, there are several circumstances which point to the sale being subject to the condition of repurchase.

It is true that none of these by itself may be conclusive, but the cumulative effect of all these circumstances is undoubtedly in favour of the respondents."

It may be mentioned that the remarks of the learned Judge that "The cases before their Lordships of the Privy Council, except the Madras one, were cases of deeds not governed by the Transfer of Property Act"

> overlook the observations of the Privy Council in 'BALAKRISHNA DAS v. W. F. LEGGE', (22 All 149 PC), to the effect that the framers of the Transfer of Property Act under Section 58(c) intended to state the existing law and practice of India. This is also evident from the Preamble of the Transfer of Property Act (Act No. IV of 1882) which commences with the Words:
>
> "Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties; It is hereby enacted as follows:"

96. The above words clearly indicate that the Act was intended to define and amend the existing law and not to introduce any new principle. Further, the remarks of the learned Judge lose their force when we remember that in the Madras case reported in 'NARSINGERJI v. PARTHASARADHI', 51 Ind App 305 (PC), their Lordships of the Privy Council, as mentioned before, considered the test of intention to be applicable to transactions after the Transfer of Property Act just in the same way as they considered it applicable to the transactions before it.

97. It is also noteworthy that in the same case the other learned Judge of the same Bench, Lindsay, J. after an exhaustive examination of the cases bearing on the point laid down the law in most emphatic terms as follows:

> "Those cases occur with considerable frequency and have given rise to a good deal of discussion in the Courts. We have had a strenuous and able argument advanced before us on both sides, and practically every case bearing upon the point has been cited to us, from the case of 'ALDERSON v. WHITE', 1858-2 De Gex L & J 97, down to the latest case decided by their Lordships of the Privy Council, 'NARASINGERJI v. PANU-GANTI', 51 Ind App 305 (PC)."

The law on the subject has been definitely laid down by their Lordships of the Privy Council in the case of 'BALKISHEN DAS v. LEGGE', 22 All 149 PC. It was there stated that in cases of this kind what has to be deter' mined is the intention of the parties at the time the transaction was entered into, and in order to ascertain this intention it was ruled that regard might be had to the surrounding circumstances which show how the language of the documents to be construed, was related to then existing facts. On the other hand it was definitely ruled that no oral evidence could be given by the parties in order to show what their intention was. It is to be observed here that in the well-known case of 'ALDERSON v. WHITE', oral evidence of intention was given on both sides. Their Lordships in the case of 'BALKISHEN DAS v. LEGGE', held that this could not be done regard being had to the rule of evidence laid down in Section 92 of the Indian Evidence Act."

This case does not, therefore, go against the proposition of law that intention is the crucial fact to be determined in such cases.

98. The third case relied on by the learned counsel for the appellants is 'MAN SINGH v. GUMAN SINGH', AIR 1929 All 619. The passage relied on by the learned counsel runs as follows:

> "It cannot be stated broadly that in every case where there is an ostensible sale subject to the condition of repurchase, the transaction cannot be a sale but must always be a mortgage by conditional sale. It seems to us that it is always open to a pre-emptor who is no party to the transaction to show by evidence, direct or circumstantial, that although the transaction was clothed in that particular garb it was in reality and substance a sale transaction. But where there are no such special circumstances and we have only a transfer of the property subject to the condition of resale it seems to us that the case would fall within the definition of a mortgage by conditional sale as laid down in Section 58(c).....
>
> In the present case there are no special circumstances which would necessarily show that the transaction was an out and out sale....."

I find it difficult to understand as to how this ruling supports the contention of the learned counsel for the appellants. On the other hand it emphasizes the aspect of intention as well as the other aspect that such transactions are put in a garb which hides the reality and substance of the

transaction. It may be noted that Sulaiman, J. who was a party to the previous judgment reported in 'MATHURA KURMI v. JAGDEO SINGH', AIR 1927 All 321, was also a party to this judgment.

99. The fourth case relied on by the appellants' learned counsel is 'RAM DHANI RAM v. RAM RIKH SINGH', AIR 1931 All 548. In this case Sulaiman J. held that where a deed, was ostensibly a sale-deed with a condition for re-transfer on payment of the amount and the condition was embodied in the document itself, the case was covered by the definition of a mortgage by conditional sale and hence the deed was a mortgage by conditional sale and not an out and out sale. The judgment of the learned Judge shows that this case was a case in second appeal in which both the Courts below had held that the transaction in question was a mortgage and not a sale. The judgment relating to this point covers only one short paragraph, and shows that the parties did not rely on any circumstances apart from the document itself. There is no reference to any Privy Council ruling in this case. The only case relied on is the case of 'MAN SINGH v. GUMAN SINGH', AIR 1929 All 619, which as shown, above goes against the appellants' contention. This case therefore, cannot be considered as laying down any principle of law indicating that intention is not the crucial test of the transaction of mortgage.

100. The above is a summary of the entire case law cited on behalf of the appellants. At the most these cases merely indicate that so far as the question of burden of proof is concerned there are two views on the point. On the one hand there is the solitary view of Sulaiman J. according to which if the transaction is concluded in the form prescribed under Section 58(c); then, in the absence of other evidence, it should be deemed to be a mortgage on the ground that the form of the transaction tallies with the definition of a mortgage by conditional sale under Section 58(c). Thus the prescribed form or appearance merely raises a presumption in favour of intention of parties to mortgage with the result that the burden to disprove such an intention lies on the party alleging the transaction to be sale. As opposed to this view there is the view of the other Judges that in such cases the general tenor of the document and the obvious appearance being that of a sale, such appearance being merely an ostensible one, i.e., not in accordance with reality, the burden lies on the person setting up the transaction to be a mortgage to prove that the said transaction was entered into for the purpose of creating a security. There is no doubt that the second view finds support from the rulings of their Lordships of the Privy Council. It is, however, not necessary to enter into this controversy for the purpose of answering the question before this Bench, because both the views are agreed on the point that intention is the main question to be decided and the difference between them lies only in the manner in which the question of evidence has to be approached, i.e., on the question of the burden of proof. As pointed out above, even, Sulaiman J. repeatedly went into the circumstances of the case with a view to ascertain the intention of the parties.

101. Thus it seems to me that there is not a single ruling in support of the proposition urged by the learned counsel for the appellants that merely giving the transaction the particular form prescribed in Section 58(c) stamps the transaction with the quality of mortgage irrespective of the intention of the parties and regardless of the circumstances of the case.

102. If the contention of the learned counsel for the appellants that the form in such a case is conclusive of the nature of the transaction is accepted, then it would lead to this absurdity that every

transaction of this nature would have to be construed as a mortgage because in every case the transaction would take a form that is prescribed in Section 58(c). No question of enquiry would arise in any case. This would be a startling result. As observed by their Lordships of the Privy Council, in such cases the parties deliberately and studiously attempt to give to the transaction an appearance which in reality it. is not and it is, therefore, the duty of the Court not to be led away by the form and to try to get at the substance of the transaction which can only be done by ascertaining the intention of the parties by reference to the terms of the transaction and the circumstances relating thereto. In fact it is the deceptive or the misleading nature of the form that opens the door for enquiry and enjoins on the Court the duty to give effect to the real nature of the transaction by finding out the intention of the parties. The appellants' argument thus provides an alluring invitation to the Court to itself walk into the trap laid for it by the parties instead of trying to catch the parties that have laid the trap for it. The Court would thus be falling into the pitfall dug for it by the parties and committing the very error against which their Lordships of the Privy Council repeatedly uttered solemn and grave warnings.

103. Regarding Section 58, Clause (a), the argument raised on behalf of the appellants is that it merely contains extraction of the principles that underlie the various forms of mortgages described thereafter. As I have shown above Clause (a) to Section 58 is not an extraction of the principles that underlie Clauses (b) to (g) but is really the foundation of the principles that govern the subsequent, clauses. This mode of approach to the question is not warranted by the natural order of the clauses of Section 58 nor by the general scheme of the sections in the chapter in which the law of mortgages finds a place in the Transfer of Property Act. The various dangers resulting from the adoption of this procedure are brought out by Boys J. in 'MT. MUMTAZ BEGAM v. MT. LACHHMI', AIR 1929 All 174 at p. 178 in the following passage:

> "But it is not in fact an academic question whether the decision as to there being a mortgage at all is approached first by a consideration of Section 58(a) or by a direct and primary consideration of Section 58(c). Of course the circumstances may be such that a mere statement of them suggests that if the transaction is going to prove to be a mortgage at all it will prove to be one of the kind named in Section 58(b), (c), (d) or (e), as the case may be, and it may be this fact that tempts to a consideration of the terms of those clauses at the outset; but, as it appears to me, to consider the terms of those clauses before it has been determined whether the transaction is a mortgage at all is not only an error of procedure but an error which is also likely to confuse and mislead. The danger is manifold. If the first consideration of the question begins with Clause (c) the mere fact that there is an apparent sale with one of the conditions specified, the mere similarity of some of the characteristics, is likely to predispose the inquirer to a finding in a particular direction. Again, the fact that one or other of the characteristics is not to be found in Section 58(c) may similarly prompt the idea that it is not a mortgage at all, whereas though not a mortgage by conditional sale, it may yet satisfy the requirements of Section 58(a) and be an anomalous mortgage. The transaction may be quite unlike that in Section 58(b), (d) or (e) and though very nearly like, yet not quite similar to that in Section 58(c), but it may nevertheless be a mortgage within the definition in Section 58(a), and of the class provided for in

> Section 98. On the other hand there is no room for these dangerous impulses if attention is first concentrated, as I have suggested it should be, on the terms of Section 58(a). If concentration of the first attention be on the words in Section 58(a) "for the purpose of securing etc." the appropriateness of the various tests which have been approved by their Lordships of the Privy Council of "purpose" or "intention" (e. g., is there anything to indicate that the relation of debtor and creditor subsisted as a result of the transaction) will be immediately apparent.
>
> "Whether or not the sale was only ostensible (i. e., ostensible in the sense in which I have held that the word is used) will be one of the facts which has to be determined when determining whether it was a mortgage at all. If it has been determined to be a mortgage that will involve a finding that the sale was only ostensible, and the first two requirements of Section 58(c) will have been found, that there is a mortgagor and a sale which was only ostensible.
>
> "Finally, the view that I have suggested appears to have this recommendation also that it allows to every word as we proceed throughout its natural meaning and it gives rise to no difficulty whatever as to the steps by which a decision is to be reached. Opinions may differ as to the exact weight to be attached to any particular item of the evidence, but that is inevitable in all cases."

In any case in putting forward this contention the learned counsel seems to be committing the fallacy of arguing in a circle because in order that the principles should be extracted from Clauses (b) to (g) they must underlie and exist in the said clauses. Even if, therefore, this argument is entertained the result would be the same, namely, that the principles enunciated in Clause (a) are present in the body of Clauses (b) to (g) and underlie them. This argument, therefore, does not advance the case of the appellants in any way.

104. The next argument on appellants' behalf relates to the meaning of the word 'ostensible'. It has been urged on behalf of the "appellant that the said word has got two meanings:

> (1) that the object bears a certain appearance without suggesting that it is or is not that of which it has the superficial appearance; and (2) that the object bears a certain appearance but is not really that of which it bears the appearance.

It is urged that the word 'ostensible' is used in the section in both the senses and not in one only. I find it difficult to accede to this argument. To my mind, the word 'ostensible' in Clause (c) is used in opposition to the word 'real.' In other words it is used only in the second sense and not in the first. The view that I have taken is in accord with the repeated observations of their Lordships of the Privy Council in rulings mentioned above. According to Iyer's Law Lexicon of British India the word 'ostensible' means "capable of being shown, proper or intended to be shown, exhibited, declared, avowed, professed, apparent--often used as opposed to real or actual."

An illuminating exposition of the meaning of this word is to be found in the judgment of Boys J. in 'MT. MUMTAZAN v. MT. LACHHMI', AIR 1929 All 174. The relevant passage runs as follows:

> "I will discuss here the meaning of the word 'ostensible' as used in Section 58(c). The word has two meanings and it is essential to be clear as to the sense in which the word is used. The word 'ostensible' may mean either (a) merely that the object bears a certain form or appearance without suggesting that it is or is not that of which it has been superficial appearance or (b) that the object bears a certain appearance but is not really that of which it bears the appearance. I may be pardoned for emphasising this by reference to the second meaning as stated in the Oxford Dictionary:
>
> "Often implicitly or explicitly opposed to 'actual' 'real' and so equals 'merely professed' 'pretended'."
>
> "It seems manifest that the second is the only meaning possible here. If it meant in Section 58(c) only "having the appearance of a sale" without importing also that it was not really a sale, it would Involve holding that the Legislature, as of course it had power to do, had declared that, regardless of the intention of the parties, if the transaction bore the appearance of a sale on one of certain conditions it was in law a mortgage even though the parties may have intended a sale.
>
> "Apart from the fact that there is no reason for crediting the legislature with so drastic an action (and I have shown that in my view the object intended and effected was quite different), the Privy Council has continued to apply the test of intention to make a sale or to make a mortgage to transaction entered into after the Act: 'NARASINGERJI v. PARTHASARADHI RAYANIM', AIR 1924 PC 226,"

The above piece of reasoning, if I may say so with respect, seems to me to be flawless.

105. A comparative study of the Indian and English law of mortgages discloses that intention is the crux of the transaction of mortgage not only in India but also in England. As a matter of fact, it would appear that emphasis on intention as an essential ingredient in the transaction of mortgage is much stronger in England, because the English law of mortgages unlike the Indian law even allows parol evidence to prove the intention of the parties, and further entitles the Court to rectify mortgage deeds in the light of such proofs. The law on the point is expounded in Coote on Mortgages (Ninth Edition) at page 29 in the following words:

> "The rule is that prima facie an absolute conveyance, containing nothing to show the relation of debtor and creditor, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every case the question is what, upon a fair construction, is the meaning of the instruments, and the absolute conveyance will be turned into a mortgage if the real intention was that the estate should be held as a security for the money. It is generally a question of construction in the light of surrounding

circumstances."

At page 32 of the same volume it is stated that:

> "Equity will admit parol evidence to show that a conveyance, which is absolute in its terms, was intended by way of security only, and that a transaction though in form a sale is in reality a mortgage." and at p. 34 it is stated that: "A party to a mortgage deed may have the deed rectified by the Court on the ground of mistake, if he establishes in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also show exactly and precisely the form to which the deed ought to be brought. The Court can only act upon the mutual and concurrent intention of all parties." (See also Fisher's Law of Mortgage (Sixth Edition), pp. 11 and 13 and Ashburner on Mortgages (Second Edition), page 343)."

Thus intention seems to be inextricably interwoven into the legal conception of mortgage in India as well as in England.

106. It would be relevant at this stage to take up the proviso added by the Amendment Act of 1929 and to view it in the background of the law as elucidated above. The proviso in question runs thus:

> "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;"

The short question that calls for answer is whether the Legislature by enacting this proviso has swept away all consideration of intention in determining the question whether the transaction is a mortgage. The legal position so far as mortgage by conditional sale under Section 58(c) prior to the addition of the proviso may be stated in the following three propositions:

> 1. The transaction had to be a mortgage,
>
> 2. The transaction had to be an ostensible sale, with any of the conditions specified therein.
>
> 3. The transaction could be evidenced by one document or by more than one document with the result that condition could be specified in the document that effected or purported to effect the sale or in another document. In other words, the Court's power to enquire was not confined to cases where evidence of specified condition was contained in the same document but extended to cases where it was contained in a separate document.

107. The proviso in question affects the legal position only so far as point No. 3 is concerned and leaves the requirements specified under points Nos. 1 and 2 above unaffected. The requirement of intention is imported from the first two ingredients; and is, therefore, left intact and untouched. The

first two points relate to matters of substantive law, but the third one relates merely to a matter of evidence or proof. The effect of the proviso, therefore, is merely to limit the Court's power to enquire into the question whether the transaction is a mortgage only to cases where the condition is embodied in one document, and to bar it in cases of multiple documents.

108. The most important point that strikes one in this connection is that the Legislature has sought to effect the amendment not by amending Clause (a) or the main part of Clause (c) but by means of a Proviso tacked on to the main Clause (c). The view contended for on behalf of the appellant seems to ignore the significance of this point. If the argument of the learned appellants' counsel is accepted then the result would be that whenever the transaction is embodied in one document the Court will have to hold that by force of the proviso the transaction in question is a mortgage, even though the parties might have intended the transaction in question not to be so. The effect of this argument would be that whereas under the main Clauses (a) and (c) of Section 58 intention would be the necessary ingredient of the transaction of mortgage, the provision of substantive law on the point contained in the main clauses would be nullified by this proviso and the transaction would have to be held to be a mortgage even though the parties never intended it to be so. In other words the effect of giving this interpretation to the proviso would be to defeat the mandatory provisions of the main clauses, and to create a serious conflict between the proviso and the main clauses. This disastrous result is to be avoided at all costs; and it is now to be seen how far this course of action is permissible in law.

109. On behalf of the appellants it is conceded that this is not the direct or positive result of the enactment of this proviso, but it is argued that the affirmative follows by implication from the negative. It seems to me that this contention on behalf of the appellants completely ignores the rules of interpretation of a proviso as enunciated by their Lordships of the Privy Council. In 'GOVERNOR-GENERAL IN COUNCIL v. THE MUNICIPAL COUNCIL, MADURA', AIR 1949 PC 39, their Lordships of the Privy Council had to interpret a proviso that was, as is the' case here, in a negative form. At p. 4,2 they observed that:

> "It is the proviso in (b) that is immediately relevant and it must first be observed that it is in form negative.....It must be conceded that it can only arise, if at all, from an affirmative which is to be implied from the negative."

Following the observations of Lord Watson in 'WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY', (1897) AC 647, their Lordships laid down the cardinal rule for the construction of provisos in such cases in the following words:

> "In this connection the well established rule of construction must be borne in mind which was thus stated by Lord Watson in 'WEST DERBY UNION v. METROPOLITAN LIFE ASSURANCE SOCIETY', (1897) AC 647, at page 652: (66 LJ Ch 726). I am perfectly clear that, if the language of the enacting part of the statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso."

110. The law on the point was also clearly stated by their Lordships of the Privy Council in 'M. & S. M. RLY. CO. LTD. v. BEZWADA MUNICIPALITY', AIR 1944 P C 71, thus:

> "The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repurcussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms."

111. At page 197 of Craies' Statute Law (Fourth Edition), the danger of interpreting provisos independently of the main section has been pointed out as follows:

> "In 'R v. DIBDIN' (1910) P 57 at p. 125, in considering the meaning of the proviso to Section 1 of the Deceased Wife's Sister's Marriage Act, 1907, Moulton, L. J. said:
>
> "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as, for instance in 'EX. P. PARTINGTON', (1844) 6 QB 649; 'RE BROCKLEBANK', (1899) 23 Q B D 461 and 'BILL v. EAST AND WEST INDIA DOCK CO.', (1884) 9 A C 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as these which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso."

112-113. In 'BROACH CO-OPERATIVE BANK, LTD., BROACH v. COMMR. OF INCOME TAX, BOMBAY', AIR 1950 Bom 45, a Bench decision of the Bombay High Court, Chagla, C. J., laid down that:

> "the proper canon of construing a section which has several provisos is to read the section and the provisos as a whole, try and reconcile them and give a meaning to the whole of the section along with the provisos which is a comprehensive and logical meaning."

114. There is absolutely no reason for thinking that the legislature intended to create a conflict between the proviso and the main clauses. If the proviso was intended by the legislature to bear the meaning put upon it by the counsel for the appellants, one would have expected a corresponding amendment of main clauses. To bring the remaining provisions of Section 58 into line with this purpose, in the main Clause (c) the Legislature would have substituted the word 'transferor' for the word 'mortgagor', the word 'transferee' for the word 'mortgagee', the word 'transferred' for the word 'mortgaged' and would have omitted the word 'ostensibly' from it. The entire Clause (a) might have been repealed as irrelevant and unnecessary. The fact that the Legislature has avoided doing it

shows that the Legislature did not intend to sweep away the pre-existing law on the point altogether. The only way of harmonizing the proviso with the main Clauses (a) and (c) is to interpret it in the form suggested by the learned counsel for the respondents.

115. Further, if the intention of the Legislature was to make the singleness of document the final and conclusive test for the determination of the question whether the transaction is a mortgage, it could easily have expressed the same in a clear and unambiguous form and in a most positive and definite manner. In any case in view of the state of law existing prior to the introduction of the proviso and the close and intimate manner in which the conception of the legal transaction of mortgage is bound up with Intention, I would be most reluctant to give an interpretation to this proviso which will at one stroke sweep away altogether the aforesaid ingredient which is so deeply embedded in it. Much less would I be inclined to extract such an interpretation from a provision of law couched in the shape of a proviso and put in a negative form or to derive it by implication from the same. Even if the matter were ambiguous, I would prefer to give to it an interpretation which would avoid conflict and create harmony, especially as such an Interpretation is admittedly possible.

116. I am, however, clear in my mind that such was not the intention of the proviso, as there is definite indication in the proviso, itself showing that it was not meant to subvert the pre-existing position of law so far as the question of intention is concerned. This is borne out by the fact that the proviso itself uses the words 'such transaction.' The words 'such transaction' clearly refer 16 the transaction mentioned in the main para of Clause (c). These words take us back to the main part of the clause and immediately import within the proviso the two ingredients mentioned in Clause (c). These two ingredients are, firstly, that the transaction should be a mortgage as mentioned in Clause (c) and as defined in Clause (a), i.e., intended for the purpose of securing payment of money. Secondly, that the transaction should be an ostensible sale, i.e., it should have the appearance of a sale, but should in I reality be intended to be a mortgage. Thus the proviso itself presumes the existence of the above ingredients and far from negativing the element of intention seems to affirm it.

117. On behalf of the appellants an attempt has been made to draw an analogy between Article 31 of the Constitution of India and the proviso in question both of which are put in a negative form. This argument seems to ignore the important features that differentiate them. The first is that whereas in Article 31 of the Constitution of India a negative form is used in the main Article itself in Clause (c) the Legislature has used the negative form not in the main clause but in the proviso attached to it. Secondly, Article 31 deals with the fundamental rights of every citizen to possess property. It is meant to lay down one and only one positive right which admits of no doubt. On the other hand the proviso to Section 58(c) deals with an ambiguous position which obviously suggests and conveys a number of alternative possibilities with the result that the elimination of one would not exclude the other. In such a case, the use of a bare negative without any positive is insufficient to exhaust every possibility so as to lead to one and only one positive result. Under the circumstances, the analogy of Article 31 of the Constitution of India to the present case seems to me to be clearly fallacious and misleading.

118. It is further argued on behalf of the appellants that the acceptance of the interpretation suggested on behalf of the respondents would result in this anomaly that whereas the transferee can take up the plea of sale both where there is one document as well as where there are more than one document, a transferor can take up the plea of mortgage only if there is one document. This argument seems to ignore the fact that there is a difference between the manner of approach to sale and to mortgage. This difference lies in the fact that the transaction is on the face of it a sale and not a mortgage. The transaction should be a sale in the normal course. It is only by way of exception that a party is allowed to plead that the transaction though on the face of it a sale is really a mortgage. The factum of mortgage has got to be proved by adducing evidence of special circumstances. This difference was recognized time and again by their Lordships of the Privy Council who laid down that the principle embodied in the famous case of 'ALDERSON v. WHITE', (1858-2 De Gex & J 97) applies to India, and that the onus lies on the mortgagee to prove that the transaction is not what it purports to be. Thus it can be said that the Legislature by enacting the proviso merely recognised the difference by allowing the general tenor of the document to prevail and to confine the operation of exception to a single case. In any case, the Court is not concerned with the policy or the motive of the Legislature in enacting a particular piece of legislation. It has to construe the law as it stands. It cannot strain the language of the Act to adjust a fancied or a surmised inequality.

119. Further, the acceptance of the interpretation sought to be placed on the proviso might lead to certain inconvenient results. Many of the cases in which the matter has arisen in U. P. are cases filed by pre-emptors, who came to Court with the allegation that the transaction in question was a sale and not a mortgage. If the suggested interpretation is accepted, then it would be open to the parties to the transaction to collude and embody the whole transaction in one document thereby making it impossible for a pre-emption and to defeat a right to which he may be legitimately entitled in law as well as in equity.

120. Further, if the intention of the Legislature was to make the number of documents and not the intention of the parties the sole test for determining the question whether the transaction is a mortgage then the test would obviously break down where the transaction contemplated by Section 58(c) is effected orally, as it can be, in case of property of a value of less than Rs. 100/-. That an oral transaction of this nature is possible will be borne out by a reference to Section 59 of the Transfer of Property Act which says that "Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property."

Thus the suggested interpretation would also seem to impinge on the rule of convenience and equity.

121. In the light of the remarks made above, it will be instructive at this stage to survey the enormous amount of case law which has sprung upon on the interpretation of this proviso since 1929, the year of its appearance. The cases are broadly divisible into three categories. Firstly, there are cases in which the transaction is embodied in one document and the Courts have held the same to be sale and not mortgage. Secondly, there are cases in which the transaction is embodied in one document and the Courts have held the same to be mortgage and not sale. Thirdly, there are cases of

two documents in which the Courts have held the transaction to be sale. The first class of cases go directly against the contention of the appellants and provide a strong support to the respondents' contention. Even the second and third class of cases contain observations in support of the respondents' contention thereby indirectly supporting his case. I shall now take up cases under each of the three categories in the order mentioned above.

122. Taking up cases under the first category, reference may at the very outset be made to a case reported in 'BISHAN LAL v. BEN-WARI LAL', AIR 1937 All 724. In this case Harries J. had to consider a transaction of 10-11-1932, in which the condition was contained in the document that effected or purported to effect the sale, and exactly the same argument was advanced as in this case. Reviewing the case law on the subject the learned Judge expressed his opinion thus:

> "It has been argued in the first place before me that where it is shown that property is sold and in the sale-deed it is provided that if the sale consideration is paid by the vendor to the vendee within a certain time, the vendee will transfer the property to the vendor, such transaction must be a mortgage by conditional sale. Reliance is placed by the appellant upon the case in 'MATHURA KURMI v. JAGDEO SINGH', (AIR 1927 All 321). In that case Sulaiman, J. (as he then was) expressed the view that a transaction cannot amount to a mortgage by conditional sale unless it fulfilled the conditions of Section 58(c), T. P. Act, but on the other hand a transaction will be a mortgage by conditional sale if it comes within that section. At page 326 he observed:
>
> "It seems to me that if a document is in the form of an ordinary conveyance usually found in India and executed by the transferor only, and it contains a covenant for re-purchase on payment of the consideration, the transaction would come exactly within the definition of a mortgage by conditional sale. In such cases I would have the utmost difficulty in trying to take it out of the scope of Section 58."

On the other hand, Lindsay J., who constituted the Bench hearing the case with Sulaiman J. expressed the view that in order to determine whether the transaction is a sale with a right to re-purchase or a mortgage by conditional sale, what had to be determined was the intention of the parties at the time the transaction was entered into and in order to ascertain this intention regard must be had to the surrounding circumstances. In my judgment this case does not compel me to decide that this is a mortgage by conditional sale merely because there is in terms a sale and in the same document a covenant that upon payment being made by the seller to the buyer the latter shall transfer the property back to the seller. In 'BISHAMBHAR NATH v. MUHAMMAD UBIDULLAH KHAN', 45 All 581, a Bench of this Court held that in deciding whether a given transaction is an out and out sale with a condition for repurchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded. Sulaiman J., referred to this case and offered certain criticisms of it, but in my view this case being a Bench decision binds me and is in accordance with the view of Lindsay J. to which I have referred. In my judgment though there is only one document in this case, that does not conclude the matter. It appears to me that according to the authorities, the Court has, in a case such as the present one, to examine the terms of the document in the light of the surrounding circumstances and to ascertain

what was the true intention of the parties. If the Court comes to the conclusion that the parties intended an out and out sale then the document cannot be construed as a mortgage by conditional sale. But on the other hand if the Court is satisfied that there was never any intention that the property should be anything other than a security for an advance, then the transaction amounts to a mortgage, though on the face of it, it is a sale with a condition to repurchase."

He held the transaction in question to be a sale even though it was embodied in one document. It is also important to note that this was taken in appeal and was affirmed by a Bench of the Allahabad High Court consisting of Thom C. J. and Ganga Nath J. The judgment in Letters Patent Appeal is reported in 'BISHAN LAL v. BANWARI LAL', AIR 1939 All 713. The interpretation of the proviso in question was specifically considered by the Bench at this stage and the learned Judges made the following weighty pronouncement regarding the same:

> "It was maintained for the appellant that in view of the plain provisions of Section 58(c), T. P. Act, and the fact that the sum of Rs. 550/-did not represent the real value of the property, transferred by the deed of 10th November 1932 that deed must be taken to be a mortgage by conditional sale. Learned counsel founded specially upon the amendment to Section 58(c) effected in the year 1929. The amendment is as follows:
>
> Provided that no such transaction shall be deemed to be a mortgage unless the condition (i.e. of purchase) is embodied in the document which effects or purports to effect the sale.
>
> The object of this amendment was to put an end to the confusion, which had resulted from innumerable decisions of the High Courts in India on such transactions embodied sometimes in two documents and which had occasioned disputes, the question in each case being as to whether the transaction was a sale or a mortgage by conditional sale. It is to be noted that the amendment does not provide that if a transaction is embodied in one document it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale. We are therefore thrown back upon the principle that the intention of the parties to the document must be gathered from the terms of the document itself and from the surrounding circumstances."

This case seems to be on all fours with the present case.

123. In THAKRA SINGH v. SHEO NATH SINGH', AIR 1940 All 227, a Bench of the Allahabad High Court consisting of Iqbal Ahmad and Bajpai JJ. held that "It cannot be broadly laid down that where the contract of sale and the contract of repurchase are evidenced by a single document or more or less contemporaneous documents the transaction is a mortgage by conditional sale and is not a sale out and out with the condition of repurchase. In every case it is a question of intention to be gathered from the document itself and the surrounding circumstances. If the ostensible vendee, out of courtesy and kindness, agreed to convey the property, this will be an important circumstance to

indicate that the transaction was a sale and not a mortgage. In order to constitute a mortgage, there must be a debt and there must be a security."

124. The latest pronouncement on this subject is to be found in the judgment of a Bench of this Court consisting of Ghulam Hasan and Chandiramani JJ. in an unreported case 'QAI-YUMANNISA v. RASHIDULMALIK', Appln. No. 9 of 1949: (AIR 1952 All 200). The judgment is dated the 13th of October, 1950. The learned Judges had before them a transaction of the 18th of June 1930. The condition of repurchase was embodied in the document that purported to effect the sale. The question of the interpretation of the proviso in question was pointedly raised before the Bench and the following passage from the judgment of Chandiramani J. is illuminating and instructive for the purpose of this case:

> "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.
>
> 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. MAHASTI GOLI', AIR 1931 Bom 371; 'SHAMBHU SINGH v. JAGDISH BAKSH SINGH', AIR 1941 Oudh 582; 'JAGANNATH v. BUTTO KRISTO', AIR 1947 Pat 345; 'VENKATA SUBBARAO v. VEERASWAMI', AIR 1946 Mad 456 and 'MERIMAL v. MT. SHARIFAN', AIR 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 BAKSH SINGH', AIR 1941 Oudh 582). It will still depend upon the intention of the parties as gathered from the contents of the documents itself and the surrounding circumstances whether the particular transaction is a mortgage by a conditional sale or a sale with a condition of repurchase (See 'SHAMBHOO SINGH v. JAGDISH BUX SINGH', AIR 1941 Oudh 582; 'TAKRA SINGH v. SHEO NATH SINGH', AIR 1940 All 227; 'DR. SYED FAZAL AHMAD v. AFAQUL RAHMAN', AIR 1938 Oudh 57 and 'BISHAN LAL v. BANWARI LAL', AIR 1939 All 713.) "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."

The learned Judge then went on to consider the facts and circumstances of the case in great detail and finally came to the conclusion that inspite of the fact that the transaction was evidenced by a single document, it was intended to be a sale and must, therefore, be held to be a sale and not a mortgage. This is again a case on all fours with the present one and I am, if I may say so with respect, in agreement with the view expressed therein.

125. In 'KUPPA KRISHNA v. MAHASTI GOLI NAIK', AIR 1931 Bom 371, Patkar J. of the Bombay High Court observed:

> "That proviso has been added to restrict the inference to be drawn in favour of a mortgage only when the condition of repurchase is embodied in one document which effects or purports to effect the sale.....; but the sub-section and the proviso do not dispense with the condition that it must be a transaction between the creditor and the debtor. In my opinion Section 58(a) would govern Section 58(c)."

He further added that:

> "Though the document may be ostensibly a sale-deed, the question for consideration is whether the sale-deed is a pretence or a reality and that question is to be determined by the construction of the document and the surrounding circumstances..... Though the fact that the agreement of sale coupled with the agreement of repurchase is embodied in one document is a circumstance to be considered in arriving at the conclusion as to the true nature of the document, it is not a conclusive test. Though there may be an agreement of sale with a right of repurchase that circumstance in itself is not a sufficient basis for an inference that it is a mortgage. This view was taken by the Full Bench of the Madras High Court.....The Act made no difference in the law on the subject."

The learned Judge also approved of the same line of reasoning adopted by Justice Batchelor in 'KASTURCHAND v. JAKHIA', 40 Bom 74 at p. 82 and by Boys J. in 'MUMTAZ BEGAM v. MT. LACHHMI', AIR 1929 All 174. Both the learned Judges constituting the Bench held the transaction to be a sale, even though there was only one document. It may, however, be mentioned that this case related to a transaction prior to 1929. The proviso was, therefore, not applicable to the case and the observations of the learned Judge have value only as obiter.

126. In 'RAM NARAYAN v. RAMRATAN RADHAKRISHAN', AIR 1934 Nag 18, a single Judge of the Nagpur High Court expressed himself thus:

> "It is argued on behalf of the respondents that the agreement of sale with a covenant of repurchase having been embodied in the document, it must be regarded as a mortgage by conditional sale within the meaning of Section 58(c). This argument is based on the proviso added to Section 58(c) by Act XX of 1929 which runs as follows:
>
> '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.' That proviso cannot be interpreted as laying down any rigid rule that if the agreement to sell and the covenant of repurchase are embodied in more than one document the inference of a mortgage would not necessarily arise, or that when the condition of repurchase is embodied in the document of sale the transaction should necessarily be regarded as one of mortgage."

The document in question was held to be a sale. In this case again it may be noted that the document before the Court was of a date prior to 1929 and the proviso in question did not therefore

apply to the case and the remarks are only obiter. Further, I should not be taken to subscribe to the view contemplating the possibility of the transaction being a mortgage even though it is embodied in more than one document.

127. In 'GOVINDSA MAROTISA v. IS-MAIL', AIR 1950 Nag 22, on a reference by a Single Judge of the Nagpur High Court, a Bench of the said Court while considering a transaction embodied in a document of the 6th of September, 1941 held the same to be a sale.

128. In 'BHAIYALAL v. KISHORI LAL', AIR 1950 Nag 198, a learned Judge of the Nagpur High Court held that the transaction dated the 9th of January 1942 was sale even though it was embodied in one document. Headnote (a) of the said case runs as follows:

> "The effect of the proviso to Clause (c) of Section 58 is that if the condition of reconveyance is not embodied in the document which effects or purports to effect a sale, the transaction cannot be regarded as a mortgage by conditional sale. As the proviso is in a negative form it does not follow that whenever there is a condition of reconveyance in a deed of sale the transaction must be deemed to be a mortgage. This, however, does not mean that when the question arises whether a transaction is a sale or a mortgage, form is to be preferred to substance. It is an inviolable rule that upon such a question the Court must find the substance behind the form. But the onus must lie upon the person who wants to construe a document contrary to its tenor to establish the circumstances which go to prove that the sale evidenced by the document is only ostensible and not real. The Court cannot be oblivious of the fact that it is open to parties to enter into a transaction of sale with a covenant for reconveyance."

The learned Judge applied the rule enunciated in 'ALDERSON v. WHITE', (1858) 2 De Gex & J 97 and mentioned above to the facts of the case.

129. In 'PARASRAM v. TARACHAND', AIR 1936 Sind 209, it was held that the proviso to Section 58(c), Transfer of Property Act is of the nature of the law of evidence.

130. The second group of cases consists of cases in which the transaction was embodied in one document and the Court held the same to be mortgage and not sale. These cases may now be taken up.

131. In 'DR. FAZAL AHMAD v. AFAQUL RAHMAN', AIR 1938 Oudh 57, a transaction of the 23rd of December, 1932, came up for consideration before a Bench of the late Chief Court of Oudh consisting of Srivastava C. J. and Hamilton J. The following passage from the judgment of the Bench is relevant in this case:

> "It is worth mention, however, that this deed was executed after the amendment of Section 58, which runs:

> '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.' The condition would of course be the provision about retransfer. One may therefore say that if the parties to the deed intended it to be a sale and not a mortgage, they had a very simple means of attaining their object namely putting the condition of retransfer in a separate document, but they did not do so. In this connection we would refer to 'MAN SINGH v. GUMAN SINGH', AIR 1929 All 619 and 'RAM DHANI RAM v. RAM RIKH SINGH', AIR 1931 All 548. It is true that these were cases in which a would-be pre-emptor urged that certain transactions were sales and not mortgages by conditional sale and as plaintiff he had to prove his case. Nevertheless we think the following observations relevant which were made in the earlier case:
>
> It cannot be stated broadly that in every case where there is an ostensible sale subject to the condition of repurchase, the transaction cannot be a sale but must always be a mortgage by conditional sale. It seems to us that it is always open to a pre-emptor who is no party to the transaction to show by evidence, direct or circumstantial, that although the transaction was clothed in that particular garb it was in reality and substance a sale transaction. But where there are no special circumstances, and we have only a transfer of the property subject to the condition of resale, it seems to us that the case would fall within the definition of a mortgage by conditional sale as laid down in Section 58(c).
>
> The distinction between a sale-deed with a condition of repurchase and a mortgage by conditional sale is one of intention to be gathered from the deed itself and the extrinsic evidence of surrounding circumstances, and we shall now consider what evidence has been held relevant in such decisions as have been cited to us."

132. In 'SAHEBA DEOCHAND v. JAGAN-NATH GUNDHARILAL', AIR 1940 Nag 84, a transaction of the 15th of June 1930 came up for consideration before the Court and in that connection the learned Judge made the following significant observations:

> ".....The obvious effect of the added proviso is that prima facie the document is a mortgage and that the burden lies on the opposite party to show that it appears rather to be an out and out sale, in which case the tests mentioned would have to be applied."

After considering the contents of the document and the circumstances of the case, the Court came to the conclusion that the transaction in question was a mortgage.

133. In 'SHAMBHU SINGH v. JAGDISH BAKHSH SINGH', AIR 1941 Oudh 582, a Bench of the late Chief Court of Oudh consisting of Bennett and Madeley JJ. had before it a transaction of the 15th of July, 1933. The entire transaction was contained in one document. The learned Judges while expressing their dissent from the view of Mukerji in his commentary on the law of Transfer of Property made the following observations which are relevant in this case:

> "The Special Judge was of opinion that the addition of the proviso left no room for doubt that the present transaction was a mortgage by conditional sale. In terms the proviso clearly does not have this effect. Its effect is only that a transaction of this kind shall not be deemed to be a mortgage unless the condition is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. It is true that in para. 125 of his Commentary on the law of Transfer of Property, Mukerji expressed the opinion that when there is a sale, and there is a condition attached at the time of the execution of the sale-deed that, on a refund of the price, the property would be reconveyed, the transaction ought to and must come under the definition of mortgage by conditional sale, but that view has not been invariably adopted. In 'BISHAN LAL v. BANWARI LAL', AIR 1937 All 724, it was held by a single Judge of the Allahabad High Court that the provision for reconveyance, though made at the time of the execution of the deed, is not conclusive on the point. For determining whether a transaction is an out and out sale or a mortgage by conditional sale, the Court has to examine the terms of the document in the light of the surrounding circumstances and to ascertain what was the true intention of the parties. It was also said that the period during which the property may be repurchased and the adequacy of consideration are some of the tests. If the Court comes to the conclusion that the parties intended an out and out sale, then the document cannot be construed as a mortgage by conditional sale. This decision was affirmed by a Bench of the Allahabad High Court in 'BISHAN LAL v. BANWARI LAL', AIR 1939. All 713. It was expressly held by the Bench that the amendment in Section 58, T. P. Act, that is the addition of the proviso, does not mean that if a transaction is embodied in one document it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale."

After considering the contents of the document along with the circumstances of the case they came to the conclusion that the intention of the parties was to enter into a transaction of mortgage and not of sale.

134. In 'BIDHA RAM v. CHHIDDA', AIR 1950 All 430, Bind Basni Prasad J. had to consider a transaction embodied in one document of the 3rd of January 1936. After referring to the definition of mortgage by conditional sale as contained in Section 58(c) he expounded its meaning in the following manner:

> "One thing is clear from the above definition and it is this. A mortgage by conditional sale is ostensibly a sale. The law provides that even though a transaction may ostensibly be a sale it will nevertheless be treated as a mortgage if the intention was not an out and out sale but to advance the money to the transferor and to give him a right to get back the property on the repayment of the money and if the property was transferred only for the purpose of serving as a security for the money advanced. The real test in such cases is to see the intention of the parties. Intention can be judged only from the surrounding circumstances. If we were to go only by the language used in the deed then there would hardly be any case of a sale which could be treated as a

mortgage."

The learned Judge then went on to discuss the cases cited before him and observed thus:

> "The second case relied upon by the learned lower appellate Court is 'THAKRA SINGH v. SHEO NATH SINGH', AIR 1940 All 227:
>
> 188 Ind Cas 333. The principle laid down in this case also is the same as in 'BISHAN LAL v. BANWARI LAL', AIR 1939 All 713:
>
> 185 Ind Cas 487. Their Lordships held that:
>
> 'It cannot be broadly laid down that where the contract of sale and the contract of repurchase are evidenced by a single document the transaction is a mortgage by conditional sale and is not a sale out and out with the condition of repurchase.' It was further held that 'in every case it is a question of intention to be gathered from the document itself and the surrounding circumstances.' Now what are the circumstances in the present case?....."
>
> Again, after considering the entire circumstances of the case the learned Judge came to the conclusion that the transaction in question was a mortgage and not a sale.

135. A reference to the latest cases on the subject is also found in the Indian Digest 1951 and the Yearly Digest 1951.

136. In 'MAROTI PARASHRAM v. FAT-TELAL JETHMAL', Second Appeal No. 239 or 1945, D/-11-7-1949 (All), mentioned in the Indian Digest 1951 (June), at page 39, column 2, it was held that the effect of the proviso to Clause (c) of Section 58, T. P. Act, is that if the condition of retransfer is not embodied in the document itself which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. But it does not follow that if that condition is embodied in the document, the transaction is a mortgage though in such a case it would be presumed to be a mortgage, and it is open to the other side to show that it was intended to be an out and out sale. The transaction in question was held to be a mortgage.

137. In 'NILAMONY BEWA v. MRUTUNJA-YA PRADHAN', ILR (1951) Cut 281 (FB), mentioned at pages 94-95 of the Yearly Digest (November part) and at pages 48-49 of the Indian Digest (August part), a Full Bench of the Cut-tack High Court consisting of Ray C. J., Jagan-nadhadas and Narasimham JJ. held that:

> "where the mortgagor ostensibly sells the mortgaged property on condition that on payment being made the buyer shall transfer the property to the seller, and the condition is embodied in the document which effects or purports to effect the sale in accordance with the proviso to Section 58(c), Transfer of Property Act, as amended in 1929, it is to be presumed a mortgage, and the party who asserts to the contrary has

> to prove it. This proof will consist of the provisions of the document, the necessary legal implications thereof and such surrounding circumstances as are admissible to prove how the language of the deed is related to the existence of real facts. In case of fraud, however, oral evidence of real intention may be admissible. In case of ambiguity or doubt, the 'ex facie' import of the tenor of the document effecting the transaction shall prevail..."

138. Although in the above cases which fall in the second group it was held the transaction contained in one document was a mortgage and not a sale, yet all these cases lend strong support to the contention advanced on behalf of the respondents, because in all of them the Court very clearly laid down the law that the singleness of the document was not the test for determining the question of mortgage but the intention of the parties had to be ascertained the Court after considering the contents of the documents along with the circumstances relating thereto. In none of them was the fact that the transaction of mortgage was contained in the same document which embodied the condition treated as an absolute, conclusive or sole test for deciding the question at issue.

139. Lastly the third group of cases in which the transaction was embodied in more than one document and was held to be sale may now be taken up.

140. In 'MA SEIN NYO v. MAUNG SAN PE', AIR 1935 Rang 212 a single Judge of the Rangoon High Court while considering a transaction entered into after 1929 and embodied in two documents held that:

> "Where the document of sale is one of outright sale with no agreement of repurchase, and the agreement to repurchase is contained in a subsequent document, the transaction shall not be deemed to be one of mortgage."

In this view of the matter the learned Judge held that the transaction was one of sale.

141. The next case is a Bench decision of the Madras High Court reported in 'VENKATA SUBBARAO v. VEERASWAMI', AIR 1946 Mad 456. Patanjali Sastri J. (at present acting Chief Justice of India) who delivered the judgment observed:

> "The language of the proviso is perfectly clear and unambiguous"

and held that "Its object evidently was to shut out an inquiry whether a sale with a stipulation for retransfer is a mortgage where the stipulation is not embodied in the same document."

142. In 'SAMSHERKHAN v. VITHALDAS', AIR 1946 Nag 264, a Bench of the Nagpur High Court observed that, "The meaning of the proviso also appears to us to be clear", and while referring to the report of the Select Committee emphasised the view of Sir Dinshaw Mulla on the point in the following passage:

> "Sir Dinshaw Mulla, who was himself a member of the Special Committee and afterwards as Law Member was responsible for the introduction of the amending Bill, treats the matter in his commentary on the T. P. Act as meaning that the transaction cannot be regarded as a mortgage if the condition for retransfer is not embodied in the document that effects or purports to effect the sale."

143. In 'JAGARNATH SINGH v. BUTTO KRISHTO RAY', AIR 1947 Pat 345, a Bench of the Patna High Court took the view that:

> "The wording of this proviso shows clearly that if the condition is not embodied in the document which effects or purports to effect the sale, then it is not open to the Court to treat the transaction as a mortgage."

144. In 'RANGUBAI W/O KISAN v. GOVIND LAXMAN', AIR 1949 Nag 243, a single Judge of the Nagpur High Court held that when a document on the face of it purported to be a sale out and out but there was another contemporaneous document under which the vendee agreed to reconvey the property to his vendor if the vendor should pay him a certain sum on or before a certain date since the condition of a reconveyance was embodied in a separate document, the transaction, as a mere matter of construction, should be regarded as a sale and that these two documents could not in law effect a mortgage.

145. In 'MERI MAL v. MT. SHARIFAN', AIR 1949 All 194, Seth J., had before him a transaction of the 26th November, 1942, which was embodied in two documents. While holding that such a transaction must in law be deemed to be a sale, contrasted such a transaction with the one embodied in a single document. His observations on the point are quoted below:

> "The lower appellate Court has held that the transaction dated 26th November, 1942, was in effect a mortgage, although it was given the garb of a sale. The attention of the learned Judge was directed to Section 58, T. P. Act as it stands after its amendment in 1929., The learned Judge thought that in spite of the amendment brought about in the year 1929 it was open to a Court to discover the intention of the parties and to hold whether a transaction was a sale or a mortgage according to its finding about the intention of the parties. He has relied upon a decision of this Court in 'BISHAN LAL v. BANWARI LAL'; 1939 All LJ 946: (AIR 1939 All 713). That was a converse case. It was held in that case that the mere fact that the transaction of sale and the agreement to reconvey were embodied in one and the same document would not necessarily make the document a mortgage and that it was open to the parties to show that in spite of the agreement for the reconveyance having been embodied in the same document, the transaction was one of sale and not one of mortgage. This could undoubtedly be done because this would not be violating any provision of any statute. Where the transfer of the property and the agreement to reconvey it are evidenced by the same document, it may be a sale or it may be a mortgage according to the intention of the parties."

146. A reference to the rulings falling within the third category, therefore, shows that the Courts have held that such transactions must in law be regarded as sale. They have nowhere laid down that the proviso was intended to lay down a conclusive test in respect of cases of single document. On the other hand they contain observations which indirectly support the respondents' contention.

147. I have tried to exhaust all the rulings relating to the proviso and the net result of a survey of the entire law on the point laid down by the High Courts in India since the year 1929 up to now is that there is not a single ruling that supports the appellants' contention. On the other hand each one of them directly or indirectly supports the contention advanced by the respondents.

148. Lastly, an attempt has been made on behalf of the appellants to support the interpretation of the proviso suggested on his behalf by a reference to the report of the Select Committee. On the other hand the learned counsel for the respondents has contended that this report cannot be used to control the construction of the statute. It has further been argued that the Court is concerned not with the intention of the Select Committee, but with the meaning of the words actually used in the statute. In this connection reference may be made to (In the matter of the Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938), AIR 1939 FC 1. At p. 23 Sulaiman J. observed as follows:

> "I doubt if it would be at all legitimate to examine the words previously used in the entries in the lists appended to the White Paper (which were professedly illustrative, not purporting to be either complete or final) or to those in the joint Committee's Report (which were later carefully revised and largely recast), corresponding to the entries now under consideration, and then to speculate why the phraseologies were changed."

149. In a judgment of their Lordships of the Privy Council in 'KRISHNA AYYANGAR v. NALLAPERUMAL PILLAI', 43 Mad 550 (PC), it was laid down that:

> "the construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words."

150. In 'A. K. GOPALAN v. STATE OF MADRAS', AIR 1950 S C 27, Kania C. J. held that:

> "Resort may be had to these sources with great caution and only when latent ambiguities are to be resolved."

151. In 'ADMINISTRATOR-GENERAL, OF BENGAL v. PREM LAL MULLICK', 22 Ind App 107 (PC), their Lordships of the Privy Council laid down that:

> "Proceedings of the Indian Legislature cannot be referred to as legitimate aids to the construction of the Act in which they result."

152. The meaning of the proviso so far as the point at issue is concerned is quite clear and unambiguous. It has also been considered to be so by various eminent Judges (vide cases referred to above). This is further evidenced by the fact that the entire mass of case law on the point has so far been in favour not the respondents' contention and there is not a single case since 1929 holding or even suggesting anything to the contrary.

153. Even if the report of the Select Committee is referred to, it is not possible to say that the Committee intended to lay down a conclusive test for all cases. The report says that:

> "The ostensible or real nature of the transaction can, however, be only determined by finding out the intention Of the parties."

The framers of the report then pointed out the difficulties that had arisen in this connection and state the object of introducing the amendment thus:

> "In order to avoid the difficulties indicated above, we think it is desirable to lay down a statutory test by which the intention is to be gathered."

It is, therefore, evident that as they themselves say, their intention was to provide 'a' test not 'the' test nor do they anywhere say that it was intended to provide 'the sole test or a conclusive test.' Moreover, they do not say that their object was to lay down the test for determining the nature of transaction. On the other hand, they themselves say that the object was to lay down a test for gathering the intention. This further shows that the test suggested by them was intended to be only one of the many tests for the purpose of ascertaining the intention of the parties. The ascertainment of intention was itself the purpose of providing the test suggested by them. If the manner adopted to amend the law and the actual language of the amendment are to be the index of their intention then they certainly point to the conclusion that their purpose was merely to set up 'a test' and not 'the sole' test. The fact that the means adopted to introduce the amendment was that of a proviso, that this proviso was couched in a negative form, that the entire Clause (a) and the main para, of Clause (c) were left absolutely untouched, that the proviso itself used the words "such transaction" arid referred back to the main clauses and other indications pointed out above clearly go to negative the intention which it is sought to attribute to them on behalf of the appellants. It is also significant that Sir Dinshaw Mulla, who was himself a Member of the Select Committee and as Law Member was responsible for introducing the Bill on a reference to authorities states the law on the point to be as follows:

> "The effect of the proviso to Clause (c) added by the Amending Act XX of 1929 is 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. But it does not follow that if the condition is embodied in the same document, the transaction is a mortgage. Prima facie it would be a mortgage, but it is open to the

> other side to show that it was intended to be an out and out sale in which case the tests mentioned above would have to be applied."

According to this view, therefore, the effect of the proviso would be merely to shift the burden of proof in cases where the transaction is embodied in one document.

154. Thus a consideration of the provisions of Section 58 of the Transfer of Property Act, a historical retrospect of the law on the subject, a reference to the rulings of their Lordships of the Privy Council as well as of all the High Courts in India, an application of the rules of interpretation relevant to the question at issue drive one irresistibly to the conclusion that where the transaction is embodied in one document the transaction does not, as a result of the proviso added by the Amendment Act of 1929, necessarily become a mortgage by conditional sale irrespective of the intention of the parties.

155. For the reasons given above I am constrained to express my respectful disagreement with the view taken by my learned brothers Chandiramani and Agarwala JJ. and answer the question in the negative.

BY THE COURT

156. According to the view of the majority of the Full Bench, the answer to the question referred to the Full Bench is: That if a deed effecting or purporting to effect a sale after the amendment in Clause (c) of Section 58 of the Transfer of Property Act came into force, contains any one of the three conditions mentioned in that clause, it is in every case a deed of mortgage by conditional sale.

Let the answer be returned to the Bench concerned.