

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 25th DAY OF JULY, 2011

BEFORE

THE HON'BLE MR. JUSTICE H.N. NAGAMOHAN DAS

R.S.A.No.1253/2005

BETWEEN:

H.R.CHANNABASAPPA
SINCE DEAD BY HIS LRS

- 1) Smt SHIVAMMA
AGED ABOUT 80 YEARS
W/O LATE H.R.CHANNABASAPPA
@ CHANNABASAVALAH
No.60, KAVITHA STUDIO, 5TH MAIN,
1ST FLOOR, CHAMARAJPET
BANGALORE - 560 018.
- 2) Smt M.C.PRAMEELA
AGED ABOUT 53 YEARS
W/O Sri B.SHIVAKUMAR
1ST FLOOR, STATE BANK OF INDIA
BUILDING, M.G.ROAD,
KANAKAPURA.
- 3) M.C.JAGDEESH
AGED ABOUT 43 YEARS
KAVITHA STUDIO
CHAMARAJPET,
BANGALORE - 560 018.



4) Smt M.C.MANJULA
AGED ABOUT 38 YEARS
W/O H.UMESH ARADHYA
No.95, 'E' POLICE QUARTERS
CANTONMENT
BANGALORE - 560 001.

5) Smt M.C.SARALA
(WRONGLY MENTIONED AS
H.C.SAFALA)
AGED ABOUT 36 YEARS
W/O Sri GIRISH
RESIDNET OF SOMESHWARA
EXTN., TUMKUR.

..APPELLANTS

(By SRI C.M.NAGABHUSHAN, ADV.)

AND:

B.M.NARAYANA SETTY
SINCE DEAD BY HIS LRS

1) Smt INDIRAMMA
AGED ABOUT 70 YEARS
W/O LATE B.M.NARAYANA SETTY

2) GOPI
AGED ABOUT 43 YEARS
S/O LATE B.M.NARAYANA SETTY

3) ANAND
AGED ABOUT 57 YEARS
S/O LATE B.M.NARAYANA SETTY

4) Smt LALITHA
AGED ABOUT 47 YEARS
D/O LATE B.M.NARAYANA SETTY

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- 5) RAMU
AGED ABOUT 45 YEARS
S/O LATE B.M.NARAYANA SETTY

R1 TO R5 ARE R/AT BALAJI
GRANITES, MUNICIPAL COMPLEX
KANAKAPURA MAIN ROAD,
KANAKAPURA TOWN
BANGALORE RURAL DIST-562117.

- 6) Smt PADMA
AGED ABOUT 49 YEARS
W/O Sri MUNIYAPPA
Sri RAMA TEXTILES, PATEL
BEEDHI, NELAMANGALA
BANGALORE RURAL
DISTRICT-562 123.

- 7) SRINIVASIAH
AGED ABOUT 56 YEARS
S/O VENKATASWAMIAH
R/AT DODDAMARALAVADI
VILLAGE, MARALAVADI HOBLI
KANAKAPURA TALUK
BANGALORE RURAL
DISTRICT - 562 117.

..RESPONDENTS

(By SRI NINGEGOWDA, ADV., FOR R1 -R3
AND R5 & R7,
R4 AND R6 ARE SERVED)

THIS RSA FILED UNDER SECTION 100 OF CPC
AGAINST THE JUDGMENT AND DECREE DATED 18.02.2005
PASSED IN R.A.No.35/2000 ON THE FILE OF THE ADDL.CIVIL
JUDGE (SR.DN.), RAMANAGARAM, ALLOWING THE



APPEAL AND SETTING ASIDE THE JUDGMENT AND DECREE DATED 30.06.2000 PASSED IN O.S.No.152/1987 ON THE FILE OF THE CIVIL JUDGE (JR.DN.) AND JMFC, KANAKAPURA.

This appeal coming on for hearing this day, the court delivered the following;

JUDGMENT

This second appeal is directed against the judgment and decree dated 18.02.2005 in R.A.35/2000 passed by the Addl.Civil Judge (Sr.Dn), Ramnagaram reversing the judgment and decree dated 30.6.2000 in O.S.No.152/1987 passed by the Civil Judge(Jr.Dn) at Kanakapura.

2.Appellants are the plaintiffs and respondents are the defendants before the Trial Court. In this judgment, for convenience, the parties are referred to their status before the trial Court.

3. Plaintiffs contend that they are the owners of the plaint schedule property. Plaintiffs borrowed loan of Rs.1,500/- from the first defendant and executed a registered mortgage deed dated

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28.7.1969 as a security for repayment of loan. Further it is contended that the possession of the plaint schedule property was handed over to the first defendant on the date of mortgage. This deed came to be registered as a conditional sale. One of the conditions in the deed dated 28.7.1969 is that first defendant shall be allowed to enjoy the plaint schedule property for the period of 5 years and thereafter the plaintiffs to pay the amount of Rs.1,500/- and to get the reconveyance deed. It is contended that though the deed is styled as conditional sale, the same is an usufructory mortgage by conditional sale. After completion of 5 years, the plaintiffs requested the defendants to accept the consideration of Rs.1,500/- and to redeem the mortgage. Finally, the plaintiffs got issued a lawyer's notice on 30.6.1987 calling upon the first defendant to reconvey the plaint schedule property. The defendants sent a reply inter alia contending that the sale in his favour is an outright sale and not a mortgage. The first defendant was in possession of the plaint schedule property as its



absolute owner and subsequently on 25.9.1986 he sold the same in favour of second defendant. Having no other alternative, the plaintiffs filed O.S.No.152/1987 for redemption of mortgage dated 28.7.1969, to declare the sale deed dated 25.9.1986 in favour of second defendant as not binding on the plaintiffs and for recovery of possession of plaint schedule property.

4. The first defendant entered appearance and filed written statement interalia contending that the deed dated 28.7.1969 is a sale deed executed by the plaintiffs for valuable sale consideration. After 5 years from the date of deed, plaintiffs have not come forward to pay the money and to get reconvey the deed and as such they have lost their right. On completion of 5 years the first defendant became absolute owner of the schedule property. Subsequently, on 25.9.1986 the first defendant sold the plaint schedule property in favour of second defendant. On these grounds, the first defendant opposed the claim of plaintiffs. The second defendant adopted the written statement filed by the first

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defendant. On the basis of pleadings, the Trial Court framed the following issues for its consideration:

- i) *Whether the plaintiff proves that the suit deed is a mortgage deed?*
- ii) *Whether the defendants prove that the suit deed is not a mortgage deed, but a sale deed?*
- iii) *Whether the plaintiff proves that the sale deed executed by the deceased defendant no.1 in favour of defendant no.2 in respect of suit property is not binding on him?*
- iv) *Whether the plaintiff is entitled for redemption of the suit property?*
- v) *Whether the plaintiff is entitled for possession of the suit property?*
- vi) *What decree or order?*

5. Before the Trial Court, the plaintiffs examined one witness as PW.1 and got marked Ex.P1 to P4. Defendants examined four witnesses as DW.1 to DW.4 and got marked Exs.D1 to D4. The Trial Court on appreciation of the pleadings, oral and documentary evidence held that the deed dated

28.7.1969 is a mortgage by conditional sale and not a sale deed. Plaintiffs are entitled for redemption of mortgage and consequently decreed the suit of plaintiffs. The defendants being aggrieved by the judgment and decree of the Trial Court filed an appeal in R.A.35/2000. The first Appellate Court on reappreciation of the entire material on record held that the deed dated 28.7.1969 is not a mortgage by conditional sale and on the other hand it is conditional sale deed. Further the first Appellate Court held that the suit filed by the plaintiffs is barred by limitation. Consequently, under the impugned judgment the first Appellate Court set-aside the judgment of the Trial Court and dismissed the suit of plaintiff. Hence, this second appeal.

6. This court by order dated 29.3.2006 framed the following two substantial questions of law:

- i) *Whether the interpretation placed by the First Appellate Court as the suit document to hold that it is not a mortgage by conditional sale is proper?*



ii) *Whether the finding of the first Appellate Court that even if it is construed as a mortgage by conditional sale that the suit is barred by law of limitation is false?*

7. I heard the arguments on the side of the appellants and perused the entire appeal papers.

8. It is not in dispute that plaintiffs were the owners of plaint schedule property and for a sum of Rs.1500/- they executed a conditional sale deed on 28.7.1969. One of the conditions of the sale deed specifies that plaintiffs are entitled to get recoveyance deed on payment of Rs.1,500/- after lapse of five years from the date of deed. The Trial Court held that the intention of the parties in entering into registered deed dated 28.7.1969 was to create mortgage by conditional sale. On the other hand, the first Appellate Court held that the deed dated 28.7.1969 is not a mortgage by conditional sale and on other hand it is a conditional



sale. In view of this controversy this court framed the first substantial question of law as stated above.

9. Section 58 (c) of the Transfer of Property Act reads as under:

Mortgage by conditional sale. – 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 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 mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

10. While interpreting Section 58(c) of Transfer of Property Act the Supreme Court in Pandit Chunchun Jha vs Sheikh Ebadat Ali and another AIR 1954 SC 345 held as under:

“The Legislature has made a clear cut classification and excluded transactions embodied in



more than one document from the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, 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 if the conditions of section 58(c) are fulfilled, then we are of the opinion that the deed should be construed as a mortgage.”

11. By following the above law declared by the Apex Court learned single Judge of this court in B.Jayashankarappa and others vs. D.S.Gulwadi ILR 2000 KAR 2173 held that “if the two transactions “Ostensible Sale” and “Sale with a condition of the nature specified in Section 58(C)” are contained in only one document, then the “Deeming Clause” in the Proviso comes into operation and such a transaction may be deemed to be a mortgage. But if, a transaction of a nature as mentioned in Section 58(c) is contained in Two or more documents, then it is not to be deemed to be and considered as a mortgage.”



12. Further this court in Smt.Nanjamma vs. H.N.Siddaiah ILR 2001 KAR 4529 while interpreting Section 58(c) of the Transfer of Property Act, held as under:

“Thus, from the discussions made above, the following tests can be employed to distinguish ‘a mortgage by conditional sale’ with a ‘bonafide sale, with a Clause to repurchase”

(1) “Whenever the documents embodying the transaction has to be construed, the intention must first be gathered in the first place from the document itself. If the words are explicit clear effect must be given to them, if however there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.

(2) If a transaction embodied in the document takes place after the amendment to Section 58(c) of the Transfer of Property Act by Act 20 of 1929, and if the sale and agreement to repurchase are embodied in separate documents that the transaction is not a mortgage.

(i) If the transaction takes place after the amendment of Section 58(c) and the entire



transaction is embodied in a single document. A presumption can safely be raised that the transaction is a mortgage, though such a presumption is always rebuttable by evidence:

- (ii) *If a reading of all the Clauses in the document indicate that the relationship of "debtor" and "creditor" subsists between the parties then it is safe to lean in favour of the transaction being a mortgage. Some of the methods of finding out "whether the relationship of creditor and debtor subsists" are:*

"If the buyer agrees to transfer the property to seller for the same sum(with or without interest) "Advanced by him and described as a sale price."

- (iii) *If money paid by the buyer was not a fair price for the 'absolute purchase' of the property. This test to be applied in conjunction to the above tests/*

- (iv) *It should also be added to the above that in doubtful cases Courts lean strongly to the construction most favorably to the person claiming right to redeem"*



13. This court in E.S.Venkatesh Gupta vs. Savithramma & others 1991(1) Kar.L.J. 477 held "in the instant case though the document is described as a Sale Deed, nevertheless it contains the recital that if the vendors were to repay the consideration received under the contract within a period of six years, the vendee was to return the properties, of course by reconveyance. Therefore, the document satisfies the condition contained in the proviso to Section 58(c) of the Transfer of Property Act, thereby it enable the Court to find out whether the transaction in question is in its true effect a Sale or a Mortgage transaction.

14. This court in Shankarappa vs. K.Srinivas Murthy 1990(4) Kar.L.J.522 held "where the deed guaranteed enjoyment of the suit lands by the mortgagee for a period of atleast 8 years, and only thereafter the mortgagor had a right to claim a reconveyance on payment of the full amount, held, the



prescription of a longer period is indicative of the intention of the parties to create a mortgage.”


15. The Supreme Court in *Tulsi vs. Chandrika Prasad* 2006 AIR SCW 4905 held that “normally in case of sale, transferee will pay the stamp duty. When transferee has paid the stamp duty is a circumstance to held that deed in question was a mortgage and not a sale”

16. Keeping the above principles of law laid down by the Apex Court and this court, the fact situation in the instant case is to be examined to find out the intention between the parties in entering into conditional sale under Ex.P1 the deed dated 28.7.1969. A perusal of Ex.P1 specifies that plaintiffs/transferees have purchased the stamp paper for writing the deed. One of the conditions of Ex.P1 specifies that the first defendant/transferee shall be allowed to be in possession of the plaint schedule property for a minimum of five years. It is only after the expiry of five years, the plaintiffs are entitled to get reconvey the



schedule property. From this admitted evidence on record, it is manifest that the intention between the parties was only to create a mortgage by way of conditional sale. The first Appellate Court without considering the law laid down by this Court and the Apex Court committed an illegality in holding that Ex.P1 is a absolute sale deed. Therefore, the finding of the first Appellate Court is liable to be set-aside. Accordingly, the first question of law is answered in negative.

17. Ex.P1, the mortgage deed is dated 28.7.1969. Plaintiffs are entitled to redeem the mortgage after lapse of five years from the date of deed. The five years lapses on 27.7.1974. Under Article 61(a) of the Limitation Act for redemption of mortgage the limitation is 30 years when the right to redeem accrues. Therefore, the suit filed on 19.9.1987 for redemption of the mortgage is within the time as specified in Article 61(a) of the Limitation Act. The first Appellate Court committed an illegality in holding that the suit of the plaintiffs is barred by limitation.



Accordingly, the second question of law is answered in affirmative. For the reasons stated above, the following:

ORDER

- i) Appeal is hereby allowed.
- ii) The impugned judgment and decree dated 18.2.2005 in R.A.NO.35/2000 passed by the Addl.Civil Judge (Sr.Dn) at Ramanagar is hereby set-aside.
- iii) The judgment and decree dated 30.6.2000 in O.S.No.152/1987 passed by the Civil Judge (Jr.Dn) at Kanakapura is hereby restored.
- iv) Parties to bear their own costs.

Sd/A
Judge