

(1974) 02 PAT CK 0008
Patna High Court
Case No: A.F.A.D. No. 452 of 1969

Smt. Janki Devi

APPELLANT

Vs

Mt. Murta Kuer and
Others

RESPONDENT

Date of Decision: Feb. 25, 1974

Acts Referred:

- Transfer of Property Act, 1882 - Section 58

Citation: AIR 1974 Patna 246

Hon'ble Judges: H.L. Agrawal, J

Bench: Single Bench

Advocate: Kailash Roy, Prabha Shankar Mishra and Kamala Prasad Roy, for the Appellant;
Arun Behari Mathur, for the Respondent

Final Decision: Dismissed

Judgement

H.L. Agrawal, J.

This second appeal is by defendant No. 1 and arises out of the following circumstances:

The plaintiffs are descendants of one Batukdhari Singh since deceased and defendant No. 2 Mahamaya Saran Singh is the son of one Kalika Singh a brother of the said Batukdhari Singh. On 17th of August, 1957 this defendant No. 2 executed a deed which has been described as Baineyadi deed in favour of defendant No. 1 wife of one Prithivichand for a sum of Rs. 6,000/- with respect to a portion of a house situated in the town of Chapra.

2. The plaintiffs instituted the present suit inter alia for a declaration that the said deed was null and void and not binding on the plaintiffs. Various grounds for invalidity of the said document were stated in the plaint namely, that the same was collusive, fraudulent, without consideration or for legal necessity and the like. It was also alleged that defendant No. 2 was a man of indecent habits and addicted to wine

and women and was not looking after the affairs of the family of the plaintiffs and the recital of the various necessities were all false and untrue. The suit was contested only by the first defendant and she, in her written statement denied all the allegations made by the plaintiff challenging the deed in his favour. It is not necessary to deal with all those pleas of defence as the question raised for decision in this second appeal is entirely different.

3. The trial court dismissed the suit on a finding that the document in question executed by defendant No. 2 was valid and binding upon the plaintiffs. On appeal by the plaintiffs in the lower appellate court, an amendment of the plaint was allowed to the effect that if the deed in question was found to be genuine and for consideration, then it should be held that it was a deed of mortgage by conditional sale and not a deed of sale outright with a condition of repurchase. Their alternative prayer succeeded in the lower appellate Court. The learned Additional District Judge has held the document (Exhibit "O") to be a mortgage by conditional sale and held the plaintiffs to be entitled to a preliminary decree for redemption under the provisions of Order 34, Rule 7 of the Civil Procedure Code.

4. Mr. Kailash Roy, learned counsel appearing for the plaintiff in support of this appeal contended that the learned Additional District Judge has committed an error of law in interpreting Exhibit "O" as a document of mortgage by conditional sale and not a deed of sale outright. The question as to whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one and has been subject to a judicial determination in various cases and must be decided on the facts of each case on the real intention of the parties. Therefore, it would be necessary to refer to some of the relevant stipulations of the document in question for its fair construction. Although according to the description of the document in the third column meant to describe it has been described as a Bai Meyadi i.e., deed of conditional sale, in my opinion that by itself would not be the determining factor to judge the intention of the executant. The document, with which we are concerned, i.e. Exhibit "O" provides the following terms:--

(1) I, the executant have executed the deed of conditional sale for one year in the name of claimant in respect of the eastern portion of the house by fixing consideration money of the sale at Rs. 6000/-

(2) I, the executant put the claimant in possession and occupation of the same as conditional vendee from this day

(3) The claimant and her heirs and representatives who remained in possession and occupation personally or through settlement of rent till the period mentioned and continued to appreciate the produce income thereof

(4) The claimant will pay municipal tax and rent of the Mallik to the extent of one third share on obtaining receipt in the name of me, the executant through himself,

(5) Only the annual repair of the house is and will be the concern of me, the executant.

(6) I solemnly declare that I shall repay the entire amount of consideration of this deed in cash and in one lump sum and return on the 1st Asin 1366 fasli and get deed of exchange executed in the name of me, the executant. In case of default in making the payment within the above mentioned period the claimant shall be competent to remain in possession and occupation as vendee or owner.

(necessary stipulations have been paragraphed by me for convenience of construction and unnecessary recitals have been omitted).

5. The mortgage by conditional sale has been defined in Section 58(c) of the Transfer of Property Act and reads as follows :--

"Where the mortgagor essentially sells the mortgaged property.

on condition that on default of payment of the mortgage money on 3 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 sales."

The proviso to this clause was added in the year 1929 by amending the Act XX of 1929 and it was specifically provided that in order that a transaction be deemed to be a mortgage the condition must be embodied in the document itself which effects or purports to effect a sale. Therefore, after this amendment if the parties chose to incorporate this term in the same document i.e. the document in question and not by a separate document the presumption that inevitably follows is that their intention was to take a document of mortgage by conditional sale. This view finds well support from a decision of Supreme Court in the case of [Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another](#), Mr. Justice B. K. Mukherjee, (as he then was) has already laid down in the said authority that the Legislature has made a clear cut classification and excluded transaction embodied in more than one document from the category of mortgage. It may be mentioned that prior to the amendment there was a conflict of decisions on this question as to whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting 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 effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a transaction a mortgage transaction must of necessity be deemed to have been intended. But from this a reasonable inference can be drawn with respect to the intention of the parties and unless that presumption is displaced by other circumstances by clear cut and in express words and if the condition of Section 58(c) of the Transfer of Property Act is fulfilled, then the deed should be construed as a deed of mortgage by conditional sale. In Chunchun Jha's case one of the stipulations was as follows :--

"(6) If we, the executant, shall repay the consideration money to the said, sendee with in two years..... the property vended under this deed of conditional sale attached shall come in exclusive possession and occupation of us, the executant"

Relying upon this stipulation in the document their Lordships of the Supreme Court construed the document as a deed of mortgage by conditional sale. The Supreme Court had to consider this question again in the case of [Bhaskar Waman Joshi \(deceased\) and Others Vs. Shrinarayan Rambilas Agarwal \(deceased\) and Others](#) . In the document which was under consideration in that case the relevant recital was as follows :--

"If our heirs or ourselves demand reconveyance of one, two or all the three houses of the above estate at any time within 5 (five) years of this date (this time limit shall be followed very strictly. It has been finally settled that we will lose this right if one more day expires), you or your heirs shall reconvey to us at our expenses the respective houses for their respective prices mentioned in this deed of sale. With a view that both sides should have equal rights in respect of this condition, it has been agreed between us that if your heirs or ourselves do not exercise this right of reconveyance in respect of all the three houses or any one of them within four and a half years of this day and if for any reason you or your heirs do not deem it proper to retain anyone or all these houses hereafter, you and your heirs have a right to take back from us or our heirs the amount of consideration of this deed of sale and to return all the three houses or any of them in the condition in which the same may be at that time and if you or your heirs express such a desire and if we or our heirs fail to comply with it, it shall be tantamount to our breaking the agreement of reconveyance and we and our heirs will be liable to pay damages. It has been further agreed between us that in the event of such a reconveyance our heirs and ourselves will pay full prices (as mentioned in this deed of sale) of the estate in the condition in which it may be at that time, that is in the condition in which it may be on account of heavenly mishap or Government action, on account of any reason whatsoever or on account of all in prices."

6. The courts below in that case had differed in the interpretation of the true effect of this condition and when the matter went to the Supreme Court the document in question was held to be a document of mortgage by conditional sale. It is no doubt

true that various other circumstances attending to the transaction were taken notice of by the learned Judges but the term being contained in the same document was also considered to be as a vital factor in interpreting the document in question. The next case of the Supreme Court which was referred to on behalf of the appellant and which has also been relied upon by the learned Additional District Judge is the case of [P.L. Bapuswami Vs. N. Pattay Gounder](#), . In this case the amendment referred to above has again been emphasised as a relevant consideration but in determining the nature of the document in question a caution of course has been stressed that the form in which the deed was couched was not decisive. It has however, been observed that if the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect, and 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. While considering the document in question in this case it was observed as follows:--

"We consider that in the present case there are several circumstances to indicate that Ext. B-1 was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place there is the important circumstance that the condition for repurchase is embodied in the same document. In the second place, there is the significant fact that the consideration for Ex. B-1 was Rs. 4,000/- while the real value of the property was, according to the Munsif and the Subordinate Judge, Rupees 8,000. The High Court has dealt with this question and reached the finding that the value of the property was Rs. 5,500, but if it is submitted by Mr. Ganapathi Iyer on behalf of the appellant that the question of valuation was one of fact and the High Court was not entitled to go into the question in the second appeal.....we are of the opinion that the transaction under Ex. B-1 was mortgage by conditional sale."

7. Coming to the document in hand, the condition of the proviso which will render this document as a mortgage by conditional sale is fulfilled and no other circumstance has been brought to my notice by the learned Counsel for the appellant which would displace the presumption by clear or expressed words.

8. From the relevant recitals also referred to above, I am satisfied that the intention of the executant is well evidenced to execute a deed of mortgage by conditional sale and not a deed of sale outright with the condition of repurchase. In the latter event there could be no possible reason for the mortgagor to undergo the burden of annual repairs of the house on himself as well as for directing the claimant (beneficiary) to pay the Municipal taxes and demand in the name of the mortgagor.

9. The learned Additional District Judge has also come to a finding that the consideration of Rs. 6,000/- was not an adequate consideration and was much lower than the market value of the property which should have been for a deed of sale.

According to him the value was Rs. 10,000/- Mt. Kailash Rai has endeavoured to argue that this finding is vitiated and suffers from errors in calculation. I must confess that I could not clearly follow those calculations that the learned Counsel emphasised before me. Be that as it may, on the materials and consideration of all the circumstances, I have got no doubt in my mind that the document (Exhibit "G") in question was a deed of mort gage by conditional sale and not an outright sale with the condition of repurchase. In that view of the matter this appeal has got no merit and must be dismissed. In the circum stances, however, I shall make no order as to costs.