

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

MIHAN CHAND (PLAINTIFF) Appellant

versus

ISHAR DAS AND ANOTHER (DEFENDANTS)

Respondents.

Civil Appeal No. 2851 of 1925.

Pre-emption—Mortgage—alleged to be in reality a sale—Onus probandi.

Held, that in order to determine whether the transaction which purports to be a mortgage is in reality a sale, the Court has to see what the intention of the parties really was, and in doing so it has to look not only to the terms of the deed which evidenced the transaction, but has also to consider them in the light of the surrounding circumstances.

Jhanda Singh v. Wahid-ud-Din (1), relied upon.

Held also, that the *onus* is in the first instance on the plaintiff to establish his case, the true question being as to the real intention of the parties when entering into the transaction. If it is established beyond reasonable doubt that the parties intended a permanent transfer, the Court will find the transaction to be one of sale, though the deed is in the form of a mortgage. If there is a reasonable doubt the plaintiff's case will fail on the ground that he has not succeeded in showing that the deed does not embody the true contract between the parties.

Jagdish v. Man Singh (2), followed.

First appeal from the decree of Mir Ghulam Yazdani, Subordinate Judge, 1st Class, Lahore, dated the 5th February 1924, dismissing the plaintiff's suit.

JAGAN NATH AGGARWAL AND TIRATH RAM, for Appellant.

BADRI DAS, DAULAT RAM, Diwan MEHR CHAND and H. C. KUMAR, for Respondents.

(1) (1915) I. L. R. 38 All. 570 (P.C.). (2) 100 P. R. 1895 (F.B.).

TEK CHAND J.—This first appeal arises out of a suit for pre-emption. The facts fall within a very narrow compass and may be stated briefly as follows :—

On the 9th January, 1922, Tulsi Das, father of defendant No. 1, alienated certain house property, situate in Kucha Bal Mata in the city of Lahore, to Shib Das Mal, defendant No. 2 for Rs. 5,500 by a registered deed Exhibit D. 1. The transaction purported to be a mortgage and the whole of the consideration of Rs. 5,500 was paid before the Sub-Registrar.

On the 9th December, 1922, Mihan Chand, plaintiff-appellant instituted a suit for pre-emption alleging that the transaction was in reality a sale and that it was given the form of a mortgage in order to defeat his rights as pre-emptor. He further stated that Rs. 4,500 was the amount which actually passed as consideration for the transaction. Both the alienor and the alienee resisted the suit pleading that the transaction was a mortgage and not a sale, that no custom of pre-emption prevailed in the locality where the house was situate, and that the sum of Rs. 5,500 was in fact paid.

On these pleadings the trial Court framed the following four issues :—

- (1) Does the custom of pre-emption prevail in the locality where the property in dispute is situate?
- (2) Does the transaction in suit amount to a sale?
- (3) Was the consideration fixed in good faith or paid?
- (4) If not, what is the market value?

The learned trial Judge decided the second issue against the plaintiff and held that the transaction was

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in fact a mortgage and not a sale. On this finding he dismissed the suit.

From this decree the plaintiff preferred an appeal before the District Judge. The learned District Judge, however, felt that it was not possible to decide the appeal satisfactorily until findings had been recorded upon issues Nos. 3 and 4. He accordingly remanded the case under Order 41, rule 25, Civil Procedure Code, for enquiry and report by the Subordinate Judge on the aforesaid two issues. The Subordinate Judge, after recording such additional evidence as the parties produced before him, submitted his findings on the 6th July, 1925, holding that the entire consideration, *i.e.* Rs. 5,500, had been actually paid, and that the market value of the property alienated was Rs. 7,900. This report was laid before the District Judge on the 4th November, 1925, when a preliminary objection was raised on behalf of the respondent that the real value of the subject matter of the dispute being over Rs. 5,000 the appeal was not cognizable by the District Court, but lay to this Court. The learned District Judge upheld the objection and ordered the return of the memorandum of appeal to the appellant for presentation in the proper Court. The memorandum was actually returned to the appellant on the 5th November, 1925, and was presented in this Court the same day.

On the appeal coming up for hearing before us to-day, Mr. Badri Das, on behalf of the alienee-respondent, raised an objection that the appeal was barred by limitation, and that no sufficient ground existed for extension of time within section 5 of the Indian Limitation Act.

The statement of facts as given above, however, shows that the appeal had been presented in perfect

good faith in the Court of the District Judge after the disposal of the suit by the trial Court, and that, when the District Judge had considered the remand report of the Subordinate Judge and had directed that the memorandum of appeal be returned to the plaintiff for presentation in the proper Court, the appellant took the earliest opportunity to comply with that order. The objection is, therefore, without force and I would overrule it.

On the merits the sole question which has been argued before us by Mr. Jagan Nath Aggarwal, on behalf of the plaintiff-appellant, is that the transaction in question was a sale and not a mortgage as it purported to be. In order to determine this question we have to see what the intention of the parties really was, and, in doing so we have to look not only to the terms of the deed which evidenced the transaction, but have also to consider them in the light of the surrounding circumstances—see *Jhanda Singh v. Wahid-ud-Din* (1). The transfer-deed is printed at pages 41 to 43 of the paper book and has been minutely commented upon by Mr. Jagan Nath. It is on the face of it a mortgage of a house for ten years which was more or less in a dilapidated condition, and was at the time fetching a rent of Rs. 9 *per mensem*. The amount which was raised on the mortgage in question was Rs. 5,500 and it was stipulated that interest on Rs. 1,000, out of the mortgage money, would be adjusted by the rent recoverable from this house; and on the remaining Rs. 4,500 interest would be payable at the rate of fourteen annas *per cent. per mensem* from the date of the transaction till redemption and that this interest would be a charge on the mortgage-pro-

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perty. It was also provided that the mortgagor or his heirs would not be competent to enhance the amount of the rent of the house beyond Rs. 9 which had been agreed upon between the parties. As the house was in a ruined condition, the mortgagee was authorized to effect repairs to it or to have it rebuilt as he liked. The amount spent by him on these improvements was to carry interest at the rate of ten annas *per cent. per mensem* and was to be a charge on the property, repayable at the time of redemption. There is a further condition that the mortgagor personally, or his other property, would not be liable for anything due on foot of this mortgage. Now, these conditions are by themselves not such as would raise an inference that the mortgagor and the mortgagee intended that redemption was never to take place and that the property was to pass absolutely and for ever to the transferee. Mr. Jagan Nath has laid considerable stress upon the statements of some witnesses that the real value of the property at the time of the sale was Rs. 4,500. It is, however, difficult to place any reliance on their *ipse dixit* as they do not seem to possess any special knowledge as to the valuation of house property in this locality and some of them are by no means independent and disinterested persons. On the other hand, an elaborate and careful enquiry was held by the Subordinate Judge after the case had been remanded to him by the learned District Judge and as a result of this enquiry the learned Judge reported that the proper market value of the house was Rs. 7,900. This report is based upon the evidence of a number of qualified engineers who had inspected the property and had submitted detailed estimates and reasons in support of their conclusions. After hearing Mr. Jagan Nath at length and giving due weight to his arguments I am

of opinion that the finding of the learned Subordinate Judge is correct and must be accepted.

This being so the very basis of the argument of the learned counsel for the appellant that the house was being transferred for its full market value falls to the ground, especially when we keep in view the fact that the learned counsel up to the last insisted that as a matter of fact only Rs. 4,500 was the amount actually paid as consideration for the transaction and not Rs. 5,500 as stated in the deed. On this last point, however, I may state that I am in entire agreement with the decision of the learned Subordinate Judge in his remand report that the sum of Rs. 5,500, which is recorded by the Sub-Registrar as having been actually paid before him, must be accepted as correct and the evidence clearly falls short of showing that Rs. 1,000 was refunded to the alienee after registration.

Lastly the learned counsel argued that some of the stipulations in the deed, which I have mentioned above, are of an onerous character, but that circumstance by itself is not sufficient to throw any doubt on the real nature of the transaction. The rule which the Courts have to follow in cases like this is clearly laid down in the leading case of the Punjab Chief Court *Jagdish and others v. Man Singh* (1), which is regarded as the leading authority on the subject in this province. It was held in that case that "in every case in which the plaintiff sues upon the ground that a certain transaction, though in the form of a mortgage, was in fact a sale, the Court must decide as to the real nature of the transaction upon all the available material, including the terms of the document itself, the *onus* in

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the first instance being on the plaintiff to establish his case, and the true question being as to the real intention of the parties when entering into the transaction. If it is established beyond reasonable doubt that the parties intended a permanent transfer, the Court will find the transaction to be one of sale, though the deed is in the form of a mortgage. If there is a reasonable doubt, the plaintiff's case will fail on the ground that he has not succeeded in showing that the deed does not embody the true contract between the parties."

It was also laid down in that case that "the conditions of a mortgage might be intentionally onerous without giving rise to any irresistible presumption that the transfer was intended to be permanent".

In applying this test to the case before us I have not the least hesitation in holding that the plaintiff appellant has wholly failed to discharge the *onus* which lay upon him to prove that the transaction was not what it *ex facie* purported to be.

I would, therefore, hold that this appeal is without force, and I would confirm the decree of the trial Court dismissing the suit, with costs in both Courts.

AGHA HAIDAR J.

AGHA HAIDAR J.—I agree.

A. N. C.

Appeal dismissed