

P. L. Bapuswami vs N. Pattay Gounder on 7 December, 1965

Equivalent citations: 1966 AIR 902, 1966 SCR (2) 918, AIR 1966 SUPREME COURT 902, 1966 2 SCWR 59, 1967 (1) SCJ 842, 1966 2 SCR 918

Author: V. Ramaswami

Bench: V. Ramaswami, S.M. Sikri, J.C. Shah, P.B. Gajendragadkar, K.N. Wanchoo

PETITIONER:

P. L. BAPUSWAMI

Vs.

RESPONDENT:

N. PATTAY GOUNDER

DATE OF JUDGMENT:

07/12/1965

BENCH:

RAMASWAMI, V.

BENCH:

RAMASWAMI, V.

SIKRI, S.M.

SUBBARAO, K.

SHAH, J.C.

SIKRI, S.M.

GAJENDRAGADKAR, P.B. (CJ)

WANCHOO, K.N.

SATYANARAYANARAJU, P.

CITATION:

1966 AIR 902

1966 SCR (2) 918

ACT:

Transfer of Property Act, 1882, s. 58(c)-Distinction between Mortgage by conditional sale and a sale with a clause for repurchase.

HEADNOTE:

M executed a document Ex. B-1 on May 28, 1946, in respect of his half share in certain lands in favour of the defendant for a consideration of Rs. 4,000/-. The document was in the form of a sale deed but it contained a stipulation that the defendant should reconvey the property

to M on his repaying the amount of Rs. 4,000/- after five years and before the end of the seventh year. After M's death his sons executed an assignment deed in favour of the plaintiff in August 1950 for a sum of Rs. 1,600/- and on the basis of this deed, the plaintiff filed a suit for redemption of the disputed property. He claimed, inter alia, that Ex. B-1 must be deemed in law to be a mortgage by conditional sale and that he was entitled to redeem as the assignee of the equity of redemption; or alternatively, that Ex. B-1 was a sale with a condition to repurchase and the defendant was bound to reconvey the property to him on payment of Rs. 4,000/- and that although this amount had been tendered several times, the defendant had refused to accept it. On the other hand the defendant denied that Ex. B-1 was a mortgage by conditional sale and contended that it was an outright sale with a covenant for repurchase and as the plaintiff did not tender the amount within the time stipulated in the document, the suit was barred by time. The trial court held that Ex. B-1 was a mortgage by conditional sale and granted a preliminary decree; but the High Court, in appeal, reversed this decision. On appeal to this Court,

HELD : Ex. B-1 was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer.

The question whether by the incorporation of a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. [921 C-F]

In the present case the following circumstances indicated that the transaction was a mortgage by conditional sale :-

- (i) As required by the proviso to s. 58(c). the condition for repurchase was embodied in the same document;
- (ii) the consideration for Ex. B-1 was Rs. 4,000/. while the real value of the property was Rs. 8,000/-;

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- (iii) the patta was not transferred to the defendant after the execution of Ex. B-1 by M;
- (iv) M, and after his death, his sons, continued to pay kist for the land; and

(v) the consideration for reconveyance was the same amount as the consideration for Ex. B-1, i.e. Rs. 4,000/-. [923 B-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 798 of 1963.

Appeal by Special Leave from the judgment and Order dated the 19th August, 1960 of the Madras High Court in Second Appeal No. 871 of 1958.

R. Ganapathy Iyer, for the appellant. C. B. Agarwala and R. Gopalakrishnan, for the respondent.

The Judgment of the Court was delivered by Ranmswami, J. This appeal is brought, by special leave, on behalf of the plaintiff from the judgment of the High Court of Madras dated August 19, 1960 in Second Appeal no. 871 of 1958.

The disputed property consisted of 16 acres and 27 cents of land in Sokkanur village of Coimbatore district of which half share belonged to Palani Moopan and the other half to his daughter Palani Mooppachi. Palani Moopan executed the document-Ex. B-1 with regard to his share of the property in favour of the 1st defendant for a consideration of Rs. 4,000/- on May 28, 1946. Out of the consideration, a sum of Rs. 2,000/- was reserved with the vendee to pay off an earlier mortgage and the balance of Rs. 2,000/- was paid to the vendor in cash. The first defendant discharged the earlier mortgage in accordance with the directions in Ex. B-1. The document, B-1 was in the form of a sale deed but it contained a stipulation that the 1st defendant should reconvey the property to Palani Moopan on his repaying the amount of Rs. 4,000/- after 5 years and before the end of the 7th year. After the death of Palani Moopan his sons executed an assignment deed in favour of the plaintiff, Ex. A-1 dated August 10, 1950 for a sum of Rs. 1,600/-. On the basis of Ex. A-1 the plaintiff has brought the present suit for redemption of the disputed property. The case of the plaintiff was that Ex. B-1 must be deemed in law to be a mortgage by conditional sale and that he was entitled to redeem as the assignee of the equity of redemption. The plaintiff further claimed that being an agriculturist, he was entitled to the benefits of Madras Act TV of 1938 as amended. The plaintiff pleaded alternatively that if Sup.Cl/66 12.

Ex. B-1 was held to be an out right sale with a condition to repurchase, the first defendant was bound to reconvey the property to him on payment of the amount of Rs. 4,000/-. The plaintiff alleged that he tendered the amount to the first defendant several times but the latter refused to accept the same. The suit was contested by the 1st defendant who denied that Ex. B-1 was a mortgage by conditional sale. It was alleged that Ex. B-1 was an out right sale with a covenant to repurchase and as no tender was made by the plaintiff within the time stipulated in the document, the suit was barred by time.

Upon these rival contentions the trial court held that Ex. B-1 was a mortgage by conditional sale and

accordingly granted a preliminary decree to the plaintiff for redemption under O. 34. r. 7 of the Civil Procedure Code. The first defendant took the matter in appeal to the Subordinate Judge of Coimbatore but the appeal was dismissed. The 1st defendant preferred second appeal in the Madras High Court which set aside the decrees of the lower Courts and ordered that the suit should be dismissed, holding that the transaction was an out right sale and not a mortgage by conditional sale. As regards the alternative plea based on the covenant for reconveyance, the High Court considered that there was no proof that the plaintiff had tendered the amount within the period stipulated in the document.

The question of law involved in this appeal is whether the document, Ex. B-1 executed by Palani Moopan in favour of the 1st defendant is, in its true effect, a mortgage by conditional sale or a sale with a condition for retransfer.

By s. 58(c) of the Transfer of Property Act a mortgage by conditional sale is defined as follows :

"58. (c) Where the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgaged-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."

The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of surrounding circumstances. If the language is plain and

unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. In the present case, the document Ex. B-1 reads as follows "..... I have settled to sell to you on this day for a suit of Rs. 4,000-0-0 the undermentioned immovable pro-

perties and have received the consideration of rupees four thousand only, as detailed below :-

In the matter of my having directed you yourself to pay the sum of Rs. 2,000/-, being my half share payable towards the usufructuary mortgage deed executed on 7th September 1944, in respect of the share of properties detailed below and in respect of some other share of properties, jointly by me and Palani Mooppachi, wife of one Palani Mooppan of the aforesaid place in favour of M. Maniyam P. V. Ramaswami Goundar, son of Venkatachala Goundar, residing in Pattampalayam village cusba, Palladam taluk, for a sum of Rs. 4,000/- and registered as Document no. 1122 of 1944, Book 1, Volume 210, pages 415 and 416 in the Office of the Sub-Registrar of Kunnathur to the aforesaid usufructuary mortgagee, get release of the properties mentioned herein and take possession of the same, the amount received by me is Rs. 2,000/-. The amount which I have received in cash on this day is Rs. 2,000/-. As, in all, I have received the sale consideration of Rs. 4,000/- as detailed above, you yourself shall, in future, hold and enjoy absolutely the undermentioned properties. In future, neither myself nor my heirs shall have any right or future claim, whatever, in respect of these properties. There is no other encumbrance, whatever, except the encumbrance mentioned above, in respect of these properties. In case anything is left out, I am bound to get the same discharged from and out of my other properties.

Whereof, in all these, and in the well in good condition, situate in Government Survey no. 93/1 and in the cocoanut, palmyrah, tamarind and wood-apple trees and in the fruit bearing and timber trees, which are in the aforesaid fields, the half-share in common. In future I have neither share nor right, whatever, in the aforesaid fields. The aforesaid Palani Mooppachi shall discharge the above mentioned balance usufructuary mortgage amount of Rs. 2,000/- from and out of the balance of the usufructuary of mortgage properties. Should I pay in cash the aforesaid sale consideration of rupees four thousand after a period of five years within a period of seven years from the date of the execution of the deed, during the date of expiry of the said deed of any year (the said properties) should be reconveyed for the very same amount to me. This condition is not valid after the aforesaid period."

We consider that in the present case there are several circumstances to indicate that Ex. B-1 was a transaction of mortgage by conditional sale and not a sale with a condition for, retransfer. In the first place, there is the important circumstance that the condition for repurchase is embodied in the same, document. In the second place, there is the significant fact that the consideration for Ex. B-1 was Rs. 4,000/-, while

the real value of the property was, according to the Munsif and the Subordinate Judge, Rs. 8,000/-. The High Court has dealt with this question and reached the finding that the value of the property was Rs. 5,500/-, but it is submitted by Mr. Ganapathi Iyer on behalf of the appellant that the question of valuation was one of fact and the High Court was not entitled to go into the question in the second appeal. The criticism of learned Counsel for the appellant is justified and we must proceed on the basis that the valuation of the property was Rs. 8,000/- and since the consideration for Ex. B-1 was only Rs. 4,000/- it was a strong circumstance suggesting that the transaction was a mortgage and not an outright sale. In the third place, there is the circumstance that the patta was not transferred to the 1st defendant after the execution of Ex. B-1 by Palani Moopan. It appears that defendant no. 1 did not apply for the transfer of patta and the patta admittedly continued in the name of Palani Moopan even after the execution of Ex. B-1. Exhibits A-6 and A-7 are certified copies of thandal extract of patta for the years 1945-54 and they prove this fact. These exhibits also show that the plaintiff had obtained patta for the land on the basis of Ex. A-2. The registered deed of transfer of patta was executed by the sons of Palani Moopan in favour of the plaintiff. There is also the circumstance that the kist for the land was continued to be paid by Palani Moopan and after his death, by the sons of Palani Moopan. Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000/-, the same amount as the consideration for Ex. B-1. Having regard to the language of the document, Ex. B-1 and examining it in the light of these circumstances we are of the opinion that the transaction under Ex. B-1 was mortgage by conditional sale and the view taken by the High Court with regard to the legal effect of the transaction must be reversed. It follows, therefore, that the plaintiff is entitled to a preliminary decree for redemption under O. 34. r. 7, Civil Procedure Code, for taking accounts and for declaration of the amounts due to the 1st defendant under Ex. B-1.

For these reasons we set aside the judgment and decree of the High Court and restore the judgment and decree of the Subordinate Judge of Coimbatore granting the plaintiff a preliminary decree for redemption of the mortgage. A period of six months is granted for payment of the amount under the preliminary decree.

The appeal is accordingly allowed with costs. Appeal allowed.