

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 6TH DAY OF AUGUST 1998

B E F O R E

THE HON'BLE MR. JUSTICE T.N.VALLINAYAGAM

R. S. A. NO. 1081/1995

BETWEEN:

1. Doddabeerappa,
aged about 50 years,
2. Chikkabeera Gowda,
aged about 47 years, .. Appellants

Both are sons of
Akkannanavara Muniswamy,
R/o; Marandahalli village,
Budikote Hobli,
Bangarpet Taluk,

(By Sri G.S.Visweswara, Adv.)

AND:

P. Muniswamy Shetty,
aged about 49 years,
S/o Pattabhiram Shetty,
R/o Budikote village (PO),
Bangarpet Taluk,
Kolar District. .. Respondent

(By Sri M.V.Seshachala, Adv.)

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This R.S.A. is filed under Section 100
of CPC against the judgment and decree dated
26-8-95 passed in R.A.No.34/90 on the file of
the Civil Judge, K.G.F. allowing the appeal
and setting aside the judgment and decree

passed by the Addl. Munsiff, K.G.F. in
O.S.No.313/89 dated 31-3-90.

This R.S.A. coming on for hearing this
day, the Court delivered the following:-

J U D G M E N T

The question in the second appeal is
whether the transaction is a mortgage by
conditional sale or an absolute sale.
There was a sale transaction on 3-10-74
when the suit property was conveyed by the
defendants to the plaintiff under Ex.P-1.
On the same day, there was an agreement
of reconveyance Ex.D-3. Both the documents
are not in serious dispute. In any event,
the Courts have found the documents are
valid. It is also admitted that the
defendants ~~are~~ continued to be in possession
notwithstanding such a sale.

2. When the suit for declaration and
possession was filed on the basis of sale
deed Ex.P-1, the trial Court found it was
a mortgage by conditional sale and confirming

the sale in favour of the plaintiff, the suit was dismissed. The Appellate Court however on an erroneous approach of the matter has held it was an absolute sale and consequently, the suit was decreed. Now, the defendants challenge the decree passed against him by the first Appellate Court.

3. The question is whether the suit transaction is mortgage by conditional sale or absolute sale. Reliance was placed for the dictum in *INDIRA KAUR vs. SHEO LAL KAPOOR* in 1988 SC 1074 for the following proposition.

"That the transaction in question was one of mortgage in essence and substance though it was clothed in the garb of a transaction of ostensible sale.

The sale deed was for a certain sum. So also the agreement which could be enforced at any time within 10 years was also for an identical sum. If

B wanted to purchase an immovable property for the sake of investment he would not have agreed to convey the very same property, for the same amount even after ten years. The stipulated period for conveying the property was a very long period of ten years. The very length of the period is suggestive of a transaction of mortgage and not a transaction of absolute sale with a stipulation to reconvey the property in such peculiar circumstances, bearing on the relationship between the parties or some other relevant consideration. If B wanted to purchase the property for his personal occupation, he would not have allowed A to continue as a tenant. The property was never mutated to the name of B. These factors clearly spell out the real intention of the parties that it was a transaction of mortgage. The reason for entering into such a transaction of ostensible sale coupled with a contemporaneous agreement

to sell within ten years was that if it was not garbed with this paraphernalia and was given the nomenclature of a mortgage the period of redemption would have been 30 years. This period could not have been curtailed without attracting the doctrine of clog on equity of redemption. This was obvious reason for resorting to this device".

4. Following the above dictum, the facts and circumstances of this case lead one to infer that it is only ^a mortgage by conditional sale and not an absolute sale.

5. In this view, setting aside the judgment and decree of the first Appellate Court and restoring the decree of the trial Court, second appeal is allowed. No costs.

Sd/
Judge

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