

(1926) 05 AHC CK 0030

Allahabad High Court

Case No: None

Jagannath

APPELLANT

Vs

Gauri Shankar and Others

RESPONDENT

Date of Decision: May 31, 1926

Acts Referred:

- Transfer of Property Act, 1882 - Section 58

Citation: AIR 1926 All 670

Hon'ble Judges: Mukerji, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Mukerji, J.

This appeal originally came before one of us and was referred to a Bench of two Judges having regard to the intricate nature of a question of law involved. The admitted facts are there that plaintiff's ancestor Pragi was a minor at the date 15th of April 1879. On behalf of him and one Bhairo, who was apparently Pragi's brother, their mother executed a document, which we have to interpret, dated the 15th of April 1879, in favour of the Respondent No. 1, Gauri Shankar, for a sum of Rs. 504-4-0. The document purported to be a deed of sale, but it contained a stipulation that if and when the executant handed over half the price, namely a sum of Rs. 252-2-0, to Gauri Shankar, he would return that portion of the property to the executant. There was a further stipulation that the executant of the deed would retain 16 bighas of land till half the property was returned to her on payment by her of Rs. 252-2-0.

2. In the Court of the Munsif of Jhansi the successor-in-title of Pragi and Bhairo instituted the suit, out of which this appeal has arisen, for redemption of half of the property transferred in 1879, "according to the conditions laid down in the sale-deed, dated 15th April 1879." They offered to pay the sum of Rupees 252-2-0.

The Munsif decreed the suit holding that it was a case of mortgage and that the property was liable to redemption. He however imposed a further condition on the plaintiffs that they should return 16 bighas of land which they held under the document in question to the defendants. It may be stated that the defendants other than Gauri Shankar were his son and grandson.

3. On appeal by Gauri Shankar and the other defendants, the learned District Judge held that it was a case of a sale-deed. It was pointed out to the learned Judge that, if the document was a sale-deed. Gauri Shankar was bound to return a half of the property, on receipt of the money under the agreement entered into. It was stated on behalf of the plaintiffs-respondents that they were ready to restore 16 bighas of land they had in possession. The learned District Judge thought that to allow the plaintiffs to enforce the agreement would amount to a change of the pleadings and he was not agreeable to accede to their request. Eventually the decree of the Munsif was set aside and the suit was dismissed.

4. On behalf of the plaintiffs-appellants in this Court it is urged that it is a case of mortgage, pure and simple, so far as one-half of the property is concerned and that in any case, there is no bar to the enforcement of the agreement on the part of Gauri Shankar, viz., a half of the property would be returned on receipt of the money and the property.

5. We have to consider first whether the document is a deed of mortgage or whether it is a deed of out and out sale. The transaction, as already stated, is one of the year 1879, that is to say, before the Transfer of Property Act came into force. If it had been a case under the Transfer of Property Act, it would have been much easier for us to hold that the transaction was one of mortgage by conditional sale. It will be noticed that the Transfer of Property Act was passed with the object of defining and amending the law of mortgage, as it stood before the passing of Act 4 of 1882. Under the circumstances the definition of a mortgage by conditional sale, as contained in Section 58 of the Transfer of Property Act, must be treated as conclusive for all transactions entered into after the passing of the Transfer of Property Act. We need not quote all the definitions that are given in Section 58 of the mortgage by conditional sale. It would be sufficient to mention that although a transaction may be, on the face of it, a sale and although all the words used in connection with it may be used as if the document were one of the sale, it may be still a mortgage, if other conditions laid down in Section 58 are present. For by the very definition itself, a transaction may be ostensibly one of sale, but if the ostensible vendee agrees that the sale is to be rescinded or the property is to be returned on payment, the transaction would be a mortgage.

6. However this question need not detain us longer, in view of the fact that the transaction is one of 1879. On a consideration of the transaction, in this particular case, we have no hesitation whatsoever in pronouncing that this is a case of mortgage so far as one-half of the property is concerned. We have nothing to do

with the other half which is admitted on all hands to have been sold to Gauri Shankar. The covenants are all contained in one and the same document. The 16 bighas of land which were allowed to be retained by the transferees, were evidently a part of the property sold, because the property is to be returned to the vendee along with the sum of Rs. 252-2-0 in order to get back the other half portion of the property. Evidently it was contemplated that at some time or other, that time being indefinite, the transferor would certainly pay the money and take back half the property and would return the 16 bighas of land held by them without payment of rent.

7. One thing we might very well point out and it is this. In cases where it is said that the transaction is one of out and out sale, with only a covenant on the part of the transferee to return the property on repayment of the sale price one difficulty arises. If the sale is completed, there is an end of the whole matter and no consideration whatsoever remains for which the vendee agrees to return the property to the vendor on payment of the sale price. In such circumstances, the agreement to return the property is without any consideration whatsoever and is therefore not enforceable under the law. Ex hypothesi, the sale transaction is a completed one and has nothing to do with the agreement to return the property. Such cases would be very rare, if not almost impossible, under the law. In all cases where there is a sale and there is an agreement to retransfer the property, the two transactions must be treated as part and parcel of one and the same transaction. If that be so, and if the case be governed by the Transfer of Property Act, the transaction must come within the purview of the definition of conditional sale in that Act. In this particular case, the transfer in favour of Gauri Shankar was clearly a consideration for the covenant on his part to return one-half the property on receipt of the sum of Rs. 252-2-0 and on return to him of the 16 bighas of land. We are clearly of opinion that this is a case of mortgage by conditional sale and of nothing else.

8. The result is that we allow the appeal set aside the decree of the lower appellate Court and restore that of the Court of first instance. We extend the time for payment and return of the 16 bighas, by six months from this date. Having regard to the fact that it was a somewhat difficult case for both the parties and Courts have differed, we order that the parties will pay their own costs throughout.