Vidhyadhar vs Manikrao & Anr. on 17 March, 1999

Equivalent citations: AIR1999SC1441, 1999(3)ALT1(SC), JT1999(2)SC183, 1999(2)SCALE93, (1999)3SCC573, [1999]1SCR1168, 1999(1)UJ665(SC), AIR 1999 SUPREME COURT 1441, 1999 (3) SCC 573, 1999 AIR SCW 1129, 1999 (2) LRI 243, 1999 (2) SCALE 93, 1999 (3) ADSC 37, 1999 SCFBRC 149, 1999 (2) ALL CJ 1147, (1999) 2 JT 183 (SC), 1999 (4) SRJ 175, 1999 (1) UJ (SC) 665, (1999) 2 SCJ 77, (1999) 2 CURCC 152, (1999) 3 ANDHLD 140, (1999) 3 ICC 84, (1999) 1 ANDHWR 263, (1999) 2 CIVILCOURTC 91, (1999) 3 MAD LW 576, (1999) 1 RENTLR 571, (1999) 2 ICC 658, (1999) 2 SCALE 93, (1999) 1 ALL RENTCAS 632, (1999) 2 ANDHWR 7, (2000) 2 CIVLJ 119, (1999) 35 ALL LR 738, (1999) 3 ANDH LT 1, (1999) 3 SUPREME 102, (1999) 3 BOM CR 564

Author: S. Saghir Ahmad

Bench: D.P. Wadhwa, S. Saghir Ahmad

JUDGMENT

S. Saghir Ahmad, J.

1. Leave granted.

2. Vidhyadhar, the appellant before us, who shall hereinafter be referred to as plaintiff, had instituted a suit against the respondents, who shall hereinafter be referred to as defendant Nos. 1 and 2 respectively, for redemption of the mortgage by conditional sale or in the alternative for a decree for specific performance of the contract for repurchase which was decreed by the Trial Court on 29.4.1975. The decree was upheld by the Lower Appellate Court by its judgment dated 28.9.1976 but the High Court, by the impugned judgment dated 3.5.1991, set aside both the judgments and passed a unique order to which a reference shall be made presently in this judgment. The plaintiff is in appeal before us.

3. The property in dispute is 4.04 acres of land of survey plot No. 15 of Kasba Amdapur, District Buldana. The whole area of survey plot No. 15 is 16.09 acres and except the land in dispute, namely, an area of 4.04 acres, the entire land is in possession of the plaintiff. Defendant No. 2 was the owner of the whole Plot No. 15. On 24th of March, 1971, he executed a document styled as "Kararkharedi" in favour of defendant No. 1 for a sum of Rs. 1500 and delivered possession thereof to the latter. There was a stipulation in the document that if the entire amount of Rs. 1500 was returned to defendant No. 1 before 15th of March, 1973, the property would be given back to defendant No. 2.

4. This land was subsequently transferred by defendant No. 2 in favour of the plaintiff for a sum of Rs. 5,000 by a registered sale deed dated 19.6.1973. After having obtained the sale deed, the plaintiff filed the aforesaid suit in which it was given out that defendant No. 2 had offered the entire amount to defendant No. 1 but the latter did not accept the amount and, therefore, defendant No. 2 had to send it by money order on 7.6.1973 which was refused by defendant No. 1. A notice, dated 5.6.1973, had also been sent by defendant No. 2 to defendant No. 1. It was pleaded that since the document, executed by defendant No. 2 in favour of defendant No. 1, was a mortgage by conditional sale, the property was liable to be redeemed. It was also pleaded in the alternative that if it was held by the Court that the document did not create a mortgage but was an out and out sale, the plaintiff as transferee of defendant No. 2, was entitled to a decree for reconveyance of the property as defendant No. 2 had already offered the entire amount of sale consideration to defendant No. 1 which, the latter, had refused and which amount the plaintiff was still prepared to offer to defendant No. 1 and was also otherwise ready and willing to perform his part of the contract.

5. Defendant No. 2 admitted the whole claim of the plaintiff by filing a one-line written statement in the trial court. But defendant No. 1 contested the suit and pleaded that the document in his favour was not a mortgage by conditional sale but was an out and out sale and since the amount of consideration had not been tendered within the time stipulated therein, the plaintiff could not claim reconveyance of the property in question. The Trial Court framed the following issues:

> 1. Does the plaintiff prove that the defendant No. 2 mortgaged the suit field with the defendant No. 1 for Rs. 1500 on 24.3.71?
>
> 2. Does the plaintiff prove that the suit field was purchased by him from the defendant No. 2 for Rs. 5,000 on 19.6.73?
>
> 3. Is the plaintiff entitled to redeem the mortgage executed by the defendant No. 2 in favour of defendant No. 1?
>
> 4. Was the defendant No. 2 ready and willing to repurchase the suit field prior to 15.3.71?
>
> 5. Is the plaintiff entitled to claim retransfer of the suit field from the defendant No. 1?
>
> 6. Relief and costs?

6. The finding on issue No. 1 was that defendant No. 2 had mortgaged the land in question to defendant No. 1 for Rs. 1500 on 24.3.1971. On issue No. 2, it was found that defendant No. 2 had transferred the property in favour of the plaintiff for a sum of Rs. 5,000 on 19.6.1973 by a registered sale deed and, therefore, the plaintiff was entitled to redeem the mortgage executed by defendant No. 2 in favour of defendant No. 1. Issue Nos. 4 and 5 were decided in the negative as the Trial Court had held the document in question to be a mortgage deed. In view of these findings, the suit was decreed and the Trial Court passed the following order:

> It is hereby declared that the amount due to the defendant-1 on the mortgage mentioned in the plaint dated 24-3-71 is Rs. 1500/-. It is further ordered and decreed that the plaintiff to pay into court on or before 29-10-75 or any later date into which time for payment may be extended by the Court the said sum of Rs. 1500.
>
> That on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due interest as may be payable under Rule 10, together with such subsequent interest as may be payable under Rule 11 of the Order 34 of the first schedule to the CPC 1908, the defendant-1 shall bring into Court all documents in his possession or power relating to the mortgage property in the plaint mentioned and all such documents shall be delivered over to the plaintiff or to such person as he appoints, and the defendant-1 shall, if so required, reconvey or retransfer the said property from the said mortgage and clear of and from all encumbrances created by the defendant-1 or any person claiming under him or any person under who he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall, deliver up the plaintiff quiet and peaceful possession of the said property. And it is further ordered and decreed - that, in default of payment as aforesaid, the defendant-1 may apply to the Court for a final decree that the plaintiff be debarred from all right to redeem the property.

7. This decree was confirmed in appeal but, as pointed out above, was reversed by the High Court in the second appeal.

8. The High Court was of the opinion that the plaintiff had not paid the entire amount of sale consideration to defendant No. 2. Out of a sum of Rs. 5,000, for which sale deed was executed, a sum of Rs. 500 alone had been paid to defendant No. 2 before the Sub- Registrar and the rest of the amount was not paid. The High Court further held that the document "Kararkharedi" which purports to have been executed for a sum of Rs. 1500 by defendant No. 2 in favour of defendant No. 1 was, in fact, executed for a sum of Rs. 800 which was paid before the Sub-Registrar. The High Court, then, disposed of the suit by directing that the land in question shall be restored to defendant No. 2 who shall pay back a sum of Rs. 800 (in instalments) to defendant No. 1 and a sum of Rs. 500 (in instalments) to the plaintiff.

9. Learned Counsel for the appellant has contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was not challenged by defendant No. 2 who, on the contrary, had admitted the entire claim set out by the plaintiff in his plaint and, therefore, the High Court was in error in setting aside the sale deed. It is also contended that defendant No. 1 who had challenged the sale deed as fictitious had not appeared as a witness in the case and had avoided the witness box in order to avoid cross-examination and, therefore, an adverse inference should have been drawn against him and this plea ought to have been rejected by the High Court which, it is also contended, could not have legally set aside the findings of fact in second appeal. It is also contended that defendant No. 1 being a stranger to the sale deed should not have been allowed to raise the plea relating to inadequacy or non-payment of consideration money.

10. Learned Counsel for defendant No. 1, on the contrary, has tried to justify the interference by the High Court at the stage of second appeal by contending that the findings recorded by the Courts were not borne out by the evidence on record and were perverse which could be set aside under Section 100 C.P.C. He also contended that the document of title in favour of defendant No. 1 was misread as a mortgage deed although it constituted an out and out sale. Moreover, on the commission of default, as contemplated by the document in question, the whole transaction, even if it was a mortgage, converted itself into an absolute sale as agreed upon between the parties. The sale having thus become absolute in favour of defendant No. 1, no title was left in defendant No. 2 to convey it to the plaintiff through the sale deed in question.

11. Let us examine the respective contentions. Beginning with the pleadings, defendant No. 2 in his written statement filed before the Trial Court, admitted the claim of the plaintiff.

12. Annexure P-III to the Special Leave Petition is the true translation of the copy of written statement filed by defendant No. 2 in the suit. It reads as under:

> IN THE COURT OF HON'BLE CIVIL JUDGE SENIOR DIVISION BULDANA:
>
> R.C. S.No. 195/73 F.F Plaintiff : Vidhyadhar Vishnupant Ratnaparkhi
>
> - v. -
>
> Defendant: (1) Manikrao Babarao Deshmukh (2) Pandu Ganu Bhalerao WRITTEN STATEMENT OF DEFENDANT NO. 2 PANDU GANU BHALERAO (1) The suit filed by Plaintiff is admitted. Hence this written statement.

Buldana Dt. 20.12.73 Sd/-

(Pandu Ganu Bhalerao) I, defendant No. 2 state on oath that the contents of para 1 of the written statement are true as per my personal knowledge.

Hence this affidavit is signed and executed at Buldana on this 20.12.73.

Sd/-

(Pandu Ganu Bhalcrao)

13. The Lower Appellate Court has noticed this and observed in its judgment as under:

> Defendant No. 2 filed his written statement at Ex.15 which is extremely brief comprising only a sentence, stating that the suit filed by the plaintiff is admitted by him.

14. Even while plaintiff was in the witness box, defendant No. 2 declined to cross examine the plaintiff which shows that defendant No. 2 after admitting the case of the plaintiff, had no interest in the litigation particularly as he had already transferred the property in favour of the plaintiff.

15. It was defendant No. 1 who contended that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was fictitious and the whole transaction was a bogus transaction as only Rs. 500 were paid as sale consideration to defendant No. 2. He further claimed that payment of Rs. 4,500 to defendant No. 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by defendant No. 1 as he did not enter into the witness box. He did not state the facts pleaded in the written statement on oath in the Trial Court and avoided the witness box so that he may not be cross examined. This, by itself, is enough to reject the claim that the transaction of sale between defendant No. 2 and the plaintiff was a bogus transaction.

16. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh and Anr. . This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh and Ors. AIR (1930) Lahore 1 and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh AIR (1931) Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in Arjun Singh v. Virender Nath and Anr. held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in Bhagwan Dass v. Bhishan Chand and Ors. , drew a presumption under Section 114 of the Evidence Act against a party who did not enter into the witness box.

17. Defendant No. 1 himself was not a party to the transaction of sale between defendant No. 2 and the plaintiff. He himself had no personal knowledge of the terms settled between defendant No. 2 and the plaintiff. The transaction was not settled in his presence nor was any payment made in his presence. Nor, for that matter, was he a scribe or marginal witness of that sale deed. Could, in this situation, defendant No. 1 have raised a plea as to the validity of the sale deed on the ground of inadequacy of consideration or part-payment thereof? Defendant No. 2 alone, who was the executant of the sale deed, could have raised an objection as to the validity of the sale deed on the ground that it was without consideration or that the consideration paid to him was highly inadequate. But he, as pointed out earlier, admitted the claim of the plaintiff whose claim in the suit was based on the sale deed, executed by defendant No. 2 in his favour. The property having been transferred to him, the plaintiff became entitled to all the reliefs which could have been claimed by defendant No. 2 against defendant No. 1 including redemption of the mortgaged property.

18. Learned Counsel for defendant No. 1 contended that since the plaintiff had filed the suit on the basis of sale deed, executed by defendant No. 2 in his favour and had sought possession over that property from defendant No. 1, it was open to the latter to show that plaintiff had no title to the property in suit and, therefore, the suit was liable to be dismissed. It was contended that in his

capacity as a defendant in the suit, it was open to defendant No. 1 to raise all the pleas on the basis of which the suit could be defeated.

19. In Lal Achal Ram v. Raja Kazim Hussain Khan (1905) 32 Indian Appeals 113, the Privy Council laid down the principle that a stranger to a sale deed cannot dispute payment of consideration or its adequacy. This decision has since been considered by various High Courts and a distinction has been drawn between a deed which was intended to be real or operative between the parties and a deed which is fictitious in character and was never designed as a genuine document to effect transfer of title. In such a situation, it would be open even to a stranger to impeach the deed as void and invalid on all possible grounds. This was also laid down in Kamini Kumar Deb v. Durga Charan Nag and Ors. AIR (1923) Calcutta 521 and again in Saradindu Mukherjee v. S.M. Kunja Katnini Roy and Ors. . The Patna High Court in Jugal Kishore Tiwari and Anr. v. Umesh Chandra Tiwari and Ors. and the Orissa High Court in Sanatan Mohapatra and Ors. v. Hakim Mohammad Kazim Mohammad and Ors. have also taken the same view.

20. The above decisions appear to be based on the principle that a person in his capacity as a defendant can raise any legitimate plea available to him under law to defeat the suit of the plaintiff. This would also include the plea that the sale deed by which title to the property was intended to be conveyed to plaintiff was void or fictitious or, for that matter, collusive and not intended to be acted upon. Thus, the whole question would depend upon the pleadings of the parties, the nature of the suit, the nature of the deed, the evidence led by the parties in the suit and other attending circumstances. For example, in a landlord-tenant matter where the landlord is possessed of many properties and cannot possibly seek eviction of his tenant for bona fide need from one of the properties, the landlord may ostensibly transfer that property to a person who is not possessed of any other property so that that person, namely, the transferee, may institute eviction proceedings on the ground of his genuine need and thus evict the tenant who could not have been otherwise evicted. In this situation, the deed by which the property was intended to be transferred, would be a collusive deed representing a sham transaction which was never intended to be acted upon. It would be open to the tenant in his capacity as defendant to assert, plead and prove that the deed was fictitious and collusive in nature. We, therefore, cannot subscribe to the view expressed by the Privy Council in the case of Lal Achal Ram (supra) in the broad terms in which it is expressed but do approve the law laid down by the Calcutta, Patna and Orissa High Courts as pointed out above.

21. In the instant case, the property which was mortgaged in favour of defendant No. 1 was transferred by defendant No. 2, who was the owner of the property, to plaintiff. This transfer does not, in any way, affect the rights of defendant No. 1 who was the mortgagee and the mortgage in his favour, in spite of the transfer, subsisted. When the present suit for redemption was filed by the plaintiff, defendant No. 2, as pointed out above, admitted the claim of the plaintiff by filing a one-sentence written statement that the claim of the plaintiff was admitted. When the plaintiff entered into the witness box, defendant No. 2 did not cross examine him. He did not put it to the plaintiff that the entire amount of consideration had not been paid by him, defendant No. 1 alone raised the question of validity of the sale deed in favour of the plaintiff by pleading that it was a fictitious transaction as the sale consideration had not been paid to defendant No. 2 in its entirety. Having pleaded these facts and having raised the question relating to the validity of the sale deed on

the ground that the amount of consideration had not been paid, defendant No. 2 did not, in support of his case, enter into the witness box. Instead, he deputed his brother to appear as a witness in the case. He did enter into the witness box but could not prove that the sale consideration had not been paid to defendant No. 2. On a consideration of the entire evidence on record, the Trial Court recorded a positive finding of fact that the sale deed, executed by defendant No. 2 in favour of the plaintiff, was a genuine document and the entire amount of sale consideration had been paid. This finding was affirmed by the Lower Appellate Court but the High Court intervened and recorded a finding that although the property which was mentioned to have been sold for a sum of Rs. 5,000/-, the plaintiff had, in fact, paid only Rs. 500 to defendant No. 2. The amount of Rs. 4,500 which was indicated in the sale deed to have been paid to defendant No. 2, prior to registration, was not correct. It was for this reason that the High Court while redeeming the property directed that the amount of sale consideration which was paid by the plaintiff to defendant No. 2 shall be returned by defendant No. 2 and the property would revert back to him.

22. The findings of fact concurrently recorded by the Trial Court as also by the Lower Appellate Court could not have been legally upset by the High Court in a second appeal under Section 100 C.P.C. unless it was shown that the findings were perverse, being based on no evidence or that on the evidence on record, no reasonable person could have come to that conclusion.

23. The findings of fact concurrently recorded by the lower Courts on the question of title of the plaintiff on the basis of sale deed, executed in his favour by defendant No. 2, have been upset by the High Court on the ground that full amount of consideration does not appear to have been paid by plaintiff to defendant No. 2. It will be worthwhile to reproduce the findings recorded by the High Court on this question. The High Court observed:

> 14. As already stated above, the plaintiff had paid a nominal amount of Rs. 500 before the Sub-Registrar and got the document executed considering the plight of the defendant No. 2 that his seven acres of land was already mortgaged with the plaintiff and, in fact, no further consideration of Rs. 4,500, as alleged, had been paid to the defendant No. 2. This conclusion is supported by the conduct of the defendant No. 2, who had served the plaintiff with a notice alleging that the sale deed executed in his favour was a sham and bogus one and without any consideration. Even a complaint came to be made before the police about the said bogus transaction, which was subsequently withdrawn in view of the fact that the defendant No. 2's lands to the extent of 7 acres were already mortgaged with the plaintiff. All these would show that the plaintiff was pursuing the defendant No. 2 to transfer his property in his favour to the extent of 4 acres 4 gunthas and under pressure the defendant No. 2 admitted to have received the sum of Rs. 4,500. As stated above, this admission was made by the defendant No. 2 in one sentence. Therefore, considering all these aspects, the learned lower appellate Court has held that no consideration has passed in favour of the defendant No. 2 except the sum of Rs. 500 only alleged to have been paid before the Sub- Registrar. It is apparent that the plaintiff might have purchased the property only for Rs. 2,000 i.e. Rs. 1,500 which were to be paid to the defendant No. 1 for redemption of mortgage and Rs. 500 paid to the defendant No. 2 before the

Sub-Registrar.

15. Considering all the above facts and circumstances, I am of the view that the conclusion arrived at by the learned lower appellate Court directing the defendant No. 1 to receive the amount of redemption and to deliver the possession of the suit field to the plaintiff is not correct. It is pertinent to note that the transaction between the defendant No. 1 and 2 itself was a money-lending transaction and that the sale-deed was a mortgage sale. Therefore, the defendant No. 1 cannot become the owner of the property. Even, as held by the learned Trial Court, that nothing has been placed on record by the defendant No. 1 to support his contention that he had paid Rs. 700 at home, and the consideration of Rs. 800 had been paid before the Sub-Registrar to defendant No. 2, the learned Trial Court observed that it is doubtful whether this amount of Rs. 700 has also been paid to the defendant No. 2 by the defendant No. 1. This shows that the said mortgage was only for Rs. 800 and that the amount of Rs. 700 has not passed to the defendant No. 2 from defendant No. 1. It is clear that except Rs. 500 nothing has been paid by the plaintiff to defendant No. 2 as the amount of Rs. 4,500 alleged to have been paid at home to the defendant No. 2 has not been established. Therefore, the view taken by both the Courts below under no circumstances, can be sustained.

24. The circumstances relied upon by the High Court had already been considered by the Courts below and ultimately the Lower Appellate Court proceeded to say as under:

But it would appear as though that all this discussion is worthless in view of the fact that deft. No. 2 himself admitted in his deposition that he executed the sale deed in favour of the plaintiff and accepted the price. His written statement and deposition is quite eloquent on that point. On the fact of these admission, there cannot be any other circumstance which would assist the Court to hold that the document executed in favour of the plaintiff by defendant No. 2 as bogus, sham and without consideration, notwithstanding the fact that the circumstances and the facts of the case infallibly point that the document of sale does not convey the real transaction that had taken place between plaintiff and defendant No. 2. As such although with reluctance, it has to be held that the plaintiff had purchased the property from defendant No. 2.

25. . In the face of the findings recorded by the Trial Court as also by the Lower Appellate Court on the question of execution of sale deed by defendant No. 2 in favour of the plaintiff with the further finding that it was a valid sale deed which properly conveyed the title of the property in question to the plaintiff, it was not expected of the High Court to set aside those findings merely on the ground that the circumstances which had already been considered by the lower Courts, appeared to suggest some other conclusion from proved facts.

26. Let us scrutinise the circumstances relied upon by the High Court.

27. In order to prove his case, the plaintiff had examined defendant No. 2 as a witness who admitted to have executed the sale deed in favour of the plaintiff and further admitted to have received the entire amount of sale consideration. The High Court has adversely commented upon the production of defendant No. 2 as a witness by saying as under:

> Next witness examined by the plaintiff was defendant No. 2. The plaintiff, while examining this witness, has not incorporated the name of this witness in the list of witness nor any application was made for the examination of defendant No. 2. The willingness of the defendant No. 2 was also not placed on record, to appear as a witness for the plaintiff.

28. This is wholly an erroneous view.

29. Summoning and attendance of witnesses has been provided for in Order 16 of the CPC. Order 16 Rule 1 which speaks of list of witnesses and summons to witnesses provides as under:

> Rule 1. List of witnesses and summons to witnesses.
>
> (1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court. (2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned. (3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in Sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. (4) Subject to the provisions of Sub-rule (2), summons referred to in this rule may be obtained by parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

30. Rule 1A which allows production of witnesses without summons provides as under:

> Rule 1A. Production of witnesses without summons.
>
> Subject to the provisions of Sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule (1), bring any witness to give evidence or to produce documents.

31. These two Rules read together clearly indicate that it is open to a party to summon the witnesses to the Court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Sub-rule (3) of Rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by a party in the Court, it may allow the party to produce a

witness though he may not have been summoned through the Court. Rule 1A which was introduced by the CPC (Amendment) Act, 1976 with effect from 1.2.1977 has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is subject to the provisions of Sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the Court may be necessary but this by itself will not mean that Rule 1A was in derogation of Sub-rule (3) of Rule 1. The whole position was explained by this Court in Mange Ram v. Brij Mohan and Ors. , in which it was held that Sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations. It was held:

> There is no inner contradiction between Sub-rule (1) of Rule 1 and Rule 1A of Order XVI. Sub-rule (3) of Rule 1 of Order XVI confers a wider jurisdiction on the Court to cater to a situation where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1A and in such a situation the party of necessity has to seek the assistance of the Court under Sub-rule (3) to procure the presence of the witness and the Court may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under Sub-rule (1) of Rule 1, the Court may still extend its assistance for procuring the presence of such a witness by issuing a summons through the Court or otherwise which ordinarily the Court would not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, Sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations.

32. In view of the above, even though the name of defendant No. 2 was not mentioned in the list of witnesses furnished by the plaintiff, he was properly examined as a witness and his testimony was not open to any criticism on the ground that he was produced as a witness without being summoned through the Court and without his name being mentioned in the list of witnesses.

33. The next circumstance relied upon by the High Court in discarding the sale deed is that defendant No. 2 himself had given a notice to the plaintiff in which it was set out that the sale deed was a sham transaction for which the consideration was not paid. In relying upon this circumstance, the High Court overlooked the fact that defendant No. 2, in his capacity as a witness for the plaintiff, had stated in clear terms that this notice was issued to the plaintiff at the instance of defendant No. 1. Defendant No. 2 also stated that the complaint made by him to the police in that regard was withdrawn by him. This circumstance, therefore, also could not have been legally relied upon by the High Court in holding that full amount of consideration was not paid.

34. It could not be ignored that the plaintiffs case had been admitted in unequivocal terms by defendant No. 2 in his written statement. It could also not be ignored that when plaintiff examined himself as a witness in the suit, defendant No. 2 refused to cross-examine him. The circumstance, which, however, clinches the matter is the statement of defendant No. 2 on oath in which he admitted that he had executed a sale deed in favour of the plaintiff and had obtained full amount of consideration. The sale deed is a registered document which recites that out of the amount of Rs.

5,000/-, which was the sale price, a sum of Rs. 4,500 had been paid earlier while Rs. 500 was paid before the Sub-Registrar. This recital read in the light of the admission made by defendant No. 2 in his written statement and, thereafter, in his statement on oath as a witness clearly establishes the fact that defendant No. 2 had executed a sale deed in favour of plaintiff for a price which was paid to defendant No. 2.

35. Even if the findings recorded by the High Court that the plaintiff had paid only Rs. 500 to defendant No. 2 as sale consideration and the remaining amount of Rs. 4,500 which was shown to have been paid before the execution of the deed was, in fact, not paid, the sale deed would not, for that reason, become invalid on account of the provisions contained in Section 54 of the Transfer of Property Act which provide as under:

> 54. "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such a transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property, of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs; in possession of the property.

A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

36. The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete.

37. There is a catena of decisions of various High Courts in which it has been held that even if the whole of the price is not paid, the transaction of sale will take effect and the title would pass under that transaction. To cite only a few, in Gyatri Prasad v. Board of Revenue and Ors. (1973) Allahabad

Law Journal 412, it was held that non-payment of a portion of the sale price would not effect validity of sale. It was observed that part payment of consideration by vendee itself proved the intention to pay the remaining amount of sale price. To the same effect is the decision of the Madhya Pradesh High Court in Sukaloo and Anr. v. Punau .

38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

39. Applying these principles to the instant case, it will be seen that defendant No. 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom remaining part of the sale consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, defendant No. 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further admitted in the witness box that he had executed a sale deed in favour of the plaintiff and had also received full amount of consideration. These facts clearly establish that a complete and formidable sale deed was executed by defendant No. 2 in favour of the plaintiff and the title in the property passed to plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld.

40. The judgment of the High Court on this point is also erroneous for the reason that it totally ignored the provisions contained in Section 55(4)(b) of the Transfer of Property Act which are set out below:

> 55. In the absence of a contract to the contrary the buyer and seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold:
>
> (1) ...
>
> (2) ...
>
> (3) ...
>
> (4) The seller is entitled-
>
> (a) ...
>
> (b) Where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, any transferee without consideration or any transferee with notice of non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part from the date on which possession

has been delivered. (5) ...

(6) ...

41. Clause (b) extracted above provides that where the ownership of the property is transferred to the buyer before payment of the whole of the sale price, the vendor is entitled to a charge on that property for the amount of the sale price as also for interest thereon from the date of delivery of possession. Originally, there was no provision with regard to the date from which interest would be payable on the amount of unpaid purchase money. The Special Committee which suggested an amendment in this Section gave the following reason:

> This clause is also silent as to the date from which the interest on the unpaid purchase money should run. It seems fair that it should run from the date when the buyer is put in possession.

42. It was on the recommendation of the Special Committee that the words "from the date on which possession has been delivered" were inserted into this clause by Section 17 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929).

43. This clause obviously applies to a situation where the ownership in the property has passed to the buyer before the whole of the purchase money was paid to the seller or the vendor. What is contained in this clause is based on the English Doctrine of Equitable Lien as propounded by Baron Rolfe in Goode and Anr. v. Burton (1847) 74 RR 633 : 1 Ex. 189. This clause confers statutory recognition on the English Doctrine of Equitable Lien. As pointed out by the Privy Council in Webb and Anr. v. Macpherson 30 Indian Appeals 238, the statutory charge under this paragraph is inflexible. The charge does not entitle the seller to retain possession of the property as against the buyer but it positively gives him a right to enforce the charge by suit. (See: Venkataperumal Naidu v. Rathnasabhapathi Chettiar ; Shobhalal Shyamlal Kunni v. Sidhelal Halkelal Bania AIR (1939) Nagpur 210 and Basalingaya Revanshiddappa v. Chinnaya Karibasappa AIR (1932) Bombay 247.

44. In view of the above, the High Court was wholly in error in coming to the conclusion that there was no sale as only a sum of Rs. 500 was paid to defendant No. 2 and the balance amount of Rs. 4,500 was not paid. Since the title in the property had already passed, even if the balance amount of sale price was not paid, the sale would not become invalid. The property sold would stand transferred to the buyer subject to the statutory charge for the unpaid part of the sale price.

45. Learned Counsel for defendant No. 1 thereafter contended that the deed dated 24th of March, 1971 was not a mortgage deed but an out and out sale with the result that the property having been transferred to defendant No. 1 was not available for being sold to plaintiff. This contention must meet the same fate as it met in the Courts below.

46. The document is headed as MORTGAGE BY CONDITIONAL SALE (KARARKHAREDI). It is mentioned in this deed that the immovable property which was described in areas and boundaries was being mortgaged by conditional sale in favour of defendant No. 1 for a sum of Rs. 1500 out of

which Rs. 700 were paid at home while Rs. 800 were paid before the Sub-Registrar. The further stipulation in the deed is that the aforesaid amount of Rs. 1500 would be returned to defendant No. 1 on or before 15th March, 1973 and the property would be reconveyed to defendant No. 2. If it was not done then defendant No. 1 would become the owner of the property.

47. Mortgage by conditional sale is defined under Section 58(c) as under:

> 58. (a) ...
>
> (b) ...
>
> (c) 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 mortgage 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) ...
> >
> > (e) ...
> >
> > (f) ...
> >
> > (g) ...

48. The Proviso to this clause was added by Section 19 of the Transfer of Property (Amendment) Act, 1929 (XX of 1929). The Proviso was introduced in this clause only to set at rest the controversy about the nature of the document; whether the transaction would be a sale or a mortgage. It has been specifically provided by the Amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document.

49. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. The Privy Council as early as in Balkishen Das and Ors. v. Legge, 27 Indian Appeals 58, had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of document in the light of surrounding circumstances. The decision of this Court in Bhaskar Woman Joshi v. Shrinarayan Rambilas Agarwal and P.L. Bapuswami v. N. Pattay Gounder are also to the same effect.

50. The contents of the document have already been considered above which indicate that defendant No. 2 had executed a mortgage by conditional sale in favour of defendant No. 1. He had promised to pay back Rs. 1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of defendant No. 1, the deed in question cannot but be treated as a mortgage by conditional sale. This is also the finding of the Courts below.

51. So far as the contention of the learned Counsel for defendant No. 1 that the mortgage money was not paid within the time stipulated in the document and, therefore, the transaction, even if it was a mortgage, became an absolute sale, is concerned, the finding of the Courts below is that this money was tendered to defendant No. 1 who refused to accept it. Defendant No. 2 had thus performed his part of the agreement and had offered the amount to defendant No. 1 so that the property may be reconveyed to him but defendant No. 1 refused to accept the money. He, therefore, cannot complain of any default in not paying the amount in question within the time stipulated in the deed. Since there was no default on the part of defendant No. 2, the document would not convert itself into a sale deed and would remain a mortgage deed. The suit for redemption was, therefore, properly filed by the plaintiff who was the assignee of defendant No. 2.

52. For the reasons stated above, the appeal is allowed and the impugned judgment passed by the High Court is set aside. The judgment and decree passed by the Trial Court as upheld by the Lower Appellate Court are restored but without any order as to costs.