

(1998) 10 AP CK 0052

Andhra Pradesh High Court

Case No: CCCA No"s. 149 and 116 of 1987

Mahmooda Begum

APPELLANT

Vs

Badrunnisa Begum

RESPONDENT

Date of Decision: Oct. 23, 1998

Acts Referred:

- Evidence Act, 1872 - Section 106, 92
- Transfer of Property Act, 1882 - Section 52

Citation: (1999) 1 ALD 71 : (1999) 1 ALT 199

Hon'ble Judges: V. Rajagopala Reddy, J

Bench: Single Bench

Advocate: Mr. Soapan Rao Patil, for the Appellant; Mr. T. Ananthababu, for the Respondent

Judgement

1. These appeals are taken up for disposal together, as they arise out of the common judgment in OS Nos.301 of 1974 and 215 of 1979, respectively, on the file of the IV Additional Judge, City Civil Court, Hyderabad, and the parties are the same in all the suits and a joint trial is held in all these suits. All the appeals are brought by the defendant. In all the appeals the premises bearing H.No.22-8-389-I and 2, situate at Purani Haveli, Hyderabad, is the subject matter. The brief facts in each appeal are stated as under:

CCCA No. 149 of 1987:

This appeal arises out of the judgment in OS 301 of 1974, which is a suit for recovery of Rs.37,820/- towards arrears of rent together with interest at 6% p.a., from the date of the suit.

2. The respondent-plaintiff is the owner of the suit premises. She let out the premises to the appellant under a rental-deed dated 22-2-1971, on a monthly rent of Rs.1100/-. The appellant, contrary to the term of the rental deed, sub-let the

premises and has been collecting the rents. The appellant committed default in payment of rent and she has paid only Rs.7,280/-. Claiming an amount of Rs.37,820/- towards arrears of rent for the period from 1971 to 1974, deducting the amounts paid the suit was brought. The appellant denied that the respondent was the owner of the suit premises. She also denied that the suit premises was let out by the respondent. It is the specific case of the appellant that the respondent, being money lender, has adopted a modus operandi of lending small amounts under pronotes used to obtain sale-deeds as security and towards interest she used to obtain rental-deeds from the debtors on the promise to reconvey the property and contemporaneously executing reconveyance deeds. Accordingly the appellant had borrowed small amounts executing sale-deeds in respect of certain other items of her property, earlier, in favour of close relations of the respondent, as security and obtained reconveyance agreement. The appellant borrowed the sum of Rs.8,000/- on 20-9-1969 and another sum of Rs. 12,000/- on 22-9-1969 against the mortgage of the suit premises, at exorbitant rates of interest. She executed ostensible sale-deed towards the aggregated sum of Rs.20,000/-, only towards security for due repayment. On the same date an agreement of reconveyance was executed by the respondent to reconvey the property on repayment of the loan amount within three years. Initially the rental deed for Rs.375/-p.m. was executed towards interest on 24-9-1969 at the rate of Rs.1.75% p.m. Another sum of Rs.20,000/- was borrowed on a pronote, furnishing the same house as security. Again on 7-11-1969 a sum of Rs. 15,000/- was borrowed on another pronote and the same house is mortgaged. Thus a total sum of Rs.55,000/- was obtained as loan on security of the suit premises. Another agreement of reconveyance was executed on 7-11-1969 substituting it for the original reconveyance agreement dated 22-9-1969. On 22-2-1971, a fresh rental-deed for Rs.1,100/-was executed in respect of the suit house representing the interest at Rs.2.00% p.m. on Rs.55,000/-. The appellant leased out the house in November, 1971, to the CTO Office and she was collecting the rents being the owner of the house. Meanwhile, the respondent herself was collecting the rents from the CTO office towards interest. The respondent was neither the owner nor possessor of the suit premises and the transaction between the parties is in the nature of mortgage and the document though executed in the form of the sale-deed, it is intended to be a mortgage deed, and the sale-deed was executed as such as the respondent promised to reconvey the property. The respondent filed rejoinder denying the allegations made in the written statement. The execution of the reconveyance deed was denied as false and even if true unenforceable.

3. On the above pleadings the following two issues are framed:

"(1) Whether the rental agreement dated 22-2-1971 was executed in the . circumstances stated by the defendant and is not enforceable?

(2) To what relief?"

CCCA No. 116 of 1987:

This appeal arises out of the judgment in OS 215 of 1979, which is a suit for recovery of possession of the suit premises after evicting the appellant and for recovery of certain amounts, being the arrears of rent and for future mesne profits. It is alleged that the appellant defaulted in payment of rents and when demanded she avoided payment. After issuing the legal notice dated 22-10-1978 u/s 106 of the Transfer of Property Act, the tenancy was terminated and the appellant was called upon to vacate the premises on the expiry of tenancy on 30-11-1978. Though the appellant received the notice, she did not reply. Hence, the suit. The appellant filed written statement reiterating her case as stated in the earlier suits.

4. On the above pleadings the following issues are framed:

"(1) Whether the rental-deed dated 2-8-1971 was executed under the circumstances shown by the defendant and whether the defendant is not a tenant under the plaintiff?

(2) Whether the plaintiff is entitled for recovery of possession of the suit house?

(3) Whether the plaintiff is entitled for recovery of Rs.2,200/- and Rs.1,867/-from the defendant?

(4) Whether the plaintiff is entitled for claiming mesne profits and if so at what rate?

(5) To what relief?"

5. On the basis of a joint memo filed by the parties, a joint trial was held of the three suits (including another) and the evidence was recorded in OS 301 of 1974 and it was treated as the evidence on the remaining 2 suits also. However, separate evidence was also recorded in OS 215 of 1979. On behalf of the respondent PWs. 1 to 3 are examined and Exs.A1 to A10 are marked. On behalf of the appellant DWs.1 and 2 are examined and EXS.b1 to B7 are marked. In OS No.215 of 1979 the plaintiff was again examined as PW1 on commission and Exs.A1 to A12 are marked. The Court below, considering the evidence adduced in the cases, came to the conclusion that the sale-deed is real and the title of the property was intended to be transferred and it was not a mortgage. Accordingly, OS 301 of 1974 was decreed with costs as prayed for. OS 215 of 1979 was partly decreed with proportionate costs. Hence, this appeals.

6. On the arguments advanced, the following points arise for consideration in these appeals:

(1) Whether the sale-deed and the rental-deed are only intended to be documents of mortgage and are executed in the circumstances stated by me appellant and hence unenforceable?

(2) Whether the respondent is not entitled or recovery of possession of the suit premises and for recovery of arrears of rents and for mesnc profits?

Point No. 1:

OS Nos. 301 of 1974, and 215 of 1979 are filed by the respondent for recovery of rents and possession. These suits were decreed. Thus, the subject-matter in all these appeals is the same i.e., premises bearing No.22-8-389-1 and 2, Purani Haveli, Hyderabad. The respondent filed the suits on the basis of the registered sale-deed Ex.A1 under which the suit house was ostensibly sold by the appellant. But the fact remains that the appellant continued to be in the possession of the suit premises. As per the respondent the house was let out to the appellant as per rental-deed Ex.A10. Execution of the sale-deed and rental-deed is admitted. Learned Counsel for the appellant contends that the transaction in question is one of mortgage in essence, the parties did not intend to sell or purchase the property and the respondent being a money lender lent the amount and secured the sale-deed which is intended to be treated as security for the amounts borrowed by the appellant and the rental-deed is executed towards interest on the promise to reconvey the property. Hence, the title did not pass under the sale-deed and the appellant continued to be the owner of the property. Learned Counsel further has shown several circumstances to substantiate that the alleged sale-deed is in essence a mortgage. Learned senior advocate Sri Ananthababu refuted the contentions submitting that it was out and out sale and the appellant continued only as a tenant. The question, therefore, is whether Ex.A1 is a sale-deed or a transaction in the nature of mortgage.

7. The appellant-plaintiff examined herself as PW1 and her husband as PW2. PW1 clearly stated that she purchased the suit house for a consideration of Rs.20,000/- under Ex.A1 registered sale-deed, Ex.A3 is the receipt passed by the appellant for Rs.8,000/- being the earnest money; balance of Rs.12,000/- was to be paid on the date of registration of the sale-deed. On 22-9-1979, Rs. 12,000/- was paid and Ex.A1 was obtained. She deposed that the appellant handed over only the link documents Exs.A4 to A9, pertaining to the house. The appellant remained in the house as tenant. The rental-deed is Ex.A10 dated 22-2-1971, originally the rent was Rs.375 p.m., as the suit house was incomplete. Subsequently the rent was enhanced to Rs. 1100/- p.m. after the house was completed by the respondent. She denied the allegation that her husband and her brother were carrying on money-lending business and that she obtained the sale-deeds only as security of the loan amount and the rental-deed for the interest. PW2 is the husband of the respondent. He denied the allegations of money-lending as according to Muslim law, taking interest was prohibited. He denied the allegations of advancing small amounts and securing sale-deeds and also executing reconveyance deeds in respect of two plots at Malakpet and Somajiguda belonging to the appellant or her husband. He admitted that his minor son Sultan-Bin-Mubarak purchased the property of one Shankaraiah, in the same way. He denied the allegation that he advanced Rs.20,000/- on security of the suit house. He denied the execution of agreement of reconveyance by PW1 and advancing further amounts on security of the suit house. He stated that when the house was purchased it was incomplete and with their amounts the additional

constructions were made and thereafter rent was enhanced. He was the son-in-law of late Nizam. He was getting Rs.2,400/- p.m. as such from the Nizam Trust. PW3, who is an Accountant in Electricity Department, is the attestor of rental-deed Ex.A10. He also deposed that the initial rent was fixed at Rs.375/-p.m. and after additional constructions were made, it was enhanced to Rs.1100/- p.m. under Ex.A10.

8. Now coming to the evidence of appellant, she examined her husband as DW1. He deposed that all the brothers of PW2 were carrying on money-lending business. They used to advance small amounts and obtain security of immovable properties, but they used to take sale-deeds, but as there is no transfer of title and possession rental-deeds used to be obtained towards interest at the rate of approximately 2% p.m., on the promise that the property would be reconveyed on the repayment of loan. DW1 borrowed Rs.5,000/- from PW2 under Ex.B2 the certified copy of the registered sale-deed dated 29-8-1969, executed by him in favour of one Basheer-Bin-Mubarak, brother of PW2, in respect of their plot at Somajiguda. The possession always would be with the owner of the house. Again for another plot of land of 600 sq.yards., at Kaladera at Malakpet, belonging to the appellant, it was mortgaged to obtain a loan of Rs.5,000/- from Basheer-Bin-Mubarak, but executed sale-deed Ex.B3, and obtained reconveyance deed in favour of PW1. Ex.B4 is the reconveyance deed. Again the appellant continued in possessioa Rental agreement, was therefore, executed for Rs.100 p.m. in lieu of interest at 2% p.m. One Shankaraiah also borrowed Rs.20,000/- from the minor son of PW1 executing the sale-deed Ex.B34. Ex.B35 is the agreement of reconveyance. Ex.B33 is another sale-deed obtained by the brother of PW2 lending Rs.10,000/- to the appellant in respect of their property at Nampally. Reconveyance deed is marked as Ex.B37 dated 24-11-1972. He admitted to have executed Ex.A1 in respect of the suit house and also taking reconveyance agreement. Ex.B5 dated 7-11-1969 is the certified copy of the agreement, the original was taken by Rahim-Bin-Mubarak, the brother of PW2, who filed OS 689 of 1972. He passed the receipt Ex.B6. The suit house is three storey house comprising of 9 rooms in the ground floor; 9 in the first floor and 1 room in the second floor. There arc 5 bathrooms. It was constructed in 1967. It is an RCC construction. He stated that a total loan of Rs.55,000/- was taken from the respondent. Originally the interest agreed to pay was Rs.370/- p.m. Subsequently in view of taking further loans the agreed interest had come to Rs.1100/- p.m. Ex.B26 is the photo copy of the reconveyance agreement filed in OS 689 of 1972. The market value of the suit premises was more than Rs.One lakh. He stated that she executed the sale-deed as security for rent and rental-deed in lieu of interest He deposed that the appellant made constructions and completed the house. DW2 is a "C" class registered contractor, who deposed that during 1967-69 he had constructed some rooms demolishing some in the ground floor of the suit house. He stated that he had completed construction of the entire building. One Lekhraj, Asst. Engineer, supervised the construction. An amount of Rs.1,50,000/-might have been spent on the construction. He has given the dates of

construction. He was an Income Tax Assessee since last 2 or 3 years and for the first time he paid Income Tax about two years back.

9. The plaintiff was again examined on commission in OS 215 of 1979. She deposed that the period of tenancy expired by the end of December, 1971. Thereafter, the tenancy is from month to month. Having paid rents upto 19-8-1971, the appellant stopped paying the rents. The tenancy was therefore terminated after issuing notice u/s 106 of T.P. Act and she was called upon to vacate the premises and deliver vacant possession. She filed Exs.A1 to A12. She stated that she did not execute any reconveyance deed in favour of the appellant. After purchase of the house out of her Mehar amount of Rs.25,000/-, she has completed the incomplete construction of the suit house, out of the proceeds of the sale of her jewellery.

10. The above pleadings and evidence indicate that the suit house was ostensibly sold under Ex.A1 for a sum of Rs.20,000/-. But the owner, the appellant herein, continued to be in the house as a tenant on rent of Rs.1100/-p.m., executing rental-deed Ex.A10. The appellant did not dispute the execution of Ex.A1 and A10. But he says that Ex.A1 is not sale-deed, but is a mortgage. There was no transaction of sale between the parties and no transfer of title was involved. An aggregate amount of Rs.55,000/- was borrowed from the respondent at 2% p.m. The respondent obtained rental-deed showing the appellant as the tenant. The sale-deed was executed on the promise made by the respondent that she would reconvey the property and accordingly the respondent executed reconveyance deed. The crucial question in this case is, whether the transaction between the parties is sale or in the nature of the mortgage and the rental-deed was executed as representing the rent or interest on the amount borrowed? Learned Judge held that the sale is real and it is not a mortgage and decreed the suit directing payment of rents and recovery of the possession of the house. But a reading of the judgment discloses that the learned Judge, except narrating the evidence, has not at all appreciated the evidence. There is no discussion regarding the effect of the evidence on this aspect. The appellant marked several documents in support of his case but none of them was properly examined. Having thoroughly gone into the evidence, I cannot but conclude that the transaction in question is one of mortgage in essence and substance, though, ostensibly is sale, for the following circumstances:

(1) Money-lender: The respondent is stated to be a money-lender. She, her husband and other family members are alleged to have advanced small amounts on the security of valuable immovable properties. In all cases they used to take sale-deeds on the promise of reconveying the property on repayment of loan. The appellant adduced evidence of the past transaction where the appellant herself borrowed certain sums and mortgaged her property executing sale-deeds on promise of reconveyance. As seen in the evidence, she borrowed Rs.5,000/- from PW2 and executed sale-deed Ex.B2 in respect of her valuable plot at Somajiguda in favour of

brother of PW2. Another amount of Rs.5,000/- was again borrowed from PW2's brother on the mortgage of another plot of her husband at Kaladera, Malakpet, under Ex.B3 sale-deed and reconveyance deed Ex.B4. In this and other two cases the appellant continued to be in possession of the premises and the alleged rental agreement only represents the interest at 2% p.m., on the amounts borrowed. One Shankaraiah also borrowed Rs.20,000/- from respondent's minor son under Ex.B34 sale-deed and Ex.B35 reconveyance agreement. Ex.B33 is another sale-deed obtained by the brother of PW2 on lending Rs.10,000/- in respect of their property at Nampally under Ex.B37 reconveyance deed. All these transactions were prior to the suit transaction. In all these cases valuable immovable properties have been mortgaged for petty amounts, however obtaining reconveyance agreements. The transactions were treated as mortgages though they were ostensible sale-deeds and the property was reconveyed except to Shankaraiah. PWs.1 to 4 speak to these transactions. Though PW2 was grilled in the cross-examination, nothing was elicited to discredit his testimony. DW2 is the son-in-law of late Nizam of Hyderabad and he was dealing with Nizam Trust money. He was also having business. He can therefore be said to have sufficient funds on hand. These facts and circumstances points to the presumption that the respondent, her husband and other family members are indulging in lending paltry amounts, taking immovable properties as security agreeing to reconvey the same. The sale-deed was therefore executed not to transfer the property, but to serve as security for repayment of the amount and on repayment, the property used to be reconveyed. The learned Judge was therefore in clear error to hold that there is no documentary evidence to show that the respondent and her family members are moneylenders.

(2) Continued Occupation: The respondent must have purchased the property for her own occupation as she deposes that she or her husband has no house, and that they were staying in her sister's house. She purchased the house selling away her jewellery and made the construction spending her entire dower amount (mehar). In such a situation would she let-out the house immediately after the purchase to the vendor herself? This is not a solitary instance. The evidence is that in the previous instances also she let-out the house to the owner himself. No reason is given by the respondent for doing so. This circumstance points out that the appellant continued to be the owner.

(3) The rental-deed represents interest: The rental-deed in the earlier transaction as well as Ex.A10, approximate to the rate of interest at 2% p.m. The usual interest on borrowals also indicate that they are not really rental-deeds but they represent the interest payable on the advances. As seen above, even after the alleged sale the owner continued to be in the occupation of the house. In order to show that she was not occupying as an owner this ingenuous method was adopted. When the advance was Rs.5,000/- (given to others) the rent would be Rs.100/- p.m. (at 2% p.m.). In the suit transaction, initially the rent was Rs.375/- p.m. on the advance of Rs.20,000/- (sale consideration), indicating interest at 1.75% p.m. When the amount

advanced aggregated to Rs.55,000/-, the rent is enhanced to Rs.1100/- indicated 2% p.m. interest! This factor is a strong circumstance that cannot be explained in any other way than that of the transaction being mortgage.

(4) Less than the true price: It is not disputed that the suit house is a huge three storeyed house, comprising 15 to 17 rooms in all, besides several bath-rooms and a new house at that time built in RCC Construction in 1967. It was purchased in 1967 when its construction was incomplete for Rs.20,000/-. By that time, only the ground floor must have been completed with 6 rooms. Thereafter about 11 rooms were built in the first and second floors. It is the evidence of PW2 that all the rooms in the ground floor were demolished as they were not to their liking and all the rooms in the house were constructed. According to the appellant, she got the matruka and was having some money as she was doing business earlier. It is true that she has not filed any documents to show her construction. On the other hand the respondent wants us to believe that she completed the house, selling her jewellery, but she has not produced any evidence, either. Hence no finding can be reached on this aspect. Nevertheless, the incomplete house with the ground floor only completed, was purchased at Rs.20,000/- in 1967. Now it has been transformed into a new big house by 1969. It is situated in the prime area of the city. The plaintiffs evidence is that the price would be above Rs.1 lakh, though no documentary evidence was filed to show the market value. Learned senior advocate does not seriously dispute it but submits that the Telangana agitation raging in 1969 could be the reason for the shump in the prices. It must be noted that we are dealing with parties who are Muslims and in the old city area the effect of the agitation on the market prices to immovable property was not very appreciable. Thus the state of evidence in the case would show that the sale price is much less to the true price or market price of the suit house.

(5) The same property was agreed to be reconveyed, executing a contemporaneous document Ex.84 which could be enforced within 3 years on payment of the same amount borrowed. Though the agreement is denied as false, sufficient evidence was brought on record by the appellant to show that it was genuine. The appellant mentioned in her written statement about it and that it was taken by the brother of PW2 and kept with him, however passing a receipt Ex.B7. Photo copy of the agreement was filed in OS 689 of 1972, the suit filed by PW2's brother. Thus, keeping away the agreement appears to be engineered by PW1. The writing of reconveyance agreement separately though on the same day without embodying the same in Ex.A1, as required in Section 58(c) of T.P. Act and not mentioning the loan amount of Rs.20,000/- in Ex.A1 is also the brain work of PW2 who is undoubtedly a clever businessman. The house must have purchased by the respondent only as an asset, if that is so she would not have agreed to reconvey the same for the same price even after 3 years, particularly in those days when the city was growing fast and the prices are escalating year by year.

11. Learned Counsel for the respondent, on the other hand, submits that the handing over of link documents in respect of the suit house to the respondent is consistent only with the transaction being sale. According to him if it is a loan transaction, there was no necessity at all handing over the link documents. I do not agree. It has come in evidence that the link documents were handed over when the amount of Rs.8,000/- was borrowed. At that time neither an agreement nor a sale-deed was executed evidencing borrowal. But it was understood that the suit house would be kept as security. Hence, the respondent must have asked the appellant to hand over the link documents. If the link documents are kept in his custody, it would be an assurance for the respondent that the same property will not be either mortgaged or sold in favour of another person. Hence, I am of the view that the handing over of link documents would tantamount to deposit of title deeds before the property was mortgaged.

12. Learned Counsel for the appellant heavily relies upon the decision in [Indira Kaur and Ors Vs. Sheo Lal Kapoor](#) . I have gone through the above decision very carefully. The facts of the case appears to be on all fours with the facts in the instant case. Considering the question whether the sale-deed is in effect a deed of mortgage and having regard to the following factors, viz., (i) reconveyance agreement; (ii) keeping the property in possession after the purchase and (iii) mutation not being effected, the Court held that the device of mortgage coupled with reconveyance agreement curtailing the period of redemption for 30 years which law provides for, was adopted only to avoid vice of the clog on redemption. It was further held that in view of the above factors the real intention of the parties was to secure the repayment of the amounts borrowed with interest. In the instant case, several other facts as discussed supra, in addition to what mentioned in the above case [Indira Kaur and Ors Vs. Sheo Lal Kapoor](#) , are present to indicate that the transaction is one of mortgage to secure the amount of Rs.20,000/- at 2% p.m. interest and Ex.A1 is not a sale. But the learned senior Counsel submits, relying upon Section 58(c) of TP Act, that unless the agreement of reconveyance is embodied in the sale-deed itself, such transaction shall not be deemed as mortgage. No doubt the proviso to Section 58(c) of TP Act states so. Respondent's husband, aware of this statutory provision of law, has adopted the device of securing mortgages on the promise to reconvey but seeing to it that contemporaneous document of reconveyance is not embodied in the sale-deed, thus successfully curtailing the period of redemption of 30 years to the shorter period mentioned in the reconveyance agreement. The Supreme Court in Smt. Indira Kaur's case (supra) has frowned upon this practice stating that- "These factors clearly spell out the real intention of the parties that it was a transaction of mortgage to secure the sum of Rs.7000/- at approximately 13-1/2% interest. But then it is not necessary to examine this dimension of the matter inasmuch as the plaintiff has not prayed for redemption though in the plaint an averment has been made that the real intention of the parties was to create a

mortgage. As the plaint stands, and as the plaintiff himself has preferred to enforce the agreement for specific performance, it is not necessary to examine the question as to whether or not the real nature of the transaction was mortgage though it was given an appearance of a transaction of a sale. For the same reason we need not examine the question as to whether or not Section 58(c) of the Transfer of Property Act would have disabled the plaintiff from claiming the relief of redemption on the basis that the real intention of the parties was to create a mortgage and not an absolute sale coupled with an agreement for reconveyance. This question will have to be dealt with at an appropriate time having regard to the fact that there is an increasing tendency in recent years to enter into such transactions in order, to deprive the debtor of his right of redemption within the prescribed period of limitation. In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property."

The appeal was ultimately allowed on other ground and the plaintiffs suit for specific performance was decreed. Though the above is an obiter dicta, it is binding on this Court as the observation was made after an examination of the facts of the case and noticing the legal effect of Section 53(c) of the T.P. Act. I am, therefore, of the view that Ex.A1 is a mortgage coupled with a promise to reconvey.

13. The learned senior Counsel lastly contends that when the words in the document are clear and when there is no ambiguity, the intention of the parties could be gathered only from the document itself and no oral evidence as to the intention of the parties is admissible. Oral evidence to explain the attendant circumstances may be admissible if the document is silent regarding the same. He relies upon the decision in [Tamboli Ramanlal Motilal \(dead\) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal \(dead\) by L.Rs. and another](#), . It therefore, becomes necessary to look into the sale-deed. It is a simple document with the usual recitals regarding the vendor's title, exclusive possession and the agreement to sell and thus executing the sale-deed. No explanation is given as to what prompted the vendor to sell. None of the other circumstances attending upon or surrounding the sale are noticed in the sale-deed. The above decision clearly says that "attendant circumstances could be looked into only to gather the intentions" if such an intention is not explicitly expressed in the document itself. The evidence is given in the case on hand to show that the surrounding circumstances of the case as discussed above. In [Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi](#), , it was held as follows:

"It is clear to us that the bar imposed by sub-section (1) of Section 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the

transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties, AIR 1936 70 (Privy Council) ." Since Ex.A1 is alleged to be only a sham document, the oral evidence given to show under what circumstances the alleged sale came into existence, is admissible.

14. It, therefore, follows that the suit house was not let-out to the appellant and that Ex.A10 is not a rental-deed, but in reality, is the agreement for payment of interest at 2% p.m., on the total amount of Rs.55,000/-borrowed. Thus, I am of the firm view that these documents came into existence in the circumstances stated by the appellant and therefore, are unenforceable. The point is answered accordingly.

Point No. 2:

The suits are filed for arrears of rents and for recovery of the suit premises, on the ground that the tenancy was terminated and also for mesne profits on the ground that the appellant defaulted the payment of rents.

15. In view of the finding given by me on Point No.1, the appellant is not liable to pay any rents, hence the question of termination of tenancy or recovery of possession does not arise. The suits are liable to be dismissed. The point is accordingly answered.

16. In the result, the appeals are allowed with costs. The judgment and decree of the Court below in OS Nos.301 of 1974 and 215 of 1979 are set aside. The suits OS Nos.301 of 1974 and 215 of 1979 are dismissed with costs.