

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 29<sup>TH</sup> DAY OF JULY 2011

BEFORE

THE HON'BLE MR.JUSTICE A.S.PACHHAPURE

REGULAR SECOND APPEAL NO.169 OF 2006

BETWEEN

1. CHIKKATHAYAMMA,  
W/O. LATE KEMPEGOWDA,  
AGED ABOUT 48 YEARS,
2. PADMA,  
W/O. NINGARAJU,  
AGED ABOUT 28 YEARS,
3. DEVARAJU,  
S/O. LATE KEMPEGOWDA,  
AGED ABOUT 26 YEARS,

All ARE R/A KALENAHALLI VILLAGE,  
KASABA HOBLI,  
PADAVAPURA TQ - 571 432,  
MANDYA DISTRICT.

... APPELLANT/S

[BY SRI. M. SHIVAPPA, ADV.]

AND

JAVAREGOWDA,  
S/O. KURIHATTI JAVAREGOWDA,  
SINCE DECEASED BY HIS L.RS.

- 1A. SMT. CHENNAMMA,  
SECOND W/O. LATE JAVAREGOWDA,  
AGED ABOUT 50 YEARS,

- 1B. SMT. JAYAMMA,  
W/O. LATE J. JAVAREGOWDA,  
AGED ABOUT 40 YEARS,
- 1C. SARASWATHI,  
D/O. LATE J. JAVAREGOWDA,  
AGED ABOUT 22 YEARS,
- 1D. RAJI,  
S/O. LATE J. JAVAREGOWDA,  
AGED ABOUT 20 YEARS,
- 1E. CHIKKA KEMPA,  
S/O. LATE J. JAVAREGOWDA,  
AGED ABOUT 48 YEARS,
- 1F. SMT. GOWRAMMA,  
W/O. LATE DYAVEGOWDA,  
AGED ABOUT 33 YEARS,
- 1G. THEJA,  
D/O. LATE DYAVEGOWDA,  
AGED ABOUT 18 YEARS,
- 1H. SHIVA,  
S/O. LATE DYAVEGOWDA,  
AGED ABOUT 16 YEARS,  
MINOR REPRESENTED BY NATURAL  
GUARDIAN HIS MOTHER  
SMT. GOWRAMMA NO. 1(F) ABOVE
- 1I. JAYARAMA,  
S/O. LATE JAVAREGOWDA,  
AGED ABOUT 35 YEARS,

ALL ARE RESIDENTS OF  
VADDARAHALLI KOPPALU,  
BILUGULI DHAKLE,  
MANDYA TALUK & DISTRICT.

2. THEJA,  
D/O. LATE KEMPEGOWDA,  
AGED ABOUT 32 YEARS,

RESIDENT OF KOLENAHALLI,  
MANDYA TALUK & DISTRICT-571 401. ... RESPONDENT/S

[BY SRI. D.R. SUNDARESH, ADV. FOR R1(A-I)]

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THIS RSA IS FILED UNDER SECTION 100 OF CPC AGAINST THE JUDGEMENT & DECREE DT. 27.10.2005 PASSED IN R.A.NO.1/2003 ON THE FILE OF THE PRL. CIVIL JUDGE (SR.DN.) AND CJM, MANDYA, ALLOWING THE APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DT.29.10.2002, PASSED IN O.S.NO.310/94, ON THE FILE OF THE ADDL. CIVIL JUDGE (JR.DN.), MANDYA.

THIS RSA HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

**JUDGMENT**

The appellants have challenged the judgment and decree of the First Appellate Court in RA 1/2003 dated 27-10-2005 allowing the appeal and dismissing the suit instituted by the appellants.

2. The facts relevant for the purpose of this appeal are as under:

I will refer to the parties as per their rank before the Trial Court for the purpose of convenience.



The appellants herein are the legal representatives of deceased plaintiff Kempe Gowda and he instituted the suit seeking the relief of redemption of the mortgage of the properties enumerated in the schedule to the plaint. The suit properties are the two agricultural lands bearing S.No.103/6 and 103/4 measuring 33 ½ guntas and 8 ½ guntas situated within the village limits of Neelagiri and the site situated at Voddarahalli Koplui Village. The deceased plaintiff is the owner of the suit properties and there was a legal necessity for him to discharge the loan amount incurred at the time of his marriage and also for the house hold expenses approached the defendant to advance the loan of Rs.2,000/-. The defendant agreed to advance the loan on the security of the properties and he executed a conditional sale deed dated 12.8.1974 for a consideration of Rs.2,000/-. According to the plaintiff, the deed dated 12.8.1974 is a mortgage deed with conditional sale. The possession of the suit properties was given to the defendants and thereafter, the plaintiff on several occasions approached the defendant to receive the amount of Rs.2,000/- and return the properties, the defendant was evading the same and in the circumstances, claiming that the suit document is a mortgage



by conditional sale, instituted the suit for redemption of the mortgage by depositing an amount of Rs.2,000/- in the Court. He sought for the possession of the properties and also the mesne profits.

The defendant has denied the allegations made and it is his claim in the written statement that the document in question executed by the plaintiff in favour of the defendant is a sale deed with a condition to repurchase the properties and as the condition itself is illegal, he contends that the plaintiff cannot seek the redemption of mortgage treating the document as a mortgage transaction. He further submits that after purchasing the properties, he has made improvements in the lands and invested Rs.2,000/- per year for the last 20 years and in these circumstances, it is his contention that as the document in question is a conditional sale deed, the plaintiff is not entitled to the redemption of mortgage and mesne profits. On these grounds, he sought for the dismissal of the suit. On the basis of these pleadings, the following issues have been framed by the Trial Court.



1. Whether the plaintiff proves that he had executed conditional sale deed in favour of defendants on 12.08.74?
2. Whether the defendant proves that the plaintiff has executed an absolute sale deed?
3. Whether the defendant proves that he has improved the suit schedule property by spending amount of Rs.2,000/- p.a. for last 20 years?
4. Whether the defendant proves that the sale deed obtained by plaintiff is fraud?
5. Whether the LRs. of plaintiff proves that they are the heirs of deceased plaintiff?
6. Whether the plaintiff is entitled for reconvey of suit schedule property as prayed for?
7. Whether defendant proves that the suit is bared by limitation?
8. Whether the plaintiff is entitled for order of ascertainment of mesne profit?
9. What relief the parties are entitled to?

During the trial, the wife of the deceased plaintiff was examined as PW.1 and a witness PW.2 and in their evidence,



the documents Exs.P.1 to P.9 were marked. The first defendant examined himself as DW.1 and two witnesses DWs.2 and 3 and got marked the documents Exs.D.1 and D.2. The Trial Court after hearing the counsel for the parties and on appreciation of the material on record, decreed the suit directing the defendants to hand over the possession of the suit properties to the plaintiff and ordered a separate enquiry for mesne profits. Aggrieved by the judgment and decree, the defendant approached the First Appellate Court in RA No.1/2003 and the said appeal came to be allowed on merits vide the judgment and decree dated 27.10-2005. Aggrieved by the judgment and decree of the First Appellate Court, the present appeal has been filed.

3. I have heard the learned counsel for the appellants and the counsel for the respondents. At the time of admission, this Court has framed the following substantial question of law:

“Whether the First Appellate Court was justified in construing Ex.P.1 a mortgage by conditional sale as an absolute sale deed and not as a mortgage ?”

4. The learned counsel for the appellant would contend that the document Ex.P.1 is a mortgage with conditional sale



and therefore, the suit instituted for redemption of mortgage was rightly decreed by the Trial Court and the First Appellate Court committed an error in dismissing the suit. It is his submission that the interpretation of the document Ex.P.1 reveals that the plaintiff intended to mortgage the suit properties for a consideration of Rs.2,000/- with a condition to return the property after the payment of Rs.2,000/-. Therefore, he contends that the First Appellate Court committed an error in allowing the appeal and dismissing the suit. Per contra, the learned counsel for the respondent has supported the judgment and decree of the Lower Appellate Court and contends that the document Ex.P.1 is a sale deed with condition to repurchase and as the condition incorporated in the document is hit by the provisions of Section 10 of the T.P.Act, it could never be treated as a mortgage deed.

5. I have scrutinized the document Ex.P.1 and it is mentioned as a conditional sale deed and the consideration for this transaction is Rs.2,000/- itself said to be the price of the properties sold under this document and the possession of the properties was given to the defendant on the date of the





transaction itself. It is also mentioned that the defendant would become the owner of the suit property including the underground treasure, water etc., the crops and whatever that has been hidden in the ground and that the defendant, his children, grandchildren have to enjoy the properties from generation to generation and that he has agreed to receive the sale consideration through a separate receipt and he states that there is no encumbrance over the properties and thereafter described the suit properties with the boundaries and the last sentence in the document reads:

“That whenever the amount under the document is paid by the plaintiff, the defendant was to execute the document transferring the property to the plaintiff.”

6. So from the contents enumerated above, it is necessary to find out as to whether the document in question which is at Ex.P.1 is a sale with condition to repurchase or a mortgage transaction.

7. The learned counsel for the appellant has placed reliance on the decision of the Apex Court reported in AIR 1954



SC 345 (Chun Chum Jha vs. Ebadat Ali and another) wherein the Apex Court so far as the construction of the document is concerned has held that it is the intention of the parties which must be gathered in the first place from the document itself and if the words are express and clear, effect must be given to them and any extraneous inquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. So, in case, if there is any ambiguity in the language employed by the parties in the document, it is permissible to look into the surrounding circumstances to determine what was intended. So, if the document in clear terms mentions it as a mortgage with conditional sale, there is no question of further considering surrounding circumstances and if there is any ambiguity in the document then the circumstances will have to be taken into consideration to decide as to whether the document is a mortgage or a sale.

8. The learned counsel has also relied upon the decision reported in AIR 1999 SC 1441 (Vidyadhar vs. Manikrao). The document was termed as mortgage by conditional sale (karar



khareedi) it was mentioned in the document that the immovable property which was described in areas and boundaries was being mortgaged by conditional sale by defendant no.1 for Rs.1,500/-, out of which Rs.700/- was paid at home and Rs.800/- was paid before the sub registrar. It was stipulated in the deed that the aforesaid amount of Rs.1,500/- would be returned to defendant no.1 on or before 15<sup>th</sup> March 1973 and the property would be reconveyed to defendant no.2. If it was not done, then defendant no.1 would become the owner of the property. Thus, the contents of the document were held to indicate it as a mortgage by conditional sale in favour of the first defendant. He had promised to pay back Rs.1,500/- to him by a particular date failing which the document was to be treated as a sale deed. So from these documents, it was held that the intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of the case and also the fact that the condition to repurchase is condition in the same document by which mortgage was created in favour of the defendant no.1, the deed in question was held



to be a mortgage by conditional sale. Further, he relied upon the full Bench decision of the Gujarath High Court reported in AIR 2003 Gujarat 305 (Kantilal M.Kadia vs. Somabhai Dahyabhai Kadia) wherein the perusal of the contents of the doucment reveal that the document was styled as a mortgage by way of a sale or conditional sale. The transaction was comprising of two documents one doucment executed by the owner as ostensible sale subject to condition that purchaser shall reconvey property on seiler returning same amount and the other document executed by ostensible purchaser agreeing to reconvey property on receiving amount after stipulated period of five years and condition for reconveyance was thus part of same document and it was held that the document was not hit by the proviso to S.58(c) and it was a transaction of mortgage by conditional sale.

9. Now, as could be seen from the decisions referred to supra, the documents reveal that the term was stipulated within which the property was to be returned after receiving the consideration. In the second decision, the property was to be returned to the owner on or before 15<sup>th</sup> March 1973 and in the



third decision, it was returned within a stipulated period of five years. At the same time, the learned counsel for the respondent has placed reliance on the decision of the Patna High Court reported in AIR 1962 Patna 53 (Darshan Dass and another vs. Ganga Bux and others) the Court took into consideration a mortgage by conditional sale and a sale with a condition to repurchase, the distinction was whether the documents purporting to be absolute sale with condition of repurchase in express and clear terms states so and the intention of the parties could be determined from the document itself and not from surrounding circumstances, it also held that the inadequacy of price or payment of cost of stamp by executant cannot alter its nature. The real crux of the matter is to find out as to whether it is a mortgage by conditional sale or a sale with condition to repurchase depends upon whether a term has been stipulated in the deed itself which is the subject matter of interpretation and if the document is couched in a language of uncertainty, dubiousness and ambiguity, the surrounding circumstances will have to be taken into consideration. It was recited in the deed about a clear stipulation that if the amount of consideration would be paid by 1<sup>st</sup> May 1955, the property



would be conveyed to the executant. So in the context of the decisions referred to above, it is relevant to note that the consideration mentioned in the document is not of much relevance and as could be seen from Ex.P.1, Rs.2,000 mentioned as sale consideration and the possession was handed over the document itself. Furthermore, there is also a mention of the fact that the property is to be enjoyed by the defendant, his children, grand children, i.e., generation to generation and he agreed to receive the same price under a separate receipt. So these recitals in the document reveal that it is a sale with a condition to repurchase. There was no period stipulated within which the property is to be returned to the plaintiff or his LRs. It is recited that whenever the amount is paid, the property is to be returned by executing the document. So, there is no stipulated period mentioned within which the property is to be returned and the document is to be executed. In such circumstances, as there is no stipulated period, the condition becomes void and the document has to be treated as an absolute deed.



10. The Trial Court on consideration of this document was of the opinion that it is a mortgage transaction. It lost sight of the fact that under the provisions of Section 58 of the T.P. Act, it has provided that where the mortgagor ostensibly sells the mortgaged property, on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or 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. So the perusal of the provisions reveal that certain date has to be fixed within which the amount has to be repaid and possession has to be returned. So there is no such date fixed in the document so far as the return of the money and execution of the deed is concerned and in the circumstances, even the condition that has been incorporated is hit by the provisions of Section 10 of the Act. This aspect of the matter has not been considered by the Trial Court while granting the decree and therefore, the Appellate Court has rectified the same and held that it is a conditional sale with condition to repurchase and as the suit



was not instituted and as the condition cannot be implemented and is hit by the provisions of Section 10 of the T.P.Act, it held that it is a sale deed with a condition to repurchase. So taking into consideration the contents of the document Ex.P.1, there is no uncertainty so as to consider the surrounding circumstances and the intention of the executor of the document is made clear by asking the purchaser to enjoy the property from generation to generation and as the condition incorporated the document is void, the document becomes absolute sale transaction. In that view of the matter, I am of the opinion that the First Appellate Court was justified in allowing the appeal and dismissing the suit of the appellants herein. In that view of the matter, I answer the substantial question of law in affirmative and proceed to pass the following:

**ORDER**

The appeal is dismissed. No costs.

**Sd/-  
Judge**

JL