

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 273 of 1993

1. Smt. Leelabai Wd/o Hastimal, aged about 42 years,
2. Moolchand S/o Hastimal, aged about 25 years,
3. Sushila Bohra, d/o Late Hastimal, aged about 21 years,
4. Chanelal Bohra D/o Late Hastimal, aged about 19 years,
5. Dulichand S/o Late Hastimal, aged about 3 years, minor through natural guardian mother Leela Bai
6. Ku. Sangita Bohra D/o Late Hastimal, aged about 11 years, minor, through natural guardian mother Leela Bai

All resident of village Mudipar, Post Mudipar, Tahsil Khairagarh, District Rajnandgaon (CG)

---- Appellants

Versus

- 1 A. Ganesh Ram aged about 46 years
- 1 B. Bhagat, aged about 42 years,
- 1 C. Hem Rai, aged about 30 years, All S/o Late Jhumak Lodhi R/o village – Pipariya, Tehsil – Khairagarh, District – Rajnandgaon (CG)
- 1 D. Manbhautin, aged about 44 years, D/o Late Shri Jhumak Lodhi, R/o. Village : Mullera, Tah. Khairagarh.
- 1 E. Devkunwar Bai, aged about 40 years, D/o Late Shri Jhumak Lodhi, R/o Vill. Acholi, Tah. Khairagarh.
- 1 F. Prabha Bai, aged about 38 years, D/o Late Shri Jhumak Lodhi, R/o Vill: Gopalpur, Tah. Khairagarh.
- 1 G. Ram Bai, aged about 34 years D/o Late Shri Jhumak Lodhi, R/o vill.-Devri, Tah. - Khairagarh, Distt. - Rajnandgaon (CG)
2. Bisoha Ram, aged 40 years son of Asaram Lodhi R/o. Vill.- Sankra, Tah. Khairagarh, Distt. - Rajnandgaon.
3. Balaram, aged 40 years S/o. Asaram R/o. Vill.- Sankra, Tah. Khairagarh, Distt. - Rajnandgaon.
4. State of Madhya Pradesh (now Chhattisgarh) through the Collector, Rajnandgaon.

---- Respondents

Shri Parag Kotecha, counsel for the appellant/s.
Shri Neeraj Kumar Sharma, Dy.G.A. for the State.

SB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

03/11/2015

This appeal is directed against impugned judgment and decree dated 10/10/92 passed by the Appellate Court in Civil Appeal No.2A-1990 by which the learned lower Appellate Court has partly reversed judgment and decree passed by the Trial Court and declared transaction of so called sale as loan transaction and the sale deed (Ex.D/6) as mortgage deed, further declaring that till repayment of Rs.6,000/-, the appellant shall be entitled to use the land in his possession.

2. This appeal was admitted on 14/09/1993 on following substantial question of law.

“Whether the lower Appellate Court is right in holding Ex.D/6 to be a mortgage deed and consequent thereof granting relief to the plaintiff ?”

3. The respondents / plaintiff filed a suit for declaration that sale deed dated 13/04/1978 be declared illegal and inoperative and also prayed for recovery of possession of land admeasuring 1.86 acres situated in khasra No.244, Village Sankra, Tehsil- Khairagarh (land in dispute), on the pleadings *inter alia* that the appellant / defendant Hastimal, taking undue advantage of unsound mind of Asaram (father of plaintiff - Sukalia Bai, Bisoha Ram and Balaram and husband of plaintiff No.4 -Kachra Bai) fraudulently got a sale deed executed in his favour on 13/04/1978 and without information and notice, got the land under the said sale deed mutated in his favour on 20/06/1980. According to the plaint allegations, a receipt dated 12/04/1978 was executed by defendant Hastimal in favour of Asaram which contains recital of return of land under sale deed to Asaram. Further pleadings were that defendant Hastimal executed a deed dated 18.06.1980 (Ex.D/4) in which, it was stated that upon repayment of amount of loan, land would be returned. Further that Bisoha Ram, on 18/06/1980, also executed document to similar effect that loan has been taken by him and upon repayment, he will be entitled to get back the land.

4. In the written statement, defendant-Hastimal denied plaint allegations and

pleaded that Asaram sold his land for Rs.4,000/-. It was stated that Asaram had taken loan from the Bank and in order to repay loan taken from the Bank, he had sold disputed land to the defendant for a valid consideration of Rs.4,000/-. Therefore, it was not a case of loan transaction. The plea of insane mind of Asaram was specifically denied.

5. The learned Trial Court holding that at the time of execution of sale deed, Asaram was of unsound mind. The Trial Court did not hold plaintiff's case of loan transaction proved but only on the ground of unsoundness of mind of Asaram, declared the sale deed void.

Aggrieved by the judgment and decree of the Trial Court, the appellant Hastimal filed first appeal. Learned lower Appellate Court however, recorded a finding that conjoint reading of agreement (Ex.P/2) and agreements (Ex.D/4 and Ex.D/8) proved that it was a case of loan transaction and the sale deed was executed by way of security towards repayment of loan. On this finding, learned lower Appellate Court held that sale deed (Ex.D/6) was in substance, a mortgage deed. At the same time, the Appellate Court held that till loan of Rs.6,000/- is repaid, the appellant would be entitled to possession and use of the mortgaged land.

6. Assailing legality and validity of the judgment and decree passed by the learned Lower Court, learned counsel for the appellant contended that the Court below has committed gross illegality and perversity in declaring the transaction to be a loan transaction because there was no specific pleading of loan taken by Asaram from Hastimal nor agreement (Ex.P/2) contains any such recital. He submits that the evidence contrary to the contents of the document (Ex.P/2) is inadmissible in evidence. Learned counsel for the appellant argued that at the most, the said document (Ex.P/2) upon proper construction, could only be said to be an agreement of re-conveyance upon payment of Rs.6,000/- given by Hastimal to Asaram. None of the attesting witnesses of Ex.P/2 have supported the case of the plaintiff that the transaction was a loan transaction. Even according to Kedarnath (DW3), who ascribed Ex.P/2, has not supported the case of the plaintiff that Ex.P/2 was executed as an evidence of loan transaction between Asaram and Hastimal. In the evidence of Bisoha (PW1), it has come that out of two attesting witnesses, the first attesting witness namely Parsadiram has died but he admitted that Parasram is alive but he has not been examined. Thus, there is neither any specific pleading of loan transaction nor any of the attesting witness or ascriber of the document

(Ex.P/2) have stated that Ex.P/2 was executed so as to create a documentary evidence of a loan transaction. It is next contended that neither Ex.P/4 nor Ex.D/8, on rational construction, can be said to be proof of loan transaction between Asaram and Hastimal. He submits that at the most, for a proper construction, all that can be said is that upon payment of Rs.6,000/- re-conveyance of sale was stipulated as between Bisoha and Hastimal. In any case, the entire gamut of evidence available on record does not make out a case of a loan transaction as between the Hastimal and Asaram.

7. The respondents have not entered appearance despite service of notice.

8. A perusal of the pleadings made in the plaint shows that suit was brought by the plaintiffs for declaration of sale of the land in dispute by Asaram in favour of defendant - Hastimal be declared illegal and inoperative and a decree of possession of land in dispute be granted and possession be directed to be delivered to the plaintiffs. The plaintiffs also prayed for mesne profits and costs. In para 5 of the plaint, it has been averred that taking advantage of insane mind of Asaram, defendant got a sale deed executed in his favour. In para 6 of the plaint, it has been averred that on the same date, i.e. on 13/04/78, defendant executed a receipt in favour of Asaram to the effect that Rs.4,000/-, being consideration towards sale of land and Rs.2,000/- which on accounts is payable to the defendant by Asaram. Thus, upon payment of Rs.6,000/-, the land under sale would be returned. In para 7, it was stated that on 13/04/78, there was no existing need of Asaram to take any loan and infact on that date, no consideration was paid. Without receiving any consideration, sham / nominal sale deed has been executed, which is illegal and inoperative. It has been further averred that on the date of sale, cost of the land was not less than Rs.7,000/- and therefore, it could not be sold on consideration of Rs.4,000/- only.

9. The aforesaid pleadings of the plaintiffs do not contain any pleading of Asaram having taken any loan from defendant / Hastimal nor specific pleading that the sale deed was executed only as a security towards repayment of loan. The receipt has been brought on record and proved as Ex.P/2. Conjoint reading of the pleadings along with document Ex.P/2 does not prove that it was a loan transaction and usufructuary mortgage was created. In the document (Ex.P/2), there is no recital that defendant was allowed to cultivate the land and reap its profits till repayment of the amount. The recital nowhere mentions the amount of Rs.4,000/- as loan taken from defendant / Hastimal.

The said document (Ex.P/2) is ascribed by Kedarnath (DW3) examined by the defendant Hastimal. Kedarnath has not supported the story of loan transaction. Bisoha (PW1), one of the plaintiffs has deposed that one of the attesting witness died, but the other was alive. However, alive attesting witness was not examined by plaintiffs to prove that nature of transaction of sale was in effect, a transaction of loan.

10. Ex.D/6 is the sale deed proved by defendant. The sale deed is a document of an outright sale. By this sale deed (Ex.D/6), a registered document, the land in dispute was sold by Asaram in favour of defendant / Hastimal. Kedarnath (DW3) is one of the attesting witness of the sale deed, who has clearly deposed in his evidence that there was no loan transaction between Asaram and Hastimal. It was an outright sale. The fact that it was a loan transaction, could be proved either by Asaram or by any other witness who witnessed the sale deed. Asaram died, therefore, he could not be examined. No other attesting witness except Kedarnath (DW3) was examined. The other attesting witness Kedarnath (DW3) has clearly stated that the sale deed was executed as an outright sale of land by Asaram in favour of Hastimal. Even according to plaintiffs, another attesting witness was alive but he was not examined to prove that it was actually a case of transaction of loan.

11. Therefore, in the absence of any attesting witness stating the fact of loan transaction, Asaram not alive and one of the attesting witness Kedarnath (DW3) stated that there was no loan transaction and it was an outright sale and further that there was no specific pleading of loan transaction between Asaram and Hastimal pleaded in the plaint, the transaction between Hastimal and Asaram could not be held to be a loan transaction.

12. While the plaintiff relied upon document (Ex.P/2) to plead that it was a case of loan transaction, there being a stipulation in the receipt dated 13/04/78 that upon repayment of Rs.6,000/-, land would be returned, the pleading that till repayment, fruits of the land would be enjoyed by Hastimal in lieu of loan, are not reflected from any of the recital in Ex.P/2.

13. Learned lower Appellate Court has also committed illegality and perversity in returning a finding of loan transaction on the basis of documents (Ex.D/4 and Ex.D/8). Ex.D/4 was executed by Hastimal on 18/06/80. It is nowhere written in this document that the sale deed, which was executed by Asaram in favour of Hastimal was a nominal sale deed as security towards repayment of loan taken by Asaram

from Hastimal. The recital of this document, therefore, do not constitute proof of the transaction between Asaram and Hastimal as transaction of loan. Ex.D/8 was executed by Bisoha / plaintiff on 18/06/80 which is also subsequent to execution of sale deed Ex.D/6 by Asaram in favour of defendant / Hastimal. It also does not contain any recital to the effect that the transaction between Hastimal and Asaram was a loan transaction and Rs.4,000/- was advanced as loan by Hastimal to Asaram and it was as a measure of security towards repayment of loan that nominal sale deed Ex.D/6 was executed. In Ex.D/8, there is no recital that the land was given in possession of the defendant - Hastimal to enjoy the fruits till the loan amount is repaid so as to constitute the transaction as one of loan.

Ex.D/4 was executed on 18/06/1980 which talks of a kind of settlement as between Hastimal and Bisoha. Therefore, Ex.D/4 also does not prove that the nature of transaction as between Hastimal and Asaram reflected vide sale deed (Ex.D/6) was not an outright sale but only a nominal sale deed being security towards repayment of loan.

14. The entire pleading in the plaint and the contents of Ex.P/2, D/4, D/8 or D/6 do not make out even a case that there was a loan transaction under which, Rs.4,000/- was advanced as loan to Asaram by Hastimal. In the absence of there being any specific pleading and clinching evidence of advancement of Rs.4,000/- as loan which is of the essence to prove transaction as one of the loan or of usufructuary mortgage, the learned lower Appellate Court was not justified in law to hold that the transaction was a loan transaction or transaction in the nature of usufructuary mortgage. Unless there are clear and specific pleading of loan transaction, no amount of evidence of loan transaction as between Hastimal and Asaram could be admitted in evidence. According to plaintiffs' pleading, taking undue advantage of insane mind of Asaram, Hastimal got a sale deed executed in his favour. The learned lower Appellate Court has clearly held that declaration sought on the ground that the sale deed was void because Asaram was not of fit state of mind or insane on the date of execution of sale deed, has not been proved. Once this finding was recorded by the learned lower Appellate Court, the entire basis for the suit fell on the ground and the case of loan transaction only on the basis of evidence and contrary to pleading set up by the appellants could not be held proved.

15. The defendant has placed on record and proved by oral and documentary evidence that Asaram was having more than 21 acres of land as reflected from Ex.D/4-A. Ex.D/1 proves that Asaram had taken loan from Primary Agriculture

Credit Society and he had liability towards repayment of loan of Rs.3,407.54 p with interest of Rs.525/- as on 01/07/1977. Ex.D/2 and D/3, the loan account of Asaram also proves that Asaram had outstanding loan of Rs. 3,000/- on 30/04/1977 maintained in State Bank of India, Branch Khairagarh. It has been the case of the defendant that Asaram had taken loan from credit society and bank and he was in need of money and towards repayment of loan and for repayment of that loan, he sold a part of his land to Hastimal and it was not a case of Hastimal having advanced loan of Rs.2,000/- to Asaram. A cash credit of Rs.4,500/- paid by Asaram in his loan account on 06/05/78 has been proved by Ex.D5-A. This document clearly proves Asaram having taken loan from credit society, in order to repay his loan liability against loan taken from Hastimal. He sold a part of his land to Hastimal vide registered sale deed and thereafter, Rs.4,500/- was paid in loan account on 06/05/1978 i.e. soon after execution of sale deed on 13/04/1978. Learned lower Appellate Court has therefore not correctly appreciated the clinching evidence on record and a distinction between a loan transaction and a transaction of outright sale. Sale of property to repay loan taken from any person would not render the transaction a loan transaction or usufructuary mortgage, unless it is proved that the loan was taken from the purchaser. In the absence of there being any pleading or evidence of Asaram having taken loan from Hastimal, the judgment of the learned lower Appellate Court, holding transaction to be a loan transaction and creation of usufructuary mortgage is perverse and contrary to the records, cannot be sustained in law.

The impugned judgment passed by the Courts below is set aside and the suit of the plaintiff is dismissed with cost. Decree be drawn accordingly.

Sd/-

(Manindra Mohan Shrivastava)
Judge