involved was not free from difficulty, I leave the parties to bear their own costs throughout.

K. S. K.

APPELLATE CIVIL

Before Tek Chand and Shamsher Bahadur, JJ.

LAL CHAND,—*Appellant.*

versus

ATMA RAM AND ANOTHER,—*Respondent.*

Regular First Appeal No. 82 of 1954.

1960

April 18th

Transfer of Property Act (IV of 1882)—Section 58(c) Proviso—Whether applicable to Punjab—"Conditional mortgage" and "Conditional sale"—Distinction between—Deed of conveyance absolute on its face—Presumption as to—Burden of proving the contrary—On whom lies—Intention of the parties—How gathered—Principles as to, stated—Circumstances in favour of mortgage or sale enumerated.

Held, that the proviso to section 58(c), Transfer of Property Act, has not been treated as applicable to Punjab because it does not embody any rule of equity, justice or good conscience, but is only a technical rule as to proof.

Held, that the basic distinction between a "conditional mortgage" and a "conditional sale" is that "mortgage" leaves title to property, in the grantor and gives to the grantee only a lien on it, by means of which the grantee is authorised to appropriate the property mortgaged to the extent of its value, to the payment of the debt thus secured. The "conditional sale" confers on the grantee title to the property giving the grantor the right to repurchase it at a certain price within the period stated. The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable for the repayment of such moneys. The right of redumption is an essential and inseparable attribute of a mortgagor.

The well-known maxim "Once a mortgage always a mortgage, and nothing but a mortgage", is a recognition of the principle that right to redeem is an essential right of the debtor who offers his property by way of security and this right inheres in every transaction by way of mortgage. On the other hand , if the transaction is by way of sale but a right of repurchase within the limited time is reserved to the vendor, it is not a mortgage, and the grantee's title becomes absolute if the condition as to repurchase is not complied with and in such a case no question of redemption can arise.

Held, that a deed which is absolute on its face carries a presumption that it is an absolute conveyance and not a mortgage, but a presumption, which is rebuttable on proof of clear and convincing evidence, that it is intended as a mortgage. The party which alleges that an instrument absolute on its face, was in reality intended as a mortgage, has to discharge the burden of proving such an allegation and the Courts insist on a clear, unequivocal and satisfactory proof for rebutting the presumption. In all such cases the burden of overcoming such a presumption raised from the terms of the written instruments rests upon the moving party.

Held, that where transaction is essentially a mortgage, or, an absolute sale with a condition for repurchase, the Courts try to find out the intention of the parties at the inception of the transaction. The original intention and meaning determine the nature of the transaction. If the real purpose of the transaction is to secure a debt it will be deemed a mortgage rather than a conditional sale. As the line of demarcation between a mortgage and a sale with a right to repurchase is obscure, it usually is a matter of considerable perplexity to determine to which category the given transaction, very often nebulous, belongs.

Held also, that in so far as the intention of both the parties, at the execution of the deed, is a determining factor, the Courts have formulated certain tests, by no means inflexible, or conclusive, to help in arriving at the truth. The first principle for ascertaining parties' intention as to whether an instrument is a conditional sale or a mortgage is that the Courts should look more to the substance than to the form of that transaction. It is not infrequent that a transaction of mortgage in substance, is

disguised as one of ostensible sale. In such a case, the grantor is not estopped from showing the true nature of the seeming sale, and the form of the deed is not in itself conclusive, as, after, the form is used as a cover, designed to veil the reality. If the transaction of ostensible sale is a mere device or a cloak to conceal loan secured by mortgage, the Courts will disregard the cloak and look at the real transaction. In other words the Courts should not content themselves, by merely looking to the deed, but they should look through it, in order to ascertain, whether the real nature of the transaction has been disguised, by giving it a form and an appearance, which is contrary, to what it actually is. The character of the transaction is fixed, according to what the intention of the parties was, when entering into it. It is always the parties' intention which stamps the transaction infallibly as a mortgage or a sale. If more than one instrument is executed contemporaneously, then the intention of the parties will be gathered by reading all the instruments together as they will be deemed to constitute one transaction.

Held, further that the Courts have considered the following circumstances to be weighty, though not conclusive, in favour of a mortgage :—

(a) The gross inadequacy of the purchase money is a circumstance of some value, though by itself insufficient for giving rise to an inference that the transaction is not really what it purports to be. But the question of adequacy has to be judged as at the time of the transaction, and not, after the property had acquired a greatly enhanced value, from some unexpected cause, and in order to be of controlling effect, the disparity must be disproportionate to the value.

(b) Condition as to payment of interest is evidence that the transaction was intended to be a mortgage, even if it is disguised under payment of rent and the grantor retains possession as tenant.

(c) Where the evidence and the circumstances are equally balanced, and do not clearly indicate whether the transaction was a sale, or only a

mortgage, the presence of very slight evidence will suffice, to persuade the Courts to treat it as a mortgage. In doubtful cases Courts lean in favour of a mortgage as it is in consonance with equitable principles, that harshness of forfeiture should be avoided, and grantor's right to redeem, should not be taken away. These are prudential considerations which avoid injurious consequences which are likely to follow on the transaction being treated as a sale.

(d) The existence of indebtedness between the parties at the time of the transaction will indicate the transaction to be a mortgage rather than a conditional sale. If, on the other hand. it seems that a pre-existing debt was recovered by the parties as extinguished, that would be a strong proof in favour of a conditional sale.

(e) A mere giving of right or option to repurchase the property at a fixed price is a neutral factor and will not suffice to convert a conditional sale into a mortgage.

(f) Financial erbarrasment of the grantor at the time of the execution of the deed is sometimes considered as a circumstance showing that the transaction was intended as a mortgage.

Held, that the existence of undermentioned circumstances will tend to show that the transaction was a sale, but they cannot be treated as decisive tests :—

(i) Where the intention is to extinguish a debt, the transaction will be a sale and not a mortgage.

(ii) By subsequent acts or admission of the parties the original character of the transaction cannot be changed, but such acts and admissions may be indicative of a pre-existing intention concerning the nature of the transaction. For instance, where the grantor having taken lease of the premises from the grantee, later on, surrenders possession, or is evicted for non-payment of rent, and he then allows the time fixed for repurchasing to expire, such a conduct would be evidence of the transaction being a conditional sale and not a mortgage.

(iii) Payment by the grantee of taxes, which are usually payable by the owner, indicates that he regarded himself as owner and this negatives the idea of a mortgage.

(iv) Lapse of considerable time during which the grantee has been in possession as ostensible owner of the estate and particularly after the expiration of the time given for repurchase, will lead the Court to treat the transaction as a sale.

Regular First Appeal from the decree of the Court of Shri Parshotam Sarup, Senior Sub-Judge, Ambala, dated the 9th day of December, 1953, dismissing the plaintiff's suit with costs and further ordering that the copy of the decree sheet to be sent to the Collector for realizing the Court-fee stamp from plaintiff.

B. R. AGGARWAL, SHAMAIR CHAND AND J. K. SHARMA, ADVOCATES, for the Appellant.

D. D. KHANNA AND V. P. GANDHI, FOR MR. BRIJ MOHAN KHANNA, ADVOCATES, for the Respondents.

JUDGMENT.

TEK CHAND, J.—This is plaintiff's appeal from the judgment and decree of the Senior Subordinate Judge, Ambala, dismissing his suit for possession by way of redemption of a two-storeyed house, bearing house tax No. 5649, and a godown bearing house tax No. 5650, situate in Sadar Bazar area, Ambala Cantonment. Tek Chand, J.

On 23rd of November, 1936, Lal Chand plaintiff and his father Kallu Mal had executed a deed of simple mortgage regarding the above-mentioned property in favour of the respondents for a consideration of Rs. 5,500. The possession was to remain with the mortgagors who undertook to pay interest at the rate of 0-13-0 per cent per mensem, but in the event of their paying interest reguarly,

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the rate of interest would be reduced to 0-9-0 per cent per mensem. No interest of any kind was paid by the mortgagors.

On 4th of October, 1940, three documents were executed by Lal Chand, his father Kallu Mal having died in the meanwhile. A deed of sale (Exhibit D. 3) was executed by the plaintiff, the price payable being Rs. 8,000. The consideration was comprised of the principal amount owed to the defendants on the mortgage, Rs. 5,500, interest due Rs. 2,070, and cash taken at the time of the execution of the sale deed Rs. 430.

The second document was an agreement to reconvey (Exhibit P. 1), whereby the vendees agreed to resell the property to the vendor for Rs. 8,000, within a period of two years, on the condition, that the obligee, i.e., the plaintiff-vendor, paid every quarter and within a period of fifteen days, after the lapse of three months, the rent, which had been agreed upon according to the rent deed, Exhibit D. 7, executed on the same day. In the event the rent was paid regularly, then on the expiration of two years, the obligee would continue to enjoy the right of re-purchase for a further period of one year on the same conditions. It was also stated in the post script by the executants that if they did not abide by the conditions in the agreement, the obligee might get it done through Court. If the obligee liked, he might get the instrument registered at his own expense.

The third document executed the same day, was Exhibit D. 7, rent deed, by which Lal Chand plaintiff undertook to pay rent of Rs. 33 per mensem, subject to certain conditions already referred

to above. Plaintiff failed to pay any rent and by ejectment proceedings taken before the Rent Controller, the plaintiff was got evicted by the defendants.

Lal Chand plaintiff has filed the present suit on 30th of September, 1952, nearly twelve years after the execution of the three documents mentioned-above. The plaintiff maintains that the transaction, though couched in terms of unconditional sale, was essentially a mortgage and he was never divested of his status as a mortgagor and now asserts his right to redeem the property, and therefore the suit was filed for possession by way of redemption on payment of such sum as may be found due against him.

The defendants contested the suit and their main stand is that the plaintiff is not a mortgagor as the transaction of 4th of October, 1940, was an out and out sale, and the deed of reconveyance was a separate and independent transaction.

On the pleadings of the parties, the following issues were framed:—

(1) Does the sale in question amount to mortgage; if so, what are the terms of the mortgage?

(2) On payment of what amount is the plaintiff entitled to get the property released ?

(3) Has the plaintiff complied with any terms of the agreement, and if not, with what effect?

On the first issue, the trial Court held that the transaction was not a mortgage, but an out

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and out sale. In view of this finding, it was not considered necessary to decide issues Nos. 2 and 3. The plaintiff's suit was dismissed with costs.

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In appeal before us the learned counsel for the plaintiff-appelllant has rested his case on the tenor of the three documents executed on 4th of October, 1940, the circumstances of this case, and the oral evidence led. The oral evidence does not need more than a cursory consideration. The plaintiff examined a number of witnesses who variously estimated the price of the property in question in 1940 to be between Rs. 25,000 and Rs. 27,000, though according to P.W. 1 Moti Ram the present value of the property should be Rs. 25,000 and its value in 1941, he considered to be Rs. 14,000. The evidence of the witnesses for the plaintiff is based on wide guesses, upon which it is not safe to place any reliance and the oral evidence does not advance the plaintiff's case. The plaintiff himself has contradicted his witnesses by stating, when he appeared as P.W. 14, that the value of the property in 1940 and 1941 was Rs. 15,000, though according to his several witnesses it was worth Rs. 25,000 to Rs. 27,000. According to the deed of partition, dated 1st of June, 1935, Exhibit D. 8, executed between the plaintiff and other members of the family by which this property fell to his share, its value was assessed at Rs. 6,000. The sale price of the property was Rs. 8,000 and it cannot be argued on the strength of plaintiff's witnesses that the consideration for the sale deed was absurdly low and, therefore, the transaction in question was not a genuine sale but a mortgage in the disguise of conditional sale.

He has next argued that in view of the following circumstances, it should be held that

the transaction was in the nature of a mortgage and not an out and out sale:—

(1) The three documents, namely, the deed of sale, the agreement to reconvey, and the rent deed, were executed on the same day, i.e., on 4th of October, 1940.

(2) The possession continued to remain with the plaintiff till he was ejected under orders of the Rent Controller.

(3) The consideration comprised in the main of the principal amount of debt Rs. 5,500, and interest Rs. 2,070, besides cash amounting to Rs. 430 paid at the time of the execution of the sale deed.

(4) The rent of Rs. 33 was calculated on the basis of interest at 0-9-0 per cent per mensem on Rs. 5,500 principal, and Rs. 430 paid in cash.

The question is whether the above circumstances taken singly or collectively are conclusive indications of the transaction being a mortgage rather than a sale.

I may now advert to the authorities upon which reliance has been placed in this case. It may, however, be stated at the outset that the proviso to section 58(c) of the Transfer of Property Act has not been treated as applicable to Punjab. It runs as under:—

"Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

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This proviso does not embody any rule of equity, justice or good conscience, but only a technical rule as to proof. It was added in 1929. Reference was made at the Bar to a Division Bench decision in *Raghubar Dial* v. *Ch. Zahur Ahmad* (1), where this view was expressed with which we find ourselves in full agreement.

We have been referred to a very large number of decisions with a view to show that under circumstances, more or less similar, the transaction was held to be a mortgage and not an out and out sale with a condition for re-purchase.

In *Raja Dhanarajagirji* v. *Raja Panuganti Parthasaradhi Ravanim Garu* (2), the transaction, in view of the circumstances of that case, was found to be a mortgage. The circumstances that mainly influenced their Lordships of the Privy Council was that the amount of the consideration was an "absurd purchase price". The consideration in this case cannot be termed to be grossly inadequate as no satisfactory proof has been led to show that the price of Rs. 8,000 in 1940 did not represent the mortgage money of the property.

A large number of authorities cited at the Bar, among others, *Wajid Ali Khan* v. *Shafkat Husain* (3), *Patel Ranchod Morar* v. *Bhikabhai Devidas* (4), *Mahabir, deceased, by Sarja Prasad etc.* v. *Bharath Bihari etc* (5), *Lalta Prashad* v. *Jagdish Narain* (6); *and Baijnath Singh* v. *Hajee Vally Mohamed Hajee Abba* (7), are distinguishable on facts.

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(1) 1946 P.L.R. 517
(2) A.I.R. 1924 P.C. 226
(3) 7 I.C. 911 (All.)
(4) I.L.R. 21 Bom. 704
(5) 78 I.C. 426.
(6) 98 I.C. 961
(7) A.I.R. 1925 P.C. 75

In Arjad Ali v. *Sheikh Habid* (1), the documents embodying the sale and reconveyance were contemporaneous and the vendor continued in possession on payment of rent to the purchasers. In that case it was held that upon a true construction of the documents and having regard to the surrounding circumstances the transaction was not merely conditional sale, but a mortgage by way of conditional sale. This case is not a very good guide as the parties were Mohammedans and the following observations bring out the *raison d' etre*—

> "He (the Munsif) has found that the possession of the premises remained with Makbul. It is true that by virtue of the *Kabuliyat* he had to pay rent which both Courts, we think, quite rightly take to be not merely rent, but a device by Muhammadans to get over the difficulty with regard to the payment of interest."

Reference was also made to *Kirpal Singh* v. *Sheoambar Singh* (2) where it was held that the transaction amounted to mortgage by conditional sale as there was a sale deed coupled with contemporary agreement to re-purchase. The proposition, in this decision, is stated too broadly and in view of the decisions of the Privy Council and of the Supreme Court referred to above, it does not lay down a correct rule of law which can be applied universally.

In *Thakar Dass* v. *Tek Chand* (3), Mahajan J. held that the document considered as a whole was indicative of mortgage by way of conditional

(1) 50 I.C. 12 (Cal.)
(2) A.I.R. 1930 All. 283.
(3) A.I.R. 1944 Lah. 175

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sale and not an out and out sale at all. He also was of the view that from the mere fact that price which had been stipulated was adequate, it could not be held that the transaction was necessarily a sale as it was a neutral circumstance which might equally be consistent with the transaction being a mortgage or a sale. In that case, it was *inter alia* stated—

> "I have by way of conditional sale transferred the shop for Rs. 600. Proprietary possession of the property has been given to the vendee. From today's date the vendee will be conditional owner of the property transferred. As the shop is in a dilapidated condition the vendee will have it repaired at his own cost and will keep proper account for it. I have agreed to pay interest at the rate of Rs. 0-13-6 per cent. per mensem to the vendee on the cost of reconstruction. If within three years the amount of Rs. 600 which I have taken today with interest at the rate of Rs. 5 per mensem along with the amounts spent on reconstructions with interest is repaid by me then the vendee will resell the shop to me and he will have no objection in doing so. If within three years I do not make the above payment then the sale would be considered absolute and I will have no further connection with the property conveyed".

In view of the language of the deed, this authority is distinguishable, though the priciples stated therein are unexceptionable. The document was described as conditional sale (*shartiah*

bai), and Mahajan J. held that the term '*shartiah bai*' was a term usually employed as indicative of the parties' intention that they were effecting a mortgage by way of conditional sale. The document considered as a whole was a document of mortgage by way of conditional sale, and not an out and out sale. It was also stated in the deed that the vendee would be 'conditional owner of the property transferred'. It was also mentioned that the transferer had agreed to pay 'interest' to the vendee on the cost of reconstruction of the property. On the basis of those peculiar terms in the document in that case an inference in favour of the transaction being a mortgage was rightly drawn.

The last authority cited by the learned counsel for the appellant is *Bhaskar Waman Joshi, etc.* v. *Shrinarayan Rambilas Agarwal, etc.* (1). It was held in that case that whether the transaction is one of sale or of a mortgage, depends upon the intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. It was remarked that what distinguished the two transactions was the relationship of debtor and creditor and the transfer being a security for the debt; and the form in which the deed was clothed, was not decisive. It is not the form which is of the essence, but the intention, as the question in each case, is, one of determination of the real character of the transaction to be ascertained from the provisions of the deed, viewed in the light of the surrounding circumstances. The observation in the Privy Council case, *Raja Dhanarajagirji* v. *Raja Panuganti Partha-Saradhi Ravanim Garu* (2) were cited with approval. It was also held that oral evidence of intention was not admissible in

(1) A.I.R. 1960 S.C. 301
(2) A.I.R. 1924 P.C. 226

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interpretting the covenants of the deed, but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents might of course be given. In that case the conditions of reconveyance were—

That the transferees would reconvey the properties within five years from the date of the conveyance to the transferor at the expense of the transferors for the price mentioned in the deed. This condition is no doubt similar to that in the instant case. But the other conditions were not analogous. Those conditions were that if within four years and six months from the date of the conveyance, the right of reconveyance in respect of the three houses or any one of them was not exercised by the transferors, and if the transferees did not desire to retain all or any of the houses, they had the right to recall from the transferors the amount of the consideration and to return all or any of the three houses in the condition in which they might be. Another condition was that in the event of failure on the part of the transferors to comply with the request to take back the houses, a breach of agreement of reconveyance rendering the transferors liable to pay damages would be committed. The next condition was that in the event of reconveyance the transferors would pay the full price set out in the sale deed and take back the houses in the condition in which by *vis major*, Government or any reason whatsoever they might be. The deed did not set out the period within which the right was to be exercised by the transferees. There were also other distinguishing features.

From the conditions incorporated in the document in that case, it was held that the real character of the transaction was a mortgage. In

the absence of factual parity, a similar conclusion is not deducible in this case from the consideration of the three documents executed on 4th of October, 1940.

It was remarked by Bose J. in *Chunchun Jha* v. *Ebadat Ali* (1), that the question whether a given transaction was a mortgage by conditional sale or a sale outright with a condition of repurchase was a vexed one which invariably gave rise to trouble and litigation. Bose, J., said—

> "There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain."

As to the construction of the deed, Bose, J., said—

> "Where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the

(1) A.I.R. 1954 S.C. 345

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parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended."

The following observations of Lord Granworth in *Alderson* v. *White* (1), were cited with approval:—

> "The rule of law on this subject is one dictated by commonsense; that *'prima facie'* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case, the question is, what, upon a fair construction is the meaning of the instruments?"

Mr. D. D. Khanna, learned counsel for the respondents, in his turn, has cited a number of authorities in which on the terms of the particular documents, the transactions were held to be conditional sales and not mortgages. These decisions good so far as they go, do not offer much guidance in construing the documents in this case. Among others, he has referred us to the decisions of the Privy Council, reported in *Bhagwan Sahai* v. *Bhagwan Din* (2), *Balkishan Das* v. *W.F. Legre* (3), *Jhanda Singh* v. *Wahid-ud-Din* (4), and also

(1) (1858) 44 E.R. 924 (928)
(2) I.L.R. 12 All. 387
(3) I.L.R. 22 All. 149
(4) A.I.R. 1916 P.C. 49

to *Ayyavayyar* v. *Rahimansa* (1), *C. Ganesh Mudaliar* v. *V. Gnanasikhamani Mudaliar* (2), *Hans Raj* v. *Mat Ram* (3) *and Mohd. Amin* v. *Bajrangi Singh* (4).

In this case in the sale deed Exhibit D. 3, the vendor Lal Chand has stated—

> "I have absolutely sold our double-storeyed Haveli."

He has also mentioned—

> "I have withdrawn my possession from over the entire property after putting the vendees aforesaid from today in actual possession over the same."

It then proceeds to say—

> "The vendees shall continue to be in possession as proprietors over the sold property generation after generation. They shall be competent to make permanent or temporary transfer (of the property) and to receive the rents etc. of all kinds."

The deed of reconveyance, Exhibit P. 1, contains the following words:—

> "If the said obligee (plaintiff-vendor) violates the conditions of the rent deed of today's date, written by him in our (the executants') favour, we, the executants, in that case, will be competent to alienate the same with us; otherwise we

(1) I.L.R. 14 Mad. 170
(2) A.I.R. 1925 Mad. 37.
(3) A.I.R. 1952 Punjab 181.
(4) A.I.R. 1949 All. 335.

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will not be competent to alienate the said property till the expiry of the said limitation."

The rent deed, Exhibit D. 7 executed by Lal Chand refers to the building "owned and possessed by L. Atma Ram and Siri Ram (defendants)". He then says—

> "The house tax shall be payable by the owners of the property and the water and cantonment tax will be paid by me (the executant). Repairs of all kinds shall be got effected by the proprietors. I, the executant, will not be competent to get any repairs undertaken."

From a bare perusal of the language of these three documents, it cannot be spelled out that the transaction was a mortgage and not a conditional sale.

The statement of Lal Chand plaintiff when he appeared as P.W. 14 is very significant. In his examination-in-chief he stated that the defendants had asked him to sell the house in question to them, and in return they agreed to reconvey the house to him on payment of Rs. 8,000, less the amount of rent received. Lal Chand then said that the intention was that he could get the house at any time on payment of Rs. 8,000. In his examination-in-chief Lal Chand nowhere mentioned or even suggested that the transaction was a mortgage or that that was the intention of the parties On the other hand, he made no secret of the fact that he had been asked to sell the house to the defendants who had agreed to reconvey it on payment of Rs. 8,000. The intention of the parties as gathered from this statement is suggestive of a sale subject to reconveyance than a mortgage in the form of conditional sale.

The law as contained in section 58(c) of the Transfer of Property Act is no different from that in force in England and America and the decisions of Courts in England and also in the United States of America are comparable and afford considerable assistance in determining the principles which should guide the Courts where the line of demarcation between mortgage by way of conditional sale and absolute sale with a reservation for repurchase is blurred or shadowy. Moreover, the bewildering maze of decisions, are, *ex-necessitate,* based upon the facts and the circumstances of each individual case and, no two of them are exactly alike and no amount of industry in quest of a precedent factually and circumstantially similar, is likely to be rewarded, for, as it is said, no resemblance runs on all fours —*nullum simile quatuor pedibus currit.* But the general principles which have been abstracted from a vast multitude of variety may serve as useful though by no means unerring guide for coming to a correct conclusion.

The basic distinction between a "conditional mortgage" and a "conditional sale" is that "mortgage" leaves title to property, in the grantor and gives to the grantee only a lien on it, by means of which the grantee is authorised to appropriate the property mortgaged to the extent of its value, to payment of the debt thus secured. The "conditional sale" confers on the grantee title to the property giving the grantor the right to repurchase it at a certain price within the stated period. The effect of a mortgage is to charge the moneys secured upon the mortgaged property and to make it answerable for the repayment of such moneys. The right of redemption is an essential and inseparable attribute of a mortgagor. The well-known maxim "Once a mortgage always a

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mortgage, and nothing but a mortgage", is a recognition of the principles that right to redeem is an essential right of the debtor who offers his property by way of security and this right inheres in every transaction by way of mortgage. On the other hand, if the transaction is by way of sale but a right of repurchase within the limited time is reserved to the vendor, it is not a mortgage, and the grantee's title becomes absolute if the condition as to repurchase is not complied with and in such a case no question of redemption can arise, *vide Coote* on Mortgages (ninth edition) pages 11 and 13; and *Knox* v. *Brown* (1).

A deed which is absolute on its face carries a presumption that it is an absolute conveyance and not a mortgage, but a presumption, which is rebuttable on proof of clear and convincing evidence, that it is intended as a mortgage. The party which alleges that an instrument absolute on its face, was in reality intended as a mortgage, has to discharge the burden of proving such an allegation; and the Courts insist on a clear, unequivocal and satisfactory proof for rebutting the presumption. In all such cases the burden of overcoming such a presumption raised from the terms of the written instruments rests upon the moving party,—*vide Howland* v. *Blake* (2).

Where the transaction is essentially a mortgage, or, an absolute sale with a condition for repurchase, the Courts try to find out the intention of the parties at the inception of the transaction. The original intention and meaning determine the nature of the transaction. If the real purpose of the transaction is a secure a debt it will be deemed a mortgage rather than a conditional sale. As the line of demarcation between

(1) 16 S.W. (2d) 262
(2) 24 L.Ed. 1027-97 U.S. 624.

a mortgage and a sale with a right to repurchase, is obscure, it usually is a matter of considerable perplexity to determine to which category the given transaction, very often nebulous, belongs. In so far as the intention of both the parties, at the execution of the deed, is a determining factor, the Courts have formulated certain tests by no means inflexible or conclusive to help in arriving at the truth.

The first principle for ascertaining parties' intention as to whether an instrument is a conditional sale or a mortgage is that the Courts should look more to the substance than to the form of the transaction. It is not infrequent that a transaction of mortgage in substance, is disguised as one of ostensible sale. In such a case, the grantor is not estopped from showing the true nature of the seeming sale, and the form of the deed is not in itself conclusive as often the form is used as a cover designed to veil the reality. If the transaction of ostensible sale is a mere device or a cloak to conceal loan secured by mortgage, the Courts will disregard the cloak and look at the real transaction. In other words the Courts should not content themselves by merely looking to the deed but they should look through it in order to ascertain whether the real nature of the transaction has been disguised by giving it a form and an appearance which is contrary to what it actually is,—*vide Re. Watson* (1), *Madell* v. *Thomas and Co.* (2), *Conway* v. *Alexander* (3), per Marshall, C.J.; and *Teal* v. *Walker* (4).

The character of the transaction is fixed according to what the intention of the parties was

(1) (1890) 25 Q.B.D. 27
(2) (1891) I.Q.B. 230 (233)
(3) 3L. Ed. 321 (328,329)
(4) 28 L.Ed. 415 (417)

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when entering into it. It is always the parties' intention which stamps the transaction infallibly as a mortgage or a sale. If more than one instrument is executed contemporaneously, then the intention of the parties will be gathered by reading all the instruments together as they will be deemed to constitute one transaction,—*vide* Jones on Mortgages, Eighth edition, Volume I, page 385. As observed by Lord Chancellor Lord Granworth in *Alderson* v. *White*, (1):—

> "The question in this case is, whether the transaction of 1825 was a mortgage or not. The first of the deeds then executed purports to be an absolute conveyance. By the deed of even date, it was stipulated that if Newman should be desirous of repurchasing the estate, he should be at liberty to do so on the terms therein mentioned. * *
> These deeds taken together do not, on the face of them, constitute a mortgage, and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by commonsense; that *prima facie* an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair

(1) 44 E.R. 924 (928)

> construction, is the meaning of the instrument?"

These observations have been cited with approval in a large number of Indian cases and among others,—*vide Balkishan Das* v. *W. F. Legge* (1), *Bhagwan Sahai* v. *Bhagwan Din* (2), *Jhanda Singh* v. *Wahid-ud-din* (3) and *Chunchun Jha* v. *Ebadat Ali* (4).

The English and American cases which allow parol evidence to be admitted to show that the nature of the transaction is different from what it appears to be, in so far as, they are contrary to the provisions of section 92 of the Indian Evidence Act, have no application. As pointed out by their Lordships of the Privy Council in *Balkishen Das* v. *W. F. Legge* (1), cases in India must be decided,—

> "on consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to the existing facts. The effect of this decision is that oral evidence outside the scope of section 92, Indian Evidence Act, is to be excluded but this question need not detain us in this case as there is no cogent and convincing parol evidence and at the Bar the plaintiff's case has been canvassed on the strength of intrinsic and circumstantial evidence".

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(1) I.L.R. 22 All. 149 (P.C.)
(2) I.L.R. 12 All. 387 (P.C.)
(3) A.I.R. 1916 P.C. 49
(4) A.I.R. 1954 S.C. 345

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The Courts have considered the following circumstances to be weighty, though not conclusive, in favour of a mortgage:—

(a) The gross inadequacy of the purchase money is a circumstance of some value, though by itself insufficient for giving rise to an inference that the transaction is not really what it purports to be. But the question of adequacy has to be judged as at the time of the transaction and not after the property had acquired a greatly enhanced value from some unexpected cause and in order to be of controlling effect the disparity must be disproportionate to the value. But this is not the case here.

(b) Condition as to payment of interest is evidence that the transaction was intended to be a mortgage, even if it is disguised under payment of rent and the grantor retains possession as tenant.

(c) Where the evidence and the circumstances are equally balanced and do not clearly indicate whether the transaction was a sale or only a mortgage; the presence of the very slight evidence will suffice to persuade the Courts to treat it as a mortgage. In doubtful cases Courts lean in favour of a mortgage as it is in consonance with equitable principles, that harshness of forfeiture should be avoided and grantor's right to redeem should not be taken away. These are prudential considerations which avoid injurious consequences which are likely to follow on the transaction being treated as a sale. In *Conway* v. *Alexander*.

(1), Chief Justice Marshall, in setting forth the reason for this rule, at page 328 said—

"And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority in order to obtain inequitable advantage. For this reason the leaning of Courts has been against them, and doubtful cases have generally been decided to be mortgages".

He further proceeded on to say—

"A conditional sale made in such a situation at a price bearing no proportion to the value of the property would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the Judges, furnish irresistible proof that a sale could not have been intended."

But where the evidence led by the grantor was unsatisfactory and insufficient to overcome a presumption created by the language of the deed, the transaction must be held what it purports to be.

(d) The existence of indebtedness between the parties at the time of the transaction will indicate the transaction to be a mortgage rather than a conditional sale. If, on the other hand, it seems that a pre-existing debt was recorded by the parties as extinguished, that would be a strong proof in favour of a conditional sale.

(1) 3 L. Ed. 321

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(e) A mere giving of right or option to repurchase the property at a fixed price is a neutral factor and will not suffice to convert a conditional sale into a mortgage.

(f) Financial embarrassment of the grantor at the time of the execution of the deed is sometimes considered as a circumstance showing that the transaction was intended as a mogage.

The existence of the undernoted circumstances, on the other hand, will tend to show that the transaction was a sale, but they cannot be treated as decisive tests :—

(i) Where the intention is to extinguish a debt the transaction will be a sale and not a mortgage.

(ii) By subsequent acts or admissions of the parties the original character of the transaction cannot be changed, but such acts and admissions may be indicative of a pre-existing intention concerning the nature of the transaction. For instance, where the grantor having taken lease of the premises from the grantee, later on, surrenders possession, or is evicted for non-payment of rent, and he then allows the time fixed for repurchasing to expire, such a conduct would be evidence of the transaction being a conditional sale and not a mortgage,—*vide* Jones on Mortgages, Volume I, page 412. This has happened in this case.

(iii) Payment by the grantee of taxes, which are usually payable by the owner, indicates that he regarded himself as owner and this negatives the idea of a mortgage. Under the terms of the rent deed in this case the defendants had to pay the house tax.

(iv) Lapse of considerable time during which the grantee has been in possession as ostensible owner of the estate and particularly after the expiration of the time given for repurchase, will lead the Court to treat the transaction as a sale,—*vide Tull* v. *Owen* (1).

In this case, plaintiff having brought the suit nearly 12 years after the transaction has been entered into and more than 10 years after he had forfeited his rights of repurchase cannot be easily brushed aside.

The Courts turn to the rules set out above when ascertaining parties' intention. These rules neither singly nor collectively are conclusive, one way or the other, but worthy of consideration. The matter of discovering the unexpressed intention. of the parties, particularly after lapse of a long time, is a difficult and an elusive pursuit.

In the background of the above rules, the facts and circumstances of this case incline me to hold, that the parties really wanted to effect a sale. and the bast clue in this case is furnished by the plaintiff's own statement as P. W. 14. At no stage, prior to the institution of this suit, the plea of mortgage had been taken. The plaintiff did not even mention, during the course of ejectment proceedings, that he considered himself a mortgagor,

(1) 9 L.J. Ex. 33

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though it is true, that in an ejectment proceeding by a landlord against his tenant, such a plea even if raised, would not have been of any avail. Lal Chand admitted that he never paid the house tax, which was being paid by the defendants. In his examination-in-chief, Lal Chand did not state that the transaction, in effect or in essence, was a mortgage though enveloped as a conditional sale. This much is proved that interest, if calculated at the principal amount of Rs. 5,500 plus Rs. 430 cash paid at the time of transaction, comes to Rs. 33 at the rate of 9 annas per cent per annum. But this is a specious argument. The interest on the mortgage amount had previously been calculated on 4th of October, 1940, when Exhibit D. 3 was executed, at 13 annas per cent per annum; and the defendants were entitled to this rate under the terms and conditions of the mortgage. Moreover if interest had been calculated on Rs. 8,000/-, and at the rate of 13 annas per cent per annum, it would come to a much higher figure. The fact that the conveyance was in satisfaction of a debt is not sufficient by itself, to rule out the sale, and to stamp the transaction as a mortgage. In order to avoid progressively increasing liability, because of interest, a grantor may as well relieve himself of his burden by disposing of a portion of his property rather than to allow his entire property to be ultimately swallowed by his mounting debt. This conduct can equally be in consonance with the desire of the debtor to liquidate his liability early and thereby extinguish the debt rather than to perpetuate his indebtedness. In this case, the plaintiff was never in a position to pay the interest, as is clear from his own statement.

The intention of the parties to perpetuate relationship of debtor and creditor is usually treated as a crucial test, bu t such an intention is

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not deducible from the facts and the circumstances of this case. These do not warrant a conclusion which the plaintiff desires us to draw; and the concomitant features of this case do not justify an inference that the transaction was not of sale which it purported to be, but actually of a mortgage.

The result is that the plaintiff's appeal fails and it is dismissed with costs throughout.

SHAMSHER BAHADUR, J.—I agree.

Shamsher Bahadur, J.

K. S. K.

APPELLATE CIVIL

Before D. K. Mahajan, J.

DR. TARLOCHAN SINGH,—*Appellant*

versus

SHRIMATI MOHINDER KAUR,—*Respondent.*

First Appeal from Order No. 6/M of 1960

1960

May, 2nd

Hindu Marriage Act (XXV of 1955)—Sections 24 and 28—Order passed under section 24—Whether appealable.

Held, that an order passed under section 24 of the Hindu Marriage Act, 1955, is appealable under section 28 of the same Act.

Smt. Sobhana Sen v. *Amar Kanta Sen* (1) and *Rukhmanibai* v. *Kishanlal Ramlal* (2) followed; *Bhamidipati Saraswathi* v. *Bhamidipati Krishna Murthy* (3) dissented from.

First Appeal from the Order of the Court of Shri Jasmer Singh, Senior Sub-Judge, Amritsar, dated the 23rd December 1959, ordering that husband Dr. Tarlochan Singh will pay maintenance pendente lite *at the rate of Rs. 80 per month from 28th May, 1959, onwards to his wife Smt. Mohinder Kaur and also Rs. 200 as expenses of this litigation.*

D. R. MANCHANDA, ADVOCATE, for the Appellant.

L. D. KAUSHAL, ADVOCATE, for the Respondent.

(1) A. I. R. 1959. Col. 455
(2) A. I. R. 1959. M. Pra. 187
(3) A. I. R. 1960, Amdh. Pra. 30