

Bhimrao Ramchandra Khalate (Deceased) ... vs Nana Dinkar Yadav (Tanpura) on 13 August, 2021

Equivalent citations: AIR 2021 SUPREME COURT 3939, AIRONLINE 2021 SC 498

Author: Hemant Gupta

Bench: A.S. Bopanna, Hemant Gupta

REPORTA

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10197 OF 2010

BHIMRAO RAMCHANDRA KHALATE
(DECEASED) THROUGH LRS.

.....APPE

VERSUS

NANA DINKAR YADAV (TANPURA) & ANR.

.....RESPON

JUDGMENT

HEMANT GUPTA, J.

1. The plaintiff is in appeal before this Court aggrieved against the judgment passed by the High Court on 11.8.2006 in second appeal whereby the order passed by the First Appellate Court on 14.1.2000 was affirmed, while dismissing the suit for redemption of the mortgage property.

2. Brief facts leading rise to the present appeal are that the plaintiff was the owner of 20 gunthas of agricultural land¹ situated in Village Khunte. The plaintiff was in need of money so he borrowed Rs.3,000/- from defendant No. 1 on 22.2.1969 by executing a For short, the ‘suit land’ document titled “conditional sale deed” as a security for the loan amount. The plaintiff requested defendant No. 1 to reconvey the suit land by accepting the loan amount of Rs.3,000/- but defendant No. 1 refused to do so. On 25.2.1989, defendant No. 1 transferred the suit land in favour of his brother (defendant No. 2). The plaintiff filed a suit against the defendants on 5.4.1989 under the Transfer of

Property Act, 1882 2 for redemption of mortgaged property and possession. The claim of the plaintiff is that the transaction dated 22.2.1969 was in the nature of mortgage even though it was titled as the conditional sale.

3. The entire dispute revolves around whether the document dated 22.2.1969 is a document of conditional sale or a mortgage?

4. Before we advert to the nature and terms of the document, certain principles of law need to be stated. Section 58(c) of the Act was amended in the year 1929 when a proviso was inserted 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”.

5. In Pandit Chunchun Jha v. Sheikh Ebadat Ali & Anr.³, the plaintiff's suit for redemption was dismissed by the High Court but appeal allowed by this court reading the deed as mortgage. The question examined was whether a given transaction is a mortgage For short, the 'Act' AIR 1954 SC 345 by conditional sale or a sale outright with a condition of repurchase. It was held that two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles were stated. The Court found that the document had no clause for retransfer and instead says (clause 6) that if the executants pay the money within two years, the property shall come in exclusive possession and occupation with the transferors. The document had no clause for retransfer. In these circumstances, this Court held as under:

“12. The next step is to see whether the document is covered by Section 58(c) of the Transfer of Property Act, for, if it is not, then it cannot be a mortgage by conditional sale. The first point there is to see whether there is an “ostensible sale”. That means a transaction which takes the outward form of a sale, for the essence of a mortgage by conditional sale is that though in substance it is a mortgage it is couched in the form of a sale with certain conditions attached. The executants clearly purported to sell the property in clause (5) because they say so, therefore, if the transaction is not in substance a mortgage, it is unquestionably a sale: an actual sale and not merely an ostensible one. But if it is a mortgage, then the condition about an “ostensible sale” is fulfilled.

13. We next turn to the Conditions. The ones relevant to the present purpose are contained in clauses (6) and (7).

Both are ambiguous, but we have already said that on a fair construction clause (6) means that if the money is paid within the two years then the possession will revert to the executants with the result that the title which is already in them will continue to reside there. The necessary consequence of that is that the ostensible sale becomes void. Similarly, clause (7), though clumsily worded, can only mean that if the money is not paid, then the sale shall become absolute. Those are not the actual words used but, in our opinion, that is a fair construction of their meaning when the document is

read as a whole. If that is what they mean, as we hold they do, then the matter falls squarely within the ambit of Section 58(c).

20.It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustices with whom he was dealing and that he would not have agreed to account for the profits : indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt and the value of the property as it ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under Section 58 (c) of the Transfer of Property Act..”

6. In a judgment reported as Shri Bhaskar Waman Joshi v. Shri Narayan Rambilas Agarwal⁴, a Bench of this Court has upheld the right of redemption. The argument raised by the transferor was that the property transferred was intended to be mortgage under a deed of conditional sale. The transferees contended that the deed was absolute sale and that the conveyance was subject to a condition of repurchase. It was, inter alia, held 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 affects AIR 1960 SC 301 or purports to affect the sale. It was held that the 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. The Court held as under:

“7. 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 circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. 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. What distinguishes 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 definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their 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. Oral evidence of intention is

not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.

xx xx xx

13. Counsel for the transferees sought to rely upon the evidence of subsequent conduct of the transferors as indicative of the character of the transaction as a sale, but as already observed, that evidence is inadmissible.”

7. In another judgment reported as P.L. Bapuswami v. N. Pattay Gounder⁵, this Court decreed the suit for redemption though the same was dismissed by the High Court. The High Court held that the transaction was an outright sale and not a mortgage by conditional sale. The alternative plea based on the covenant for re-conveyance, the High Court considered that there was no proof that the plaintiff had tendered the amount within the period stipulated in the document. In appeal, this court held that the distinction between the conditional sale and mortgage is the relationship of debtor and creditor and the transfer being a security for the debt. The Court held as under:

“5. ...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 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 AIR 1966 SC 902 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...”

8. In view of the Judgments referred to above, now we examine the facts of present case. The deed in question is Ex. 68. The document reads as under:

“I, above Executant, given in writing that I am executing this conditional sale deed in your favour in front of Sub-Registrar, Phaltan as I am taking Rs.3,000/- (three thousand) in cash from you for my household expenses in respect of land which is in my possession owned by me and enjoyed by me absolutely on this date. The description of the land located within limits of town Khunte, Division Satara, Tq.

Phaltan, irrigated by Government Canal. Its boundaries and other particulars are – xx xx xx The above land owned and enjoyed by me along with all materials standing on it including trees, stones, mud etc. is being handed over to you by me for your possession on the condition that you are giving back its possession to me any-time within one year from the date of this sale deed when I repay the above amount to you while re-transferring the above land to my name. In case non-payment by me of the said amount within the stipulated period, this sale deed will be taken as a permanent one and you will enjoy the possession of the land as your own. Any future disputes in respect of the said land will be dealt by me if they arise.

I sign this sale deed today on 22nd February, 1969."

9. A perusal of the aforesaid document would show that:

- (i) The plaintiff has borrowed a sum of Rs.3,000/- from the defendant for his household expenses in respect of the land which was in his possession.
- (ii) The possession of land was handed over to the defendant on the condition that the possession will be given back to him within one year from the date of conditional sale deed.
- (iii) The defendant is bound to retransfer the land to the plaintiff when he repays the amount of Rs.3,000/-.
- (iv) If the amount is not paid within the stipulated period, the conditional sale deed may be taken as a permanent one.

10. A complete reading of the document would show that a sum of Rs.3,000/- was taken as a loan from the defendant for household expenses. The same was to be returned and the defendant was bound to retransfer the land. The condition that if the plaintiff is not able to pay the loan amount within one year, the document will be taken as a permanent sale deed is the contentious clause between the parties.

11. In view of the judgments mentioned above, the intention of the parties has to be seen when the document is executed. It is not in dispute that the condition of retransfer is a part of the same document (Ex. 68). Such is the condition inserted by an amendment in the year 1929 expressed by the proviso of Section 58(c) of the Act. As held in Pandit Chunchun Jha, a transaction which takes the outward form of a sale but in essence the documents are of a mortgage, though it is couched in the form of a sale. This Court held that it is impossible to compare one case with another. Each case must be decided on its own facts and circumstances. The document has to read as a whole and if any word is ambiguous, then to find out the intention of the parties when such document was executed.

12. Therefore, a reading of the document would show that the docu-

ment was executed for the reason that the plaintiff has borrowed a sum of Rs.3,000/- for his household expenses and the defendant is bound to retransfer the land if the amount is paid within one year. The advance of loan and return thereof are part of the same document which creates a relationship of debtor and creditor. Thus, it would be covered by proviso in Section 58(c) of the Act. Now, some of the later judgments of this Court interpreting the proviso in Section 58(c) of the Act need to be considered.

13. This Court in Umabai & Anr. v. Nilkanth Dhondiba Chavan (Dead) by LRs & Anr.⁶ was examining contemporaneous documents executed on 30.12.1970 whereby the plaintiff had agreed to sell the property for consideration of Rs.45,000/-. A sale deed was executed as well. Another agreement to sale was executed between the parties on the same date where the defendants agreed to reconvey the property on receipt of Rs.45,000/-. It was, thus, (2005) 6 SCC 243 held that the benefit of Section 58(c) of the Act would not be applicable to the plaintiff as the document of reconveying the property was not part of the same document. This Court held as under:

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

14. In Tulsi & Ors. v. Chandrika Prasad & Ors.⁷, this Court held that a distinction exists between a mortgage by way of conditional sale and a sale with condition to repurchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter, the transaction does not evidence an arrangement of lending and borrowing, thus, right to redeem is not reserved. The circumstances which weighed with the High Court holding are that the transaction in question was mortgaged by way of sale, it reads thus:

“9. The following circumstances weighed with the learned trial court as well as the High Court in arriving at the finding that the transaction in question was a mortgage by way of a conditional sale:

(2006) 8 SCC 322

(i) The husband of Appellant 1 was a tenant in respect of the property and he continued to occupy the same in the same capacity.

(ii) The appellants bore the costs of stamp duty which is not the normal practice in a case of absolute sale.

(iii) The transaction essentially was a Baibulwafa viz.

mortgage by conditional sale.

(iv) The land was required to be kept in the existing condition.

(v) The transferor had an option to repay the entire consideration in one instalment whereupon a deed of reconveyance was to be executed by the transferor in her favour. For the said purpose a specific date was fixed viz. 30-12-1971 and on obtaining such amount the transferee was to restore possession of the land to the plaintiff and only in the event of default on her part to repay the same was the sale to become absolute and perfect.

(vi) In the margin of the deed, the transferor categorically stated that he had executed a deed of Baibulwafa in respect of two parts of the shop.

(vii) The amount has been received by the transferor in the presence of the husband of the transferee." In view of the factors mentioned in para 9, the defendants appeal was dismissed and, the decree for redemption was main- tained.

15. In Vithal Tukaram Kadam & Anr. v. Vamanrao Sawalaram Bhosale & Ors.⁸, the suit for redemption was decreed by setting aside the judgment of the High Court. It was held as under:

(2018) 11 SCC 172 "14. The essentials of an agreement to qualify as a mortgage by conditional sale can succinctly be broadly summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agree-

ment for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property and the transaction value along with the duration of time for reconveyance are important con- siderations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors along with the recitals in the agree- ment, intention of the parties, coupled with other at- tendant circumstances, considered in a holistic man- ner."

16. In another judgment reported as Ganpati Babji Alamwar (Dead) by LRs Ramlu & Ors. v. Digambarrao Venkatrao Bhadke & Ors.⁹, the decree in a suit for redemption was main- tained by the High Court. The Court held as under:

"10. Whether an agreement is a mortgage by conditional sale or sale with an option for repurchase is a vexed question to be considered in the facts of each case. The

essentials of an agreement, to qualify as a mortgage by conditional sale, can succinctly be summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The value-

(2019) 8 SCC 651 action of the property, and the transaction value, along with the duration of time for reconveyance, are important consider-

ations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors, along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner. The language used in the agreement may not always be conclusive.”

17. On the other hand, learned counsel for the defendants relied upon Vanchalabai Raghunath Ithape (Dead) by LR v. Shankarrao Baburao Bhilare (Dead) by LRs & Ors. 10. It was a case where the suit for redemption filed by plaintiff-appellant was maintained. However, the judgment of this Court reported in Umabai and Tulsi were not brought to the notice of this Court. In the absence of consideration of such judgments, we find that the judgment of this Court in Vanchalabai Raghunath Ithape will not lay down a binding precedent.

18. In Dharmaji Shankar Shinde & Ors. v. Rajaram Shripad Joshi (Dead) through LRs & Ors. 11, the defendants appeal was allowed by this court and the suit for redemption was dismissed. It was, inter alia, held that if the sale and agreement to repurchase are embodied in the separate documents then the transaction cannot be a “mortgage by conditional sale” irrespective of whether the documents are contemporaneously executed; but the converse does not hold good. This Court held as under:

(2013) 7 SCC 173 (2019) 8 SCC 401 “22. Considering the contemporaneous conduct of the parties, it is clear that Shankar Shinde and thereafter the appellants were dealing with the suit property as if they were the owners of the land. The clause in Ext. P-73 that if the amount is not paid within a period of five years, the transaction will become a permanent sale deed and there-

after, the transferee will have the absolute right over the property are consistent with the express intention of parties making the transaction a conditional sale with option to repurchase.”

19. A perusal of the above judgment shows that the plaintiff has bor-

rowed a sum of Rs.7000/- for the marriage of his daughter eight days prior to execution of the document. While executing document on 28.7.1967, the plaintiff borrowed an additional amount and a document titled as “mortgage by conditional sale” was executed for a consideration of

Rs.2500/-, but the plaintiff received Rs.1800/- only. This Court held that the intention of the parties in putting an end to the debtor creditor relationship with respect to the sum of Rs.700/- is clear from the recitals of the document. It was held that clauses in the document are consistent with the intention of the parties making the transaction of a conditional sale with an option to repurchase. The Court held that there are no recitals in the document to establish creditor debtor relationship, nor does it contain the right of foreclosure, payment of interest etc. which are essential requirements in a mortgage deed. The Court held that undetermined mortgage amount for which the interest in the immovable property was created as security, indicates that the parties have never intended to create a mortgage deed.

20. The said judgment does not help the argument raised by the de-

fendants, as the document in the present case clearly stipulates the amount of Rs.3000/- was borrowed by the plaintiff and on return of such amount, a mandate to defendant No. 1 to execute re-conveyance of suit land was asked for which was refused by defendant no.1.

21. Another judgment referred to by the learned counsel for the defen-

dants is Sopan (Dead) through his LR v. Syed Nabi¹² but that was a case where the registered sale deed was executed on 10.12.1968 and on the same date, a separate agreement was executed whereby the plaintiff has agreed to repay the amount and secure reconveyance of the property. Since the two separate documents were executed, this Court has rightly found that it is not a document of mortgage but of conditional sale which is not covered by the proviso to Section 58(c) of the Act.

22. Learned counsel for the defendants has also referred to the fact that the suit for redemption was filed after twenty years of the document being executed and, in the meantime, defendants have made improvements over the land. Thus, the plaintiff would not be entitled to seek redemption. Section 63 of the Act contem- (2019) 7 SCC 635 plates that any accession by the mortgagee, during the continu- ance of the mortgage, the mortgagor shall on redemption be entitled to such accession in the absence of a contract to the contrary. Under Section 63(a) of the Act, the liability of mortgagor to pay for improvement will arise if the mortgagee had to incur the costs to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient or being made in compliance with the lawful order of any public servant or public authority. None of the eventualities arose in the present case compelling the mortgagor to pay for the improve- ments if any carried out by the mortgagee. A mortgagee spends such money as is necessary for the preservation of the mortgaged property for destruction, forfeiture or sale; for supporting the mort- gagor's title to the property; for making his own title thereto good against the mortgagor; and when the mortgaged property is a re- newable lease-hold, for the renewal of the lease, such expenditure incurred by the mortgagee can be added to the cost of improve- ments in the principal amount due. However, in the absence of any positive evidence of any improvement and the cost incurred, the defendants are not entitled to recover anything more than the mortgage amount. Since the possession was given to the mort- gagee, he has enjoyed usufruct from the mortgage property which compensates not only of the user of the land but also improve- ments made by him. The improvements were to enjoy the usufruct of the property mortgaged.

23. The argument that plaintiff has filed suit for redemption after 20 years of execution of the document is not tenable as the suit for redemption can be filed within 30 years from the date fixed for re- demption. The period of 30 years would commence on 22.2.1969 and the suit was filed in the year 1989, which is within the period of limitation.

24. In view thereof, we find the order of the First Appellate Court ac-

cepting the appeal of the defendants and dismissing the suit for redemption is not sustainable in law, so as the order passed by the High Court. Consequently, the judgment and decree passed by the First Appellate Court and that of the High Court are set aside and the suit is decreed. The plaintiff may pay or deposit the mort- gage amount within three months of the receipt of copy of the or- der. The appeal is allowed with no order as to costs.

.....J. (HEMANT GUPTA)J. (A.S. BOPANNA)
NEW DELHI;

AUGUST 13, 2021.