

JUDGMENT

1. Through this composite judgment I intend to decide this Civil Revision No.367-2004 titled 'Khushi Muhammad Vs. Muhammad Ashfaq' as well as Civil Revision No.368-2004 titled 'Khushi Muhammad Vs. Muhammad Ashfaq' arising out of the same consolidated judgment and decree dated 20.9.1992 passed by learned Civil Judge Arifwala and the consolidated judgment and decree dated 04.7.1997 passed by learned Additional District Judge Arifwala.

2. Succinctly the facts leading to these civil revisions are that Mumtaz Ali (deceased predecessor of the respondents) filed a suit for declaration etc on 04.5.1983 against Hasab ud Din (deceased predecessor of the petitioners) alleging that he was owner in possession of the suit shop by conditional sale through registered mortgage deed executed by Hasab ud Din in his favour. The suit was resisted by Hasab ud Din by filing contesting written statement with the contentions that he being an illiterate old aged villager mortgaged his shop in dispute in favour of Mumtaz Ali for a sum of Rs.7500/-vide mortgage deed dated 21.5.1969 but the said Mumtaz Ali fraudulently manipulated the entries regarding conditional sale mortgage price as Rs.10000/- instead of Rs.7500/- and period of six months for redemption of mortgage. Hasab ud Din also filed a separate suit for redemption on 30.7.1983 which was contested by Mumtaz Ali. Both the suits were consolidated on 23.5.1985 and following consolidated issues were framed by the learned trial Court:-

1. Whether the suit has been incorrectly valued for the purposes of value and jurisdiction? If so, what is correct value and to what affect?OPD
2. Whether the suit is within time?OPP
3. Whether the suit is liable to be dismissed for misdescription of suit property?OPD
4. Whether the plaintiff is owner in possession of the suit property?OPP
5. On proving issue No.4 in affirmative, whether the impugned mutation No.4517 is void, illegal, ineffective as against the rights of the plaintiff?OPP
6. Whether the suit of the defendant is not maintainable in view of the preliminary objection No.1.?OPP
7. Whether the suit of the defendant has been incorrectly valued for the purposes of court fee and jurisdiction? If so, what is its correct value and to what affect?OPP
8. Whether the defendant is entitled to the possession of the suit

property through redemption?OPP

9. Relief.

3. Parties led their pro and contra evidence in support of their respective pleas. The learned trial Court vide consolidated judgment and decree dated 20.3.1986 decreed the suit for declaration etc. filed by Mumtaz Ali and dismissed the suit for redemption filed by Hasab ud Din. Being aggrieved Hasab ud Din preferred two separate appeals before the learned Additional District Judge Sahiwal which were allowed vide consolidated judgment and decree date 18.6.1989 and both the cases were remanded for fresh decision with following additional issues:-

8-A. Whether Mumtaz Ali plaintiff perfected title over the property in dispute by adverse possession? OPP

8-B. Whether the deed registered on 21.5.1969 is a mortgage by conditional sale or sale with condition of re-purchase? OP-Parties.

8-C. Whether the deed registered on 21.5.1969 was obtained by the plaintiff from the defendant through fraud and exploitation of his illiteracy and simpletonness? OPD

8-D. Whether the condition contained in the deed registered on 21.5.1969 that in default of payment of Rs.10,000/-within six months the transaction shall stand converted into a sale deed, is void, illegal and of no effect against the rights of the defendant? OPD.

4. In post remand proceedings parties did not lead any evidence. Learned trial Court after providing opportunity of hearing to the learned counsel for the parties decreed the suit for declaration filed by Mumtaz Ali and dismissed the suit for redemption filed by Hasab ud Din vide impugned consolidated judgment and decree dated 20.9.1992. Hasab ud Din assailed the same through two separate appeals before the learned Additional District Judge Arifwala which were also dismissed vide impugned consolidated judgment and decree dated 04.7.1997, hence these civil revisions.

5. It is argued by learned counsel for the petitioner that findings of the learned trial Court on issue Nos.2, 8-A,B,C & D as maintained by learned Appellate Court are erroneous, against law and facts, based on misreading and non-reading of the material available on the record and liable to set aside; that learned Courts below while recording concurrent findings were in grave error to hold that impugned transaction was a mortgage by conditional sale or that on account of non-payment of the mortgage money within stipulated period i.e. six months the same has attained the status of sale or that

the impugned condition of sale was not a clog on the mortgage. It is further argued that learned trial Court also fell in legal error while holding the petitioner's suit for redemption as barred by limitation in terms of Section 120 of the Limitation Act 1908. Learned counsel for the petitioner added that impugned concurrent findings suffer from misinterpretation of document, against law and facts, based on misreading and non-reading of evidence, untenable and liable to set aside.

6. Both the civil revisions are resisted by learned counsel for the respondent with the contentions that Hasab ud Din has admitted the execution of mortgage deed but failed to prove his contention with regard to any fraudulent manipulation of condition of sale, amount of mortgage and stipulated period for redemption through any reliable ocular or documentary evidence; that on account of mortgagor's failure to return the mortgage amount within stipulated period of six months the transaction stood matured as sale in favour of Mumtaz Ali; that petitioners have no case to seek possession of the dispute shop through redemption of the mortgage after lapse of about fourteen years; that concurrent findings of the learned Courts below based on salutary appreciation of evidence do not suffer from any factual or legal infirmity therefore petitioners have no case to invoke the revisional jurisdiction of this Court and that both the revision petitions are liable to be dismissed.

7. Arguments heard. Record perused.

8. The controversy in hand mainly relates to interpretation of the document i.e. mortgage deed No.67 dated 21.5.1969 (Exh.P1). Mumtaz Ali alleged that it was a mortgage by conditional sale which has attained the status of absolute sale for non-payment of mortgage money within stipulated period of six months. On the other hand Hasab ud Din predecessor of the petitioners contended that it was a usufructuary mortgage and that entries regarding conditional sale, mortgage price and stipulated period of six months for redemption of mortgage were fraudulently manipulated by Mumtaz Ali.

9. In legal history, mortgages underwent a process of evolution. A mortgage by conditional sale was a very early form of mortgage among Hindus. Among Mohammedans the mortgage by conditional sale was a device to evade the Islamic Prohibition of interest. This was ordinarily called as *bye-bil-wafa* i.e. a sale with promise so that the mortgagee enjoys the rent and profit in lieu of interest and became absolute owner of the property if the debt was not paid. The earliest form of Mohammedan security was the *rahn* or pledge or mortgage with possession corresponding to the Roman

Pignus which was a transfer not of ownership but of possession without liability to forfeiture. In this case mortgage deed (Exh.P1) speaks for itself that the same was created under most pressing demand for money as the mortgagor parted with the possession and income of the shop. In such cases a moment of weakness of needy person is exploited by the mortgagee. He enjoys the usufruct of the mortgaged property in his possession with increased market value attracting all the ingredients of interest forbidden in Islam. In such circumstances Courts of law and equity are expected to construe various transactions concerning mortgage in such a liberal way that the right of rightful owner survives and the one who has enjoyed the possession of usufructuary of the mortgaged property for a considerable time and thus has recovered the amount manifold, should not be allowed to get away with the mortgaged property as well. Reliance be made upon **Maqbool Ahmed Vs. Government of Pakistan** (1991 SCMR 2063).

10. In clause (a) of Section 58 of the Transfer of the Property Act 1882, 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. Remaining clauses of this Section however define different kinds of mortgages. For the purpose of this case clause (c) and clause (d) of Section 58 of the Transfer of Property Act 1882 are relevant which read as under:-

“(c) Mortgage by conditional sale: Where the mortgagor ostensibly sells the mortgaged property—

On condition that on default of the 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 authorizes 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 usufructuary mortgagee.”

11. While referring to the proviso of clause (c) (supra) it is emphatically argued by learned counsel for the respondents that mortgage deed (Exh.P1) failing to contain an unambiguous condition which effects or purports to effect the sale in favour of the respondents clearly manifests that impugned transaction between the parties was not mortgage and that transaction between the parties has attained status of absolute sale for non-payment of mortgage money on expiry of stipulated period of six months. I am afraid learned counsel for the respondents is misconceived. Transfer of Property Act 1882 being not enforced in the Province of the Punjab therefore its provisions are not binding on the Courts in this Province. However there is no cavil to the proposition that in the areas of which the Act

has not been extended its general principles in accordance with rules of justice, equity and good conscience are followed. Needless to say that technical provisions of the Act are not obligatory.

12. The 'absolute sale' and 'mortgage with conditional sale' are two different types of transactions. In the first category relationship of borrower and creditor do not exist between the parties and the title in the property is absolutely passed on to the vendee by virtue of the sale deed. The second category however manifests the arrangement for borrowing money much below the value of the property which is tendered as security for payment of the loan and if it is not paid the creditor can fall back on the security. In this instance having been created relationship of the mortgagor and mortgagee the ostensible owner of the property retains the interest in it.

13. It is settled principle of law that interpretation of a document is strictly a question of law and not a fact however for finding out the real character of the transaction the intention of the parties to the document furnishes a positive test. Such intention, however, must essentially be gathered from the language adopted in the document viewed in the light of the surrounding circumstances. Reliance be made upon Muhammad Kazam through Legal Heirs

Vs. Mst. Janat Bibi (PLD 1985 Lahore 637).

14. Bare reading of mortgage deed (Exh.P1) transpires that it bears title *RAHN-BA-QABZA DUKAN* (mortgage with possession of shop). Mumtaz Ali (respondent) being beneficiary of the document (Exh.P1) was under obligation to establish that the impugned transaction was a mortgage by conditional sale and not a usufructuary mortgage. He has produced Kh.Mudadat Hussain petition writer (PW-1) the scribe of the mortgage deed (Exh.P1). While facing the cross-examination the said PW-1 admitted that contents of mortgage deed (Exh.P1) were not read over to the mortgagor. Akhtar Ali (PW-3) an attesting witness of mortgage deed (Exh.P1) while facing the cross-examination stated that at the time of deal of mortgage between the parties at Arifwala no conversation between the parties had taken place as regards *bye-bil-wafa*. Mian Ahmed Yar Khan (PW-2) the

other marginal witness of mortgage deed (Exh.P1) while facing the cross-examination stated that the expression *bye-bil-wafa* in the mortgage deed (Exh.P1) was scribed by the petition writer himself. Statements of both the attesting witnesses that contents of mortgage deed (Exh.P1) were read over to Hasab ud Din mortgagor are not supported by the scribe (PW-1) therefore Mumtaz Ali mortgagee respondent has not been able to produce any reliable and confidence inspiring ocular or documentary account to establish that impugned transaction was mortgage by conditional sale or *bye-bil-wafa*.

15. On the other hand, petitioners' witnesses in their testimonies have categorically stated that market value of the shop at the time of mortgage was about Rs.50/60 thousand i.e. much more than mortgage money i.e. Rs.10,000/-. They were not particularly cross-examined by the respondents on this dimension. Respondents' witnesses in their testimonies did not state that the market value of the shop was Rs.10,000/- at the time of mortgage. Besides it is pertinent to note that contents of mortgage deed (Exh.P1) clearly manifest that income of the mortgaged property and interest on the loan will be treated equal. It is therefore obvious that transfer of the shop as security for a loan of Rs.10,000/- i.e. a considerable low price apparently was a usufructuary mortgage rather mortgage by conditional sale. The respondent/mortgagee has not been able to establish it as mortgage by conditional sale or *bye-bil-wafa* through any reliable and confidence inspiring ocular or documentary account. The petitioner has been described as mortgagor and the respondent as mortgagee in the mortgage deed (Exh.P1) and its language unequivocally demonstrate that transaction in dispute was in fact a usufructuary mortgage and not an absolute sale.

16. At this juncture it may be expedient to reproduce the provisions of Section 60 of the Transfer of Property Act 1882 which reads below:-

“60. Right of mortgagor to redeem: At any time after the principal money has become due, the mortgagor has a

right, on payment or tender, at the proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgaged-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right is derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property. Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor."

17. The expression '*provided that the right conferred by this section has not been extinguished by the act of the parties or decree of the Court*' used in the above quoted provision is of grave importance. In the present case none of these circumstances exists. There is no decree of the Court nor did parties take any action after the initial execution of mortgage deed (Exh.P1) on 21.5.1969 to extinguish the right of redemption which had come into existence by the very nature of the transaction. In terms of Section 60 of the Transfer of Property

Act 1882 the right of redemption is statutory right. Besides it is also a rule of justice, equity and good conscience. It has been variously held by the Superior Courts that any clog on redemption of the mortgage will be invalid being violative to the law and equity. Section 60 of the Act *ibid* unequivocally affirms the right of redemption in all mortgages following the principle 'once a mortgage always a mortgage'. Reliance be made upon **Suleman and 3 others Vs.**

Custodian, Evacuee Property, West Pakistan, Lahore and 2

others (PLD 1971 Lahore 77). The contention of learned counsel for the respondent that the transaction of mortgage in dispute should be treated as sale and the respondent be treated as owner in possession of the disputed shop for non-payment of mortgage money on the expiry of stipulated period of six months therefore is devoid of any force for the simple reason that the impugned stipulation is a clog on the petitioners' right of redemption and as such repugnant to law and void. In this regard reliance is placed upon an observation made by Lord Hanley in a case titled **Vernon V. Bethell (2Eden.113)** which reads below:-

“The Court, as a Court of Conscience is very jealous of persons taking securities for a loan and converting such securities into purchases. And, therefore, I can take it to be an established rule, that a mortgagee can never provide at the time of making the land for any event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule for necessitous men or not, truly speaking, free men, but to answer a present exigency, will submit to any terms that crafty may impose upon them.”

18. The proviso of Section 60 of the Act clearly contemplates that subsequent to the mortgage transaction the parties may by their act extinguish the right of redemption but not in the same transaction by which the mortgage is created. There is no cavil to the proposition that consequent to the original transaction the parties are not debarred from converting the transaction from mortgage into a sale by drawing up a separate sale deed otherwise the transaction would remain a

mortgage and possession of mortgagee would not be converted into possession as an owner therefore condition imposed in mortgage deed (Exh.P1) being a clog on the equity of redemption is void and inoperative and possession of the respondent over the shop will remain as mortgagee and would not be converted into a possession as vendee. Reliance be made upon **Abdur Rahim Vs. Abdul Malak and others** (PLD 1971 Azad J & K 1) and **Mir Zaman Vs. Ashraf Khan** (PLD 1959 Azad J. & K. 73).

19. As regards the point of limitation and laches suffice to say that once it is held that the disputed transaction is one of the mortgage and not the absolute sale the refusal to get the property redeemed therefore becomes recurring wrong on the part of the mortgagee for which the principle of laches is not attracted at all. Reliance be made upon **Mr.Fazlul Quader Chowdhry and others Vs. Mr.Muhammad Abdul Haque** (PLD 1963 Supreme Court

486). Besides it is pertinent to mention that when a matter is referable to the law of limitation the question of laches loses significance. Contents of mortgage deed (Exh.P1) contain that income of the mortgaged property and interest on the loan advanced to the mortgagee will be treated equal. It is obvious that respondent/mortgagee being in possession of the mortgaged shop is continuously enjoying the income of the mortgaged property as payment of interest on the debt which would amount to acknowledgment on the part of mortgagee giving fresh time of limitation within the meanings of Section 20 of the Limitation Act 1908. In the attending circumstances of this case no period of limitation would run against the petitioner/mortgagor. The property can be get redeemed by the petitioner/mortgagor at any stage without mischief of the law of limitation barring redemption after the passage of sixty years in terms of Article 158 of the Limitation Act 1908. Reliance be made upon **Abdul Haq Vs. Ali Akbar and 12 others** (1998 CLC 129 Peshawar).

20. The nutshell of the above discussion is that concurrent findings of the learned Courts below non-suiting the petitioner and

decreeing the respondent's suit for declaration etc. based on wrong premises of law and facts, misreading and non-reading of evidence, misinterpretation of the document being untenable are liable to set aside.

21. For the above reasons both these civil revisions are allowed, impugned judgments and decrees passed by learned Courts below are set aside and the suit for declaration etc. lodged by Mumtaz Ali mortgagee is dismissed and the suit for redemption of the mortgage etc. lodged by Hasab ud Din mortgagor succeeds in terms that petitioners are entitled to the redemption of the mortgage in lieu of Rs.10,000/-. A preliminary decree in terms of Order 34 Rule 7 of the Code of Civil Procedure 1908 is therefore passed in favour of the petitioners against the respondents directing the petitioners to pay the mortgage money Rs.10,000/- within a period of 90 days into the learned trial Court and ordering the respondents to return all the documents in their possession or power relating to the mortgage property and to retransfer the mortgaged property to the petitioners at their costs free from the mortgage and from all encumbrance if any created by them and put the petitioners in possession of the property. Learned trial Court is directed to proceed further in the matter in accordance with law.

Order accordingly.