

1948

Present : Basnayake J.

PALINGU MENIKA, Appellant, and MUDIYANSE, Respondent

S. C. 18—C. R. Teldeniya, 853

*Sais—Agreement to re-transfer—Stipulation of interest—Possession with vendor—Is it mortgage?—Test to be applied.*

Where the question is whether a transaction is a mortgage or a transfer with an undertaking to re-sell within a specified time, the stipulation of interest and the retention of possession by the vendor are circumstances which go a long way to negative the claim that the deed is a *pactum de retrovendendo*. If there is any doubt the court should lean to the side which claims the transaction to be a mortgage.

**A**PPPEAL from a judgment of the Commissioner of Requests, Teldeniya.

*G. P. J. Kurukulasuriya*, for defendant appellant.

*T. B. Dissanayake*, for plaintiff respondent.

*Cur. adv. vult.*

November 10, 1948. BASNAYAKE J.—

The plaintiff-respondent, one E. M. D. Mudiyanse (hereinafter referred to as the plaintiff) instituted this action against three persons named Idamegedera Palingu Menika, Idamegedera Bandara Menika, and Abesingedera Kalu Banda. He asks that he be declared entitled to an undivided half share of a land called Hapugallawelahena in extent one acre, one rood, and thirty-nine perches, that the defendants be ejected therefrom, and for damages. He claims to be entitled to the land by virtue of deed No. 16235 dated January 31, 1942, attested by Notary R. A. F. Jayasinghe (hereinafter referred to as P 1) and by prescriptive possession. The second and third defendants in their answer deny the allegations in the plaint and allege that the deed pleaded by the plaintiff relates to a "money-lending transaction" and that the plaintiff holds the land claimed by him in trust for Palingu Menika and her heirs. They ask that the plaintiff's action be dismissed and that he be ordered to accept the money due to him and execute a re-transfer of the land. The first defendant having died after the institution of the action, her heirs were substituted as defendants.

The trial proceeded on the following issues :—

- " 1. Did Palingu Menika transfer the premises in dispute to the plaintiff on deed No. 16235 on January 31, 1942 ?
- " 2. Are the defendants in wrongful possession of the premises ?
- " 3. Damages.
- " 4. Was deed No. 16235 of January 31, 1942, an outright transfer to plaintiff ?
- " 5. Was deed No. 16235 a money-lending transaction ?
- " 6. Was there a valid tender of the money due on the said deed ?
- " 7. Was any sum paid out of the money due on the deed ?
- " 8. If there was no valid tender, can defendants ask for a re-transfer ? "

The learned Commissioner held that Palingu Menika, the deceased defendant, transferred the land in dispute by P 1 and that the defendants were in wrongful possession of the premises. He further held that P 1 was a conditional transfer and that the defendants were not entitled to a re-transfer as there had neither been a valid tender of the full sum due nor any part payment.

Before I discuss the questions arising on this appeal it will be useful if I set out the relevant provisions of P 1. They are as follows :—

“ Know all men by these presents that we Mawanna Kana Thangasamy Nadar of Henagehuwala in Pallispattu of Pata Dumbara and Abeysin Mudiyansele Narangaha Cotuwagedera Palingu Menika of Kudadeniya in Pallispattu aforesaid for and in consideration of the sum of Rs. 75 of lawful money of Ceylon, do hereby sell and transfer unto Watapana Digane Cumburegedera Mudiyanse of Rambukwella in Pallispattu aforesaid the following premises reserving the right to re-purchase the same within a period of three years by paying the said sum of Rs. 75 with interest thereon at the rate of cents 16 per Rs. 10 per month from the date hereof.

“ Therefore we do hereby authorise unto the said vendee to hold and possess the said premises from the date hereof free of dispute for ever or to deal with the same at will and pleasure and we do hereby declare that we have not done any act whatsoever prior to this and that in the event of any such dispute occurring we shall and will warrant and defend the title and settle such dispute, of us the said Thangasamy Nadar possess the said premises from the date thereof free of dispute by virtue of a deed No. 3706 dated April 11, 1939, and attested by M. A. S. Marikar, N.P., and the said Palingu Menika also by the said deed.”

Thangasamy Nadar became a party to P 1 because on a prior deed No. 3706 dated April 11, 1939, attested by M. A. S. Marikar, Notary Public (hereinafter referred to as P 2), Palingu Menika had in similar terms conveyed the land to him for Rs. 50. The material provisions of P 2 are as follows :—

“ Know all men by these presents that I, Abasin Mudiyansele Narangahakotuwagedera Palingu Menika of Kudadeniya in Pallispattu West of Lower Dumbara in the District of Kandy, Central Province (hereinafter calling myself “ the vendor ”) for and in consideration of the sum of rupees fifty (Rs. 50) of lawful money of Ceylon paid to me by Mawanna Kana Thangasamy Nadar of Henagehuwala of Pallispattu aforesaid (hereinafter called “ the vendee ”), the receipt whereof is hereby acknowledged, do hereby sell, assign, convey, transfer, set over and assure unto the said vendee his heirs, executors, administrators, and assigns the premises in the schedule hereunder written particularly described together with all rights, privileges, easements, servitudes and appurtenances whatsoever thereof or thereunto in any wise belonging or used or enjoyed therewith, or reputed or known as part or parcel thereof, and all the estate, right, title, interest, claim, and demand whatsoever of me the said vendor in, to, out of, or upon the same, which said premises have been held and possessed by me upon Crown grant dated September 8, 1937.

“ To have and to hold the said premises with their and every of their appurtenances unto him the said vendee and his aforesaid subject however to the right in me the said vendor or my heirs, executors, administrators and assigns to re-purchase the said premises within the term of three years from the date hereof on payment of the sum of rupees fifty (Rs. 50) with interest at the rate of eighteen cents per rupees ten per month unto the said vendee or his aforesaid and Notarial expenses.

“ And I the said vendor do hereby for myself my heirs, executors, and administrators covenant with the said vendee and his aforesaid that the said premises are free from every encumbrance whatsoever, and that I shall always warrant and defend the same unto him the said vendee and his aforesaid against all and every other person or persons whomsoever. ”

Although it is not so stated in P 1, the plaintiff admits that it was agreed that Palingu Menika was to remain in possession of the land for the three years within which she was declared entitled to obtain a re-transfer. The plaintiff also admits that the sum of Rs. 75 was borrowed from him to pay off the loan of Rs. 50 due to Thangasamy Nadar on P 2 in respect of the same land. A comparison of the two deeds reveals that at the time of the execution of P 2 the full sum due to Thangasamy Nadar may have been about Rs. 75 and that the rate of interest on P 1 was more favourable than that on P 2. The latter deed stipulated a rate of eighteen cents for every ten rupees while the former stipulated a rate of sixteen cents. These are matters which favour and lend support to the claim of the defendants that P 1 was executed in respect of a loan.

The plaintiff denies that any money has been paid to him on P 1, while the witnesses for the defence, J. M. T. Banda and E. M. Tikiri Banda, assert that Rs. 65 has been paid. The plaintiff also denies that he failed to comply with a request for a re-transfer of the land in November, 1944. The learned Commissioner, who saw and heard the witnesses, has rejected the evidence of the defence witnesses and accepted the plaintiff's evidence. The proctor for the defendants sought to prove a document D 2 which purported to be a receipt for Rs. 65 signed by the plaintiff, but when the plaintiff denied the signature thereon he withdrew the document but later produced it through witness E. M. Tikiri Banda. The learned Commissioner has rightly refused to act on that document without proof of the signature thereon. I am not disposed to interfere with the learned Commissioners's findings of fact.

The question that arises for decision is whether the transaction evidenced by P 1 is a mortgage or a transfer with an undertaking to re-sell within a specified time. It is settled law that if the transaction in question is in fact a mortgage, the right of the debtor to redeem cannot be taken away even by express stipulation<sup>1</sup>. On the other hand, if it is a contract of sale subject to the condition that the vendor shall be entitled to receive back the land on paying the price, within the stipulated time in a case where a time is stipulated, the failure to pay the price within the time disentitles the vendor to a re-conveyance<sup>2</sup>. In order to

<sup>1</sup> *Ana Lana Saminathan Chetty v. Vander Poorten*, (1932) 34 N. L. R. 287 at 294.

<sup>2</sup> *Jeremias Fernando et al. v. Perera et al.*, (1926) 28 N. L. R. 183.

*Wijewardene v. Peiris et al.*, (1935) 37 N. L. R. 179.

determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account.<sup>1</sup>

Although P 1 speaks of a sale and transfer of the land referred to therein for a sum of Rs. 75 it reserves to the vendors described therein the right to purchase the land within a period of three years by paying the said sum of Rs. 75 with interest thereon at the rate of 16 cents for every Rs. 10 per month. It is clear from the plaintiff's evidence that Thangasamy Nadar had no rights except those flowing from P 2 which the plaintiff calls a mortgage though, as I said earlier, it is in the same terms as P 1. Plaintiff goes on to say in cross-examination that the money was "borrowed" from him to pay Thangasamy Nadar's "loan". The plaintiff's evidence that the rate of interest stipulated in P 1 is "the rate of interest at which we lend money in the village" is significant and is definitely in favour of the claim of the defendants. The plaintiff does not deny that although the deed gave him a right to enter into possession immediately on its execution the second vendor continued to remain in possession.

P 1 is not the form in which a *pactum de retrovendendo*<sup>2</sup> is expressed, for Voet says: "Nearly allied to the *pactum commissorium* is the *pactum de retrovendendo*, 'agreement for repurchase', (or *Jus Redimendi*), the effect of which, when annexed to a purchase, is that the vendor may within or after a time fixed, or at any time, redeem or take back the thing sold, on restoring the same price he actually received for it, and not what may be the just price and equivalent to the commodity at the time of the redemption, unless it has been expressly agreed otherwise."

In my view the stipulation of interest and the retention of possession by the vendor are circumstances which go a long way to negative the claim that the deed is a *pactum de retrovendendo*. Besides, P 2 which is admitted by the plaintiff to be in respect of a loan and the plaintiff's evidence in regard to it, go to support the claim of the defendants that the transaction evidenced by P 1 is one between debtor and creditor. In such a case the policy of our law is against allowing the enforcement of an agreement between them to the effect that if the debt be not paid within the stipulated time the property affected by the transaction is to become the property of the creditor<sup>3</sup>.

This principle of Roman-Dutch law is found also in the civil law. Domat says<sup>4</sup>: "Although the thing pawned or mortgaged be given that it may be sold in default of payment, yet the creditor cannot stipulate, that, if he is not paid at the term agreed on, the pledge shall from thenceforth be his in lieu of his payment. For such a covenant would be contrary to humanity and good manners, seeing the pledge may chance to be of greater value, or esteemed by the debtor to be worth more than the debt; and because it is given to the creditor only for his security, and not that he may take advantage of the poverty of his debtor."

<sup>1</sup> *Ana Lana Saminathan Chetty v. Vander Poorten*, (1932) 34 N. L. R. 287 at 294.

<sup>2</sup> Voet, Bk. XVIII, Tit. III, Sec. 7.

<sup>3</sup> *John v. Trimble & others*, (1902) 1 Transvaal High Court 146 at 156.

*Siribohamy v. Rattaranhamy*, (1890-91) 1 Ceylon Law Reports 36.

<sup>4</sup> Domat, Part I, Book III, Tit. I, Section III, Art. XI, Strahan's translation, paragraph 1709, volume I.

In construing such an instrument as P 1, if there is any doubt the court should I think lean to the side which claims the transaction to be a mortgage. In the instant case I have no doubt that the transaction is one between debtor and creditor. The plaintiff is not entitled to the relief he claims. All he may do is to sue the defendants for the debt due to him together with the stipulated interest and sell the land in execution if the judgment debt is not paid. The plaintiff's action must therefore be dismissed with costs.

The defendants ask that the plaintiff be ordered to accept the money due to him and execute the necessary re-conveyance. Although the defendants have not deposited the money in court, in order to avoid the expense of another action I order that the plaintiff do execute the necessary re-conveyance of the land mentioned in P 1 on the deposit by the defendants in court of the full amount of the principal and interest due on P 1 on the date of such deposit.

The appeal is allowed with costs.

*Appeal allowed.*

