(1997) 1 OLR 281

Orissa High Court

Case No: Second Appeal No''s. 4 and 10 of 1986

Gudla Minna Rao		APPELLANT
	Vs	
Lado Avataram and Others		RESPONDENT

Date of Decision: Jan. 29, 1997

Acts Referred:
Transfer of Property Act, 1882 â€" Section 83

Citation: (1997) 1 OLR 281

Hon'ble Judges: P.K. Misra, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

P.K. Misra, J.
These two Second Appeals are being disposed of by this common judgment as the parties and the facts are the same. The

facts giving rise to both the Second Appeals are as follows:

Admittedly, the disputed property belonged to Kona Venkatappa Rao and his son. The Appellant in both the appeals claims that the property was

sold to him for Rs. 3,000/- by the admitted owners by a registered document dated 3.7.1974. Though there was a condition that the original

owners could get back the property by paying back Rs. 3,000/- within five years, the same having not been done, he has got absolute right over

the property. It is further claimed by him that the subsequent purchase by Respondent No. 1 from the other Respondents by registered document dated 24.4.1977 is not binding on him. On the basis of the aforesaid claim, he filed Title Suit No. 8of 1983 which was dismissed. Thereafter Title

Appeal No. 22 of 1984 was also dismissed. Second Appeal No. 10 of 1986 is directed against the aforesaid judgment.

Second appeal No. 4 of 1986 is directed against the judgment and decree passed in Title Suit No. 19 of 1982 and confirmed in Title Appeal No.

21 of 1984. The said suit had been filed by Respondent No. 1 for redemption of mortgage and mesne profits. It is the case of Respondent No. 1

that the document dated 3.7.1974 was, in fact, a mortgage with conditional sale and not a sale with condition of re-purchase. It is further claimed

that he purchased the right of redemption from the other Respondents (original owners) on 24.4.1977 and thereafter filed M. J.C. No. 14 of 1979

purporting to be a proceeding u/s 83 of the Transfer of Property Act depositing Rs. 3,000/- for refund of the same to the present Appellant. Since

the present Appellant refused to accept the, said money, the present Appellant should be directed to convey the property and deliver possession

along with mesne profits. In the said suit, the trial Court passed a preliminary decree in favour of the present Respondent No. 1 with further

direction for payment of mesne profits at the rate of Rs. 5.50 paise per day from July, 1979. The present Appellant had filed Title Appeal No. 21

of 1984 against the said decree. Both the Title Appeals were dismissed by a common judgment and hence these Second Appeals.

2. Both the Courts below negatived the contention of the present Appellant that the document dated 3.7.1974 was a sale with condition of re-

purchase and they found that, in fact, it was only a mortgage with conditional sale and as such the original mortgagor or his successor-in-interest

(the present Respondent No. 1) had right of redemption.

3. The only question to be decided in both the Second Appeals is as to whether the document dated 3.7.1974 was a sale with condition of re-

purchase or a mortgage with conditional sale. Law is well settled that the nature of a transaction is to be ascertained from the intention of the parties to the document and if the recitals of a document are clear and unambiguous, the intention of the parties has to be gathered from the recitals of the document itself. However, if the recitals are ambiguous, the surrounding circumstances may be looked into for ascertaining the true nature of a transaction. It is also clear that the mere form in which a deal is clothed is not decisive.

The document marked as Ext. 1 was styled as "Condition Kraya Dalil". The recitals of Ext. 1 indicate that the original owner executed the document for himself and his minor son for Rs. 3,000/- on condition that the present Appellant would possess the said property by paying tax and other charge etcetera. It is further recited that in case the executant and his son would repay Rs. 3,000/- on or before 3.7.1979, the factum of repayment should be endorsed on the document and a receipt should be granted and possession should be re-delivered to the executants and in case they failed to repay the amount by 3.7.1979, they would execute a sale deed for Rs. 3,000/- or for consideration to be decided by four gentlemen and from that day the present Appellant would enjoy the said property as purchaser.

4. It is contended on behalf of the Appellant that the aforesaid transaction was a sale transaction and the only right reserved by the vendor was right to re-purchase the same on repayment of Rs. 3,000/- However, such contention of the Appellant is not tenable in view of the recital in the document itself that in the event of failure of the executants to repay Rs. 3,000/- by the stipulated date, a fresh document (sale deed) is to be executed for Rs. 3,000/- or for a consideration to be decided by four gentlemen such recital is ore consistent with the view that, in fact, the transaction was a mortgage with conditional sale rather than a sale with condition of re-purchase. There was no transfer of ownership on the date of execution, but only a right to remain in possession of the property had been given with further condition that in case the original executants failed to pay the money be a stipulated date, another sale deed is to be executed. Even the Appellant while being examined as P. W. 1 admitted in his

evidence that the document was indeed a mortgage deed and not a sale deed. Though it was recited that the present Appellant was to pay tax

etcetera, that by itself cannot make the transaction a sale Even a person in possession as a mortgagee or otherwise may be required to pay tax and

other dues etcetera. Recitals of the document coupled with the admission of the Appellant himself make it clear that the transaction was only a

mortgage with conditional sale and as such the executants had the right of redemption. It is not disputed that the original executants sold the

property to Respondent No. 1 (Plaintiff in Title Suit No 19 of 1982) on 24.4.1977 and as such transferred the right of redemption to the latter.

Respondent No. 1 had every right to seek for redemption of the property by tendering the money which he had by filing M.J.C. No. 14 of 1979

deposited on 28.6.1979. As such, in view of the aforesaid findings, the Courts below rightly dismissed Title Suit No 8 of 1983 filed by the present

Appellant.

5. Even assuming that the transactions was a sale with condition of re-purchase, the original executants or their successor-in-interest had the right

to get back the property by repaying Rs. 3,000/- as contemplated in Ext. l. Since the present Respondent No. 1 had purchased the property from

the original owners and had thus stepped into the shoes of the original owners, he had the right to get back the property by repaying the money. As

already indicated, he deposited the money on 28.6.1979, i.e. prior to the stipulated date i.e. 3.7.1979, Thus, in either view of the matter, the views

expressed by both the Courts below cannot be held to be illegal so as to warrant interference in second appeal.

6. The learned Counsel for the Appellant, however, submitted that the mesne profits decreed by the Courts below appear to be excessive and

without any basis. The Courts below fixed the mesne profits at the rate of Rs. 5.50 per day i.e. at the rate of Rs. 165/- per month. During the

pendency of the Second Appeal, while granting interim stay, this Court had directed the Appellant to deposit mesne profits at the rate of Rs. 50/ -

per month by order dated 15.4.1986. Subsequently, the said order was modified by order dated 9.9.1986 and the Appellant was directed to

deposit Rs. 150/- per month. If the Appellant gives up vacant possession of the disputed property in favour of Respondent No. 1 within a period

of two months, Respondent No. 1 would be entitled to withdraw the amount lying in deposit till today and it would represent the total mesne

profits payable to Respondent No. 1 and the Appellant shall not be liable to pay any further amount towards mesne profits. However, if the

Appellant does not give up vacant possession within two months from today, the decrees relating to mesne profits as passed by the Courts below

shall remain operative and apart from withdrawing the amount already in deposit, Respondent No. 1 shall be free to proceed with the execution

case. The Appellant is, however, permitted to withdraw the amount of Rs. 3,000/- deposited by Respondent No. 1 in M.J.C. No. 14 of 1979.

7. Both the second appeals are dismissed subject to the aforesaid observation. There shall be no order as to costs of this Court.