

(1959) 03 CAL CK 0019

Calcutta High Court

Case No: Appellate Decree No. 595 of 1958

Jakeria Mondal

APPELLANT

Vs

Md. Osmanali Mondal and
Others

RESPONDENT

Date of Decision: March 6, 1959

Acts Referred:

- Transfer of Property Act, 1882 - Section 58(c)

Citation: 63 CWN 430

Hon'ble Judges: Banerjee, J

Bench: Single Bench

Advocate: Ranjit Kumar Banerjee and Dhires Chandra Chakravarty, for the Appellant; Apurbadhan Mukherjee and Gopal Chandra Narayan Chowdhury and Manan Kumar Ghose for Deputy Registrar, for the Respondent

Final Decision: Dismissed

Judgement

Banerjee, J.

This appeal, by defendant No. 1 is directed against an appellate decree affirming the decree of a learned Munsif. Plaintiff brought a suit for recovery of possession of the land, described in schedule Ka to the plaint, upon declaration that there has been a redemption, by enjoyment of usufruct, of the mortgage, executed by the proforma defendant No. 16 in favour of the predecessor-in-interest of the principal defendants Nos. 1 to 15, or Agrahayan 25, 1343 B.S. (corresponding to the 11th December, 1936). The alternative prayer of the plaintiff was for redemption of the said mortgage.

2. Plaintiff's case was that subsequent to execution of the mortgage by the proforma defendant No. 16, he purchased the self-same property from the said proforma defendant under a conveyance, dated Pons 7, 1355 B.S. (corresponding to the 2nd December 1948) and in that capacity was entitled to seek for the declaration

or claim redemption.

3. The suit was contested by the defendant No. 1 alone whose substantive defence was that the land in suit had been sold to his predecessor-in interest by the proforma defendant No. 16 and not merely mortgaged as alleged by the plaintiff.

4. The trial court overruled the plaintiff's contention that there had been an automatic redemption of the Mortgage by enjoyment of the usufruct but passed a preliminary decree for redemption, holding that deed dated the 26th Agrahayan; 1343 B.S by the proforma defendant No. 16 was not a conveyance but a deed of mortgage by conditional sale.

5. The defendant No. 1 appealed The lower appellate court affirmed the decree of the trial court. Hence this second appeal.

6. Mr. Ranjit Kumar Banerjee learned Advocate for the defendant appellant, argued with emphasis that the courts below erred in the construction of the document, Ext. B (4), dated the 25th Agrahayan, 1943 B.S According to Mr. Banerjee there was no indication in the deed itself about the existence of any debt which the mortgage was to secure. He, therefore, contended that the court of appeal below was wrong in holding that the Transaction as embodied in the document disclosed the existence of a debt and the sale spoken of was nothing but an ostensible sale intended as a security for the debt. Mr. Banerjee submitted that the deed, Ex. B(4), should be held to be a deed of sale with a condition of repurchase.

7. Mr. Apurbadhan Mukherjee, learned Advocate for the plaintiff respondent, argued on the other head that the internal evidence supplied by the deed, Ext. B(4), was good enough for the finding that the document created a mortgage by conditional sale.

8. It is necessary for me, therefore, to examine the deed, Ext. B(4), in order to find out its true character. The deed, which is in Bengali language, opens with the words "This deed of Kat-Kobala, that is to say, English mortgage of occupancy raiyati interest, is executed to the following effect". The deed closes with the words "I execute this deed of Kat Kobala". In the material part of the deed it is stated as follows:

For my own requirement I sell land in my enjoyment and possession within the boundaries as in the schedule below, on receipt of a sum of Rs. 150/- from you. You become entitled to the land in my own right but there remains this condition that if I can repay to you the entire amount of the aforesaid sum of money together with interest within the month of Chaitra, 1953 B.S., you will return the land to me. If I cannot do so then I shall not be entitled, on the expiry of the period, to claim return of the land. You will go on with the enjoyment and possession in the same way as you have been doing. * * * Being entitled to enjoyment and possession of the said property in my right, you will enjoy and possess the same, as you like, in estate of

inheritance in the line of your sons and grand sons and with right to sell and make a gift.

9. Mr. Ranjit Kumar Banerjee was right in his submission that the document did not expressly disclose existence of any debt as erroneously held by the court of appeal below. But for the opening and closing words, the recitals in the material part of the deed would not have been inappropriate in a deed of sale with a condition of repurchase. Nor will the recitals ill befit a mortgage by conditional sale.

10. Vivian Bose, J. in delivering the judgment of the Supreme Court in *Pandit Chunchun Jha v. Sk. Ebadat Ali* (1) (1954) S.C.A. 611 emphasised on the difficulty one has to face in trying to interpret a document couched in language of ambiguity, such as I have now for my consideration His Lordship observed:

The question Whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because 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.

11. Of a document couched in language of uncertainty, dubiousness and ambiguity, it is not possible to find out or to determine the nature of the document from a reading of the document itself. In such a case one has to see what type of document the parties intended to create or what was the intention of the parties as envisaged in the document.

12. One indication of such intention may be the name given to the document. I do not mean to say that the name of a document over-rides the internal indications the document itself to the contrary. But where there are no such indications, there is no reason to exclude from consideration the name given by the parties themselves to the document.

13. In a Full Bench decision of the Bombay High Court, reported in ILR 26 Bom. 252 (2) (*Tukaram Bin Mahal v. Ramchand Mulukchand*), where doubt arose as to whether a particular document was a mortgage or an agreement of sale or lease. Crowe, J. observed as follows:

What then is the nature of the document in the case before as it is described in the heading as a mortgage deed * * * * *

The learned District Judge has observed that it is not the name given to a contract, but its contents or the relations constitute it, by it, that determine its nature, and, applying that canon of interpretation to the present case, we are of opinion that it is impossible to come to any other conclusion than that the transaction, according to

the term thereof was intended by the parties to be a mortgage. They have declared this in the most forcible way of which they were capable, and, in arriving at our conclusion, we think it is impossible to overlook the importance of the view taken by the parties themselves of the nature of the transaction. It is difficult to believe when the parties deliberately designated the transaction as a mortgage, they did not believe themselves to be clothed with all the rights and remedies incidental thereto.

14. A document like the present one, described or labelled as "Kat Kabila" both in the beginning and at the end but claimed by one party as a conveyance and by the other as a deed of mortgage by conditional sale came up for consideration before the Dacca High Court in a case reported in (3) 55 C W.N. (3 D.R.) 45. I refer to that decision because the document in that case was the nearest to the present one being described as "Kat Kobala" both at the beginning and in the end. Apart from relying upon other circumstances, the Dacca High Court relied, in order to find out the true nature of the document, on the description of the document and observed as follows:

Here the document begins and also ends with the word "Kat Kobala" and this is very significant and so on the face of it, it is a mortgage by conditional sale." If it was intended to be a sale deed the usual word "Bikray Kabala or "Kabala" (deed of sale) would have been used and not the word "Kat Kabala".

15. In the two cases referred to above, the description given to the document was relied upon in the absence of internal evidence in the document or in the surrounding circumstances pointing to a contrary state of affair.

16. An instance where the description of a document as a deed of mortgage was ignored on the basis of internal evidence contained in the document itself, is to be found in L.R. 30 I.A. 54 (4) (Nidha Sah v. Murli Dhar) in which Sir John Bonser, in delivering the judgment of the Privy Council observed:

This instrument, though it is called a mortgage, and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the Courts below, is not a mortgage in any proper sense of the word. It is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed term free of rent in consideration of a sum made out of past and present advances.

"The only guiding rule" observed Subba Rao, J. in the case of Mahant Ramdhan Pun v. Bankey Bihari (5) (1959) S.C.A, 110, "that can be extracted from the cases on the subject is that the intention of the parties must be looked into and that once you get a debt with security of land for its redemption, then the arrangement is a mortgage by whatever name it is called.

17. But where the intention of the parties is not otherwise ascertainable from the document or from the surrounding circumstances, the name or heading of the document may be taken as evidence of the intention of the parties.

18. The Patna High Court has laid down another workable test for interpretation, where doubt exists whether a document is an instrument of sale with condition of repurchase or of mortgage by conditional sale. In a decision reported in (6) [Debnath Bhagat and Others Vs. Bhoju Mandal and Others](#), Ramaswami, C.J. and Chowdhury, J. observed as follows:

The proviso (meaning proviso to sec. 58(c) of the Transfer of Property Act) has only attempted not to permit a controversy to be raised for construing a document as being one of mortgage by conditional sale unless the condition is embodied in that very document. That does not, however, say that if the condition is embodied in one and the same document, it must necessarily be a mortgage by conditional sale. * * * The decision of the question whether a particular document is a mortgage by conditional sale or a sale out and out with a condition of repurchase, depends on the particular facts of each case and the intention of the parties entering into the transaction * * * It is reasonable to suppose that persons, who after the amendment (meaning the proviso added to sec. 58(c) of the Transfer of Property Act by the Amending Act 29 of 1929) choose not to use two documents, do not intend the transaction to be a sale unless they displace that presumption by clear and express words and that if the conditions of section 58(c) of the Transfer of Property Act are fulfilled, then the deed should be construed as a mortgage.

19. The view of the Nagpur High Court, on this point, is similar to that of the Patna High Court. In a decision reported in (7) AIR 1955 272 (Nagpur) Hidayatulla, C.J. and Mangalmurti, J. observed as follows:

"If ambiguous, it can be interpreted either as a mortgage or as a sale, with a presumption in favour of a mortgage.

20. Bearing in mind the rules of interpretation quoted above, I turn again to the document, Ext. B(4), the true character of which needs determination. The document, as already stated, is labelled a "Kat Kabala" and bears the date December 11, 1936, that is to say, a date considerably posterior to the date of the Amending Act 20 of 1929. The conditions about sale becoming either absolute or void are not embodied in different deeds but are contained in the self-same document. Taking all these things into consideration it is not unreasonable to construe the document as a deed of mortgage by conditional sale.

21. Then again the deed, Ext. B(4) speaks of the money being repaid with interest. Now interest on money ordinarily means legal profit or recompense on loans of money to be taken from the borrower by the lender. This is a piece of internal indication that the document was meant to be an instrument of mortgage in security of a loan.

22. The recitals in the deed giving authority to recipient of the document to sell and make a gift of the property and also to enjoy the property as an estate of inheritance, ordinarily to be found in a conveyance, are not absolutely inappropriate in a deed of mortgage by conditional sale. These recitals were referable to when the sale was to become absolute. Considering all the above aspects, I am of the opinion that the courts below were right in interpreting the deed Ext. B(4), as a deed of mortgage by conditional sale. At one place in the opening portion of the deed the words ""Kat Kabala" and "English mortgage" were used as interchangeable terms. That was however a mistake. In the view that I take I dismiss this appeal. In the circumstances of the case, I make no order as to costs.