

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 20.01.2016
Pronounced on: 29.01.2016

+ **RFA (OS) 100/2014, C.M. APPL.10293/2014**

NAGESHWAR PANDEY

.....Appellant

Through: Sh. Sanjiv Sindhwani, Sr. Advocate with Sh.
Anshul Mittal and Sh. A.K. Sinha, Advocates.

Versus

KARAN MADAAN AND ORS.

.....Respondents

Through: Ms. Maninder Acharya, Sr. Advocate with Ms.
Anu Bagai and Sh. Bhuvan Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

MR. JUSTICE S. RAVINDRA BHAT

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1. This appeal is by the defendant/counter claimant who is aggrieved by the judgment and order of the learned Single Judge wherein contentions of the plaintiffs were accepted and the suit was decreed, invoking Order XII Rule 6, Code of Civil Procedure (CPC); the counter claim, by invoking the power under Order VII Rule 11, CPC was rejected. The parties shall hereafter be referred to in accordance with their nomenclature in the suit, i.e plaintiffs and defendant.

2. Three plaintiffs filed the suit; first two are businessmen and the third plaintiff is the mother of the second plaintiff. They alleged that the defendant was sole and exclusive owner of built-up property, No. EC-5,

Inderpuri, New Delhi - 110 012 admeasuring 500 sq. yds. situated in village Naraina, Delhi ("the suit property"). Through a registered sale deed dated 01.11.2011, the defendant transferred it to the plaintiffs for a total consideration of ₹1,65,00,000/-. The plaintiffs described their respective shares in the suit property. The sale deed was registered on 02.12.2011 in the office of the Sub-Registrar No. IX, New Delhi. The plaintiffs stated that their right of possession was recognized in the sale deed, which acknowledged that vacant and physical possession of the suit property under sale has been given to the Vendees by the Vendor, *"who have occupied the same."* They complained that despite receipt of the entire consideration and execution of the sale deed, the defendant failed to handover vacant and physical possession of the suit property to them, citing several diverse reasons such as his wife's ill health, urgent work commitments etc. The plaintiffs stated that they did not press for immediate possession of the suit property, believing the defendant's excuses. Subsequently the plaintiffs exerted pressure on the defendant to handover possession of the suit property. The suit alleged that the defendant threatened and intimidated the plaintiffs with dire consequences every time he was asked to hand over the possession.

3. The plaintiffs mentioned a legal notice dated 20.04.2012 issued on their behalf to the defendant demanding vacant, physical and unencumbered possession of the suit property. The suit alleged that on 28.04.2012, the defendant met the plaintiffs and agreed to resolve the matter amicably. The same day, the defendant handed over vacant, unencumbered and physical possession of the suit property to the plaintiffs against a possession slip. The

plaintiffs took possession of the suit property on 28.04.2012 and shifted some furniture and crockery into the suit property. They scheduled a "*Greh Pravesh*" (house warming ceremony) the next day i.e. 29.04.2012, a Sunday. That day the defendant allegedly forcibly took back the possession of the suit property. The suit alleged that the plaintiffs called the police station and lodged a complaint by dialing number 100. They complained of having been forced to leave the suit property under duress and without consent. They filed a separate complaint for criminal trespass and criminal intimidation, which is pending investigation. They alleged that the suit property is lying vacant under the lock of the defendant, who is resident of the adjoining property bearing No. EC-4, Inderpuri, New Delhi. It is under these circumstances that the plaintiffs claimed vacant, physical possession of the suit property on the basis of their title. They also claimed damages on account of being out of possession of the suit property.

4. On receipt of summons, the defendant filed his written statement along with counter-claim. His defense in the written statement was that the plaintiffs proposed to advance a loan to him, and in *lieu* of the loan amount, the defendant executed a sale deed of the suit property in their favour, and handed over the original chain of documents to them. The defendant stated that the loan was interest bearing @ 2% per month, payable in cash every month, against which he could not claim any receipt. The defendant alleged that in terms of this loan transaction, the plaintiffs also agreed to execute a fresh Sale deed in his favour as and when the entire money was repaid along with interest @ 2% per month; expenses incurred while registering the sale deeds; court fees, etc. to the plaintiffs by him.

5. The defendant also alleged that possession was not claimed by the plaintiffs till 28.04.2012, though the sale deed was executed and registered on 02.12.2011, which went to show that the real intention of the parties was not to transfer the suit property to the plaintiffs by way of sale. The defendant alleged that the value of the suit property is more than ₹15 Crores, and the defendant would not have sold the same for a petty consideration of ₹1.65 Crores.

6. The defendant alleged that the suit property is an integral part of his residence, i.e. EC-4, Inderpuri, New Delhi - 110 012. The two properties share a common driveway and common lounge. There is no partition between EC-4 and EC-5 by any wall, or gate, etc. While the defendant resides at EC-4, the suit property is used by him for his guests and outsiders. He stated that he was ready and willing to pay the entire loan amount along with interest, including costs and charges incurred in execution of sale deed to the plaintiffs. The defendant denied delivery of possession of the suit property to the plaintiffs on 28.04.2012, or its re-possession by him on 29.04.2012. He denied all allegations in the suit, regarding threat and, intimidation and violence by him.

7. In the counter-claim, the defendant claimed cancellation of the sale deed dated 01.11.2011 registered on 02.12.2011 in respect of the suit property, and/or execution of a fresh sale deed in his favour on the receipt, by the plaintiffs, of the entire loan amount. He also sought a direction to the plaintiffs to return to him the original chain of documents in respect of the suit property, after receipt of the entire loan amount.

8. During pendency of the suit, the plaintiffs filed two applications: I.A. No.1111/2013 under Order VII Rule 11(a), (b) & (c) CPC seeking rejection of the defendant's counter-claim and I.A. No.1112/2013 for a decree on admission under Order XII Rule 6 CPC. In support of the argument that the counter claim required rejection, it was contended that no document in support of the said defence had been produced by the defendant. The defendant had claimed that the registered sale deed dated 01.11.2011 was executed by the defendant in favour of the plaintiffs with a view to secure the so-called loan taken by the defendant from the plaintiffs. The plaintiff argued that such a defence is not tenable, and was barred under Sections 91 and 92 of the Evidence Act, 1872 ("the Evidence Act") in the face of the registered instrument of sale, admittedly executed by the defendant favouring the plaintiffs. A written document cannot be contradicted by oral evidence. The plaintiff also urged that given the language of Section 31 (1) of the Specific Relief Act, 1963 only a written instrument which is void can be cancelled. Here it was argued that a written document had to be void or voidable against the party who seeks cancellation of the same. The plaintiffs contended that the duly executed and registered sale deed in their favour was neither void, nor voidable, as the defendant had failed to disclose any basis for any such claim.

9. The defendant on the other hand, argued in his reply to the applications that the sale deed records that consideration was paid between February to November 2011. However, there was no recital in the sale deed, as to when the parties agreed that the suit property be sold by the defendant to the plaintiffs. No agreement to sell was set up, though payments were

made in installments spread over about ten months. Since the plaintiffs did not claim that the sale transactions were concluded in one-go, i.e. by payment of entire consideration in lump sum, had the parties intended that the suit property be sold, they would have executed an agreement contemporaneously when the initial payments were made.

10. The defendant/counter claimant also urged that the sale deed in question is hit by fraud. The definition of fraud contained in Section 17 of the Contract Act was relied on; it *"includes a promise made without any intention of performing it by a party to a contract with the intention to deceive or induce the other party to enter into a contract"*. The defendant argued that where the consent of a party is obtained by fraud, the contract is voidable at the option of the party whose consent was so caused. It was also argued that the plaintiffs made a promise to the defendant that they would not misuse the sale deed and would execute a reverse sale deed in his favour on repayment of the loan amount. He submitted that upon the filing of the present suit, the fraudulent intentions of the plaintiffs were exposed, thus entitling the defendant to lodge the counter-claim for cancellation of the sale deed. The defendant also argued that Sections 91 and 92 of the Evidence Act were inapplicable in the present case, as contentions raised in the counter claim were covered by Provisos 1 to 3 to Section 92, and Explanation 3 to Section 91.

The impugned judgment

11. On a construction of Sections 91 and 92 of the Evidence Act the learned Single Judge held that they were inapplicable having regard to the

sale deed, which absolutely conveyed the property. He also noticed that the documents filed along with the plaint, showed that the chain of title documents were handed over to the plaintiffs and that the name of the plaintiff was substituted in the stead of the defendant, in respect of the municipal, electricity service provider, utilities services, etc. These belied the counter claim that any agreement contrary to the terms of the sale deed existed. He held that the allegation that an oral loan transaction existed between the parties, was completely at variance with and contradicted by the sale deed which, *"absolutely and forever, conveys the suit property to the plaintiffs. The defendant is seeking to foist an obligation on the plaintiffs to reconvey the suit property to him upon the repayment of the so-called loan with interest and other charges - an obligation not borne out by the instrument of sale and contrary to the express covenant"*. The defendant's counter claim amounted to contradicting and adding to the terms of the registered sale deed- a course clearly impermissible in law. The learned Single Judge noted that the covenant expressly stated that the purchaser/ plaintiffs were to *"hold, use, enjoy as they like and to sell, mortgage, lien, let-out or make additions/alterations/ re-construct with all construction for construction of further floors in the same as their own property without any hindrance, claim or demand whatsoever from the Vendor"*. The learned Single Judge discussed the judgment cited by the defendant, i.e. *Roop Kumar v Mohan Thedani*¹ and held that the *ratio* of the said judgment was inapplicable to the facts of the case. He followed the decision in *Ramaswamy (Dead) By LRs Vs. M. Lobo (Dead) By LRs*² and *Krishi*

¹ (2003) 6 SCC 595

² (2001) 10 SCC 176

*Utpadan Mandi Samiti, Sahaswan, District Badaun through Its Secretary v Bipin Kumar & Anr*³. It was also held that *Tulsi & Ors Vs. Chandrika Prasad & Ors*⁴, relied by counsel for the defendant was of no avail. There the document was described as a sale deed. However, the terms contained in the document stipulated that if the entire consideration was repaid by a particular date, the purchaser had to re-convey the property and deliver possession.

12. The impugned judgment further held that the loan transaction alleged by the defendant was also illegal as one of its essential components was allegedly, the payment of interest by the defendant to the plaintiff in cash, without receipt i.e. without any accounting. The alleged loan transaction, said the learned Single Judge, entailed the generation of unaccounted income for the plaintiffs, and the payment of unaccounted amounts by the defendant towards interest - both of which were illegal by reason of Section 40A (3) of the Income Tax Act, 1961. The plea that the amounts were paid over a period of time suggested a transaction different from the apparent one, i.e. of sale, was rejected too. It was held by the learned Single Judge that "*Mere spread of the period, during which consideration was paid by the plaintiffs to the defendant-during February and October, 2011 does not suggest that the amounts were given as a loan, and not towards sale consideration. As noticed, such a plea is barred by law*" due to Sections 91 and 92 Evidence Act.

³ (2004) 2 SCC 283

⁴ (2006) 8 SCC 322

13. On the application for a decree on admissions, it was held that the court should proceed with a suit, and try issues which really arise for adjudication. The fact that a litigant might wish to prolong a dispute, with no real issue needing trial, should not bar the court from looking at the reality of the pleadings and documents, to discern if there was an admission. The impugned judgment held that:

"70. There is no purpose of dragging the matter further into trial so far as the relief of possession is concerned, since the title of the plaintiffs in respect of the suit property stands established, and the only consequence thereof, in law, can be that the suit of the plaintiff for possession has to succeed.

71. The defendant has failed to establish any right or title in the suit property. At the highest, the defendant may have occupied the suit property for some duration after the execution of the sale deed in favour of the plaintiffs as a licensee. The said license clearly stands terminated, if not earlier, upon receipt of summons in the suit, inter alia, for possession. (See judgment in Nopany Investments (P) Ltd. v Santokh Singh (HUF), (2008) 2 SCC 728)."

Arguments of parties

14. Mr. Sanjiv Sindhvani, learned senior counsel for the defendant appellant argued that the impugned judgement firstly erred in law in holding that the terms of Sections 91 and 92 barred the counter claim, inasmuch as it set up a case that the registered sale deed was not meant to be acted upon, rather that there was another transaction which was the one which parties intended to be bound by, i.e loan by the plaintiffs, which upon repayment, was to result in the re-conveyance of the suit property. Counsel relied on the

decision of the Privy Council in *Tyagaraja Mudaliyar vs Vedathanni*⁵ commending on Sections 91 and 92 that "even if there were no provisos to either section, the result in the present case would be the same, because there is nothing in either section to exclude oral evidence that there was no agreement between the parties and therefore no contract." This judgment, submitted counsel, was approved and followed by the Supreme Court in *Gangabai w/o Rambilas Gilda v Chhabubai*.⁶ In *Gangabai* (supra) it was observed that:

"It is clear to us that the bar imposed by sub-s. (1) of S. 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether not recorded in the document, was entered into between the parties."

Learned counsel also relied on *Ishwar Dass Jain (dead) thr LRs. v Sohan Lal (dead) by LRs*⁷ and *Smt. Bhagwan Devi Vs. Smt. Beni Bai*.⁸

⁵ AIR 1936 PC 70.

⁶ AIR 1982 SC 20

⁷ AIR 2000 SC 426

15. The defendant next urged that having regard to the allegation in the written statement that the fair market value of the suit property was not ₹1.65 crores, but ₹15 crores, the Court should not have rejected the counter claim, but proceeded with the trial. This was a strong circumstance pointing to the real nature of the transaction of the parties, i.e to treat the sale deed as a security for the loan advanced by the plaintiffs. The defendant's counsel relied on the decision of the Andhra Pradesh High Court in *Habeeb Khan v Valasula Devi*⁹ where the High Court considered the fact that the market value of the property at the relevant time is relevant and in case the consideration is much less than the market value the sale deed will be considered as a conditional sale deed and Section 92 of the Evidence Act will have no application.

16. Mr. Sindhwani next argued that the Appellant had repeatedly submitted in his written statement and counter claim and also during the course of arguments that he was ready and willing to re-pay the entire amount with upto date interest and also the cost of registration incurred by the plaintiffs, though that has been already deducted from him. The Learned Single Judge however, did not consider this and further disbelieved the defendant's version and passed the impugned Judgment.

17. It was argued that the plaintiff's contentions with respect to possession were both contradictory and false. It was argued in this regard that the defendant disputed the issuance of any receipt; the document produced was a disputed one. Furthermore, The defendant alleged in the written statement that the suit property had no separate entity and it is an integral part of EC-4

⁸ AIR 2006 All 251

⁹ AIR 1997 AP 53

Indepuri, New Delhi, which was supported by the report of the Local Commissioner, who stated that the property bearing No. EC-4 and EC-5, Inderpuri is within a common boundary and the plaintiffs did not dispute the said report.

18. There were inherent pointers to the fact that the registered sale deed was not meant to be acted upon, stated counsel for the defendant. It was emphasized that if indeed, the sale transaction was genuinely recorded in the registered deed, other surrounding circumstances, such as the amounts paid over several months, in many instalments, lack of any pre-existing agreement to sell (in the absence of which the probability of the real nature of the transaction being a mortgage was stronger) and the depressed value of the property, all suggested that the defendant's version was correct. As a consequence, the court could not have dismissed the counter claim and decreed the suit.

19. Learned counsel argued that as far as the decree based on alleged admission was concerned, firstly the plaint itself was contradictory because in one breath it was asserted that the plaintiff was not given possession despite repeated requests; on the other, it was contended that the defendant dispossessed the plaintiff on a particular date. Moreover, the so-called possession slip was a forgery and could not have been relied on. Learned counsel relied on the decisions of the Supreme Court on the law of admissions, asserting that unless the admission is categorical, deliberate and unambiguous, the court should not exercise its discretion to decree the suit, as it would prejudice the defendant's right to a complete trial on merits. Reliance was placed on the judgment reported as *Jeevan Diesel &*

*Electricals Limited v. Jasbir Singh Chadha & Another*¹⁰, to submit that to issue a decree on admissions under Order XII Rule 6 CPC, the admission has to be unequivocal or unambiguous and not one which is qualified. To the same effect, *Uttam Singh Duggal & Co. v. United Bank of India & Ors*¹¹ and *Charanjit Lal Mehra and others v. Kamal Saroj Mahajan (Smt.) & Anr*¹² were relied upon.

20. Ms. Maninder Acharya, learned senior counsel for the plaintiff, argued that the learned Single Judge acted correctly in holding that the counter claim was without any basis and consequently in rejecting it. She argued that the court has to consider the pleadings and the documents in totality, to discern whether, through the device of clever drafting, a cause or suit is instituted, which should otherwise not be considered and allowed to go to trial as it would be burdensome to the court to allow such matters to clog the judicial system. Reliance was placed on *T. Arivandandam v. T.V. Satyapal*¹³; *Church of Christ Charitable Trust v Ponniamman Education Trust*¹⁴.

21. It was argued that the palpable falsehood in the case set up in the counter claim is apparent and laid bare in the pleadings itself. Here, learned senior counsel highlighted the pleadings in the counter claim to say that though a sale deed was executed, conveying title to the property to the plaintiff, there was a contrary agreement. The pleadings relied on are to the effect that the parties agreed that the Sale deed would be executed only to

¹⁰ (2010) 6 SCC 601

¹¹ 2000 (7) SCC 120

¹² (2005) 11 SCC 279

¹³ 1977 (4) SCC 467;

¹⁴ 2012 (8) SCC 706

secure a loan given to the defendant, which was to carry a rate of interest @2% per month; the property was to be conveyed back to the vendor (defendant) after the amounts were repaid. The pleadings also were that the defendant paid monthly interest which the plaintiff accepted. The circumstance pressed into service to say that the real transaction was a mortgage was the allegation that the property continued in the defendant's possession and that the sale consideration was grossly inadequate. Counsel submitted that the basic rules of pleadings were not followed in the counter claim; no dates as to when the amounts were paid towards interest, or the amounts, or the tenure of the so called loan were spelt out. Furthermore, the defendant nowhere disclosed in any document that the consideration paid was inadequate. Also the amounts repaid were not sought to be co-related to any amounts withdrawn from any bank account, etc. The defendant was an Advocate and could not have been misled into executing a sale deed not meant to convey title. Furthermore, the defendant never spelt out the story of a mortgage, at any point of time, before the suit was filed.

22. Ms. Acharya argued that the defense of the appellant and the counter claim were instances of false claims, that have been frowned upon by the Supreme Court, which had exhorted courts to reject such pleas. She relied on the judgment reported as *Maria Margarida Sequeira Fernandes v Erasmo Jack De Sequeira* 2012 (5) SCC 370. It was argued that the court has to discern the truth not only on the basis of pleadings, but also on consideration of all the materials on record. The omission to place any materials on record on the one hand, and make bald and vague assertions about a parallel agreement to reconvey the property, on the other, showed

that the defense as well as the counter claim were false; they were correctly rejected.

23. It was argued that the lack of any particularity in the pleadings about the dates on which interest amounts were allegedly paid to the plaintiff, by the defendants, as well as the amounts themselves, let alone details in the form of bank withdrawals, entitled the court to reject them. Counsel relied on the judgments reported as *D.M. Deshpande v Janardhan Kashinath Kadam & Ors* AIR 1999 SC 1464 and *Ram Sarup Gupta v Bishen Narain Inter College & Ors* 1987 (2) SCC 555 in support of this argument. She submitted that if these averments were to be ignored, as they rightly were, the defendant had no explanation how he was in possession; the plaintiff was the undoubted owner. The decree for possession was warranted.

24. It was argued that the interpretation placed on Sections 91 and 92 of the Evidence Act, by the learned Single Judge, do not call for interference. It was argued that the story made out by the defendant, i.e that there was another part to the transaction, which was that the registered sale transaction was to be reversed after the entire loan amount was repaid contradicted the terms of the written document and therefore no oral evidence could be led. If such were the correct position, there was no question of the matter proceeding further. In the circumstances, the impugned judgment was correct and the appeal is without merit.

Analysis and Findings

25. The facts are fairly straightforward; the parties executed a sale deed which was registered on 02.12.2011. It conveyed title to the suit property

absolutely to the plaintiffs. Its terms leave no room for any other construction; the defendant does not deny having received the full consideration, i.e ₹ 1.65 crores, in the manner described in the document. What the defendant disputes is possession; according to him it was never handed over to the plaintiff, who was never dispossessed. The second substantial plea urged in the written statement (which was also the centerpiece of the counter claim) and reiterated in court was that the real nature of the transaction was one of mortgage- although he did convey title to the property, that apparent transaction was never meant to be; the plaintiff was to re-convey the property to him after he repaid the amount borrowed from the defendant with 2% monthly interest. He further urged that the monthly interest amounts were paid in cash and that the parties' understanding was that such repayments were not to be evidenced by written receipts. Furthermore, he submitted that the real value of the property was much more, i.e in the range of ₹ 15 crores.

26. The learned Single Judge invoked Section 92 of the Evidence Act and held that the defendant could not set up the plea that he did, in the counter claim as such plea was barred. Section 92 reads as follows:

"92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso(1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality,

want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts."

According to the defendant, the true character of the document is under a cloud, because of the counter claim. It is interesting to notice here that the defendant has not alleged fraud, coercion or any other factor known to law which would render a contract or instrument void. His bald averment is that the sale deed recorded only a part and not the whole of the transaction, the other part being embodied in an oral agreement to reconvey the property upon repayment of the entire consideration by him, with agreed interest.

27. The case set up by the defendant may be usefully reproduced from the counter-claim averments, which are identical to the written statement. According to the defendant, the sale deed no doubt conveyed title to the plaintiff, but there was another transaction

"contrary to the understanding between the parties that the Plaintiff will cancel the Sale Deed dated 01.11.2011 and/or execute a fresh Sale Deed in respect of the suit property to the Defendant on receipt of the entire loan amount advanced to the Defendant along with the interest, for which Sale Deed of the suit property was executed as security.

2. That the Plaintiffs are builders and money lenders. The Plaintiffs proposed to give a loan to the Defendant and in lieu of the said loan amount the Defendant has to execute Sale Deed of his property No. EC-5, Inderpuri as a Security in their favour and handed over the original chain of documents to the Plaintiffs.

3. That the Plaintiffs further told the Defendant that they will charge interest @ 2% per month which will be payable in cash per month against which the Defendant will not claim any receipt. The Plaintiffs further agreed that they will execute a fresh Sale Deed in favour of the Defendant as and when the entire money is paid alongwith interest @ 2% per month, expenses incurred while registering sale deeds, court fees etc. to the Plaintiff by the Defendant.

8. That the Defendant was paying regular monthly interest amount towards the loan to the Plaintiffs till the date of filing the present suit. After filing the present suit the Plaintiff declined to receive the interest amount which the Defendant was ready to pay as they have developed dishonest intention to grab the suit property of the Defendant, hence the present Counter Claim is filed.

9. That when the suit property is worth more than 15 Crores, the question of selling the same for Rs. 1.65 Cores does not arise. The ulterior motive and malafide intention of the Plaintiffs is clear from this fact alone and therefore the claim of the Plaintiffs is false, bogus and illegal.

10. That the cause of action for the counter claim arose in favour of the Defendant and against the Plaintiff at Delhi when the Plaintiffs advanced loan of Rs. 1.65 Crores to the Defendant and on 01.11.2011 when the Defendant executed Sale Deed in favour of the Plaintiffs as Security to the aforesaid loan. It further arose on 02.12.2011 when the Sale Deed was registered by the Defendant in favour of the Plaintiffs and it further arose on all dates when the Plaintiff received the monthly interest for the loan from the Defendant. The cause of action further arose on when the Defendant approached the Plaintiffs for repayment of the loan amount and/or cancel / execute Sale Deed in favour of the Defendants. It further arose on the date of filing of the suit, and when the Defendant received the summons of Suit on 18.07.2012. The cause of action still survives."

28. It is quite evident from the extract, that the suit is bereft of any particulars- let alone material particulars with regard to when and if so within which period the amount of ₹ 1.65 crores was to be repaid by the defendant to the plaintiff. If the defendant's submission that he paid 2% monthly interest were accepted, the fact remains that substantial amounts would have been received. Each monthly installment would be to the range of about ₹ 3,30,000/-. The defendant - in the counter statement is silent as to the dates when such amounts were paid; if so the exact amounts which were paid. There is no material to support the claim at all despite the fact that the counterclaim was filed in July 2012 and the judgment was rendered much later. No document pointing to this was filed along with the list of documents by the defendant in support of the written statement as well as

the counterclaim. Most importantly the defendant did not plead fraud or any other vitiating circumstances that would render the sale deed voidable as against the plaintiff. These factors are vital and in the opinion of this court were rightly highlighted by counsel for the plaintiff during the submissions.

29. *Ishwar Dass Jain (dead) thr LRs.* (supra) cited by the defendant/appellant is an authority that when a case of a document being a facade or sham is set up, the litigant claiming it has to more than merely plead it to be so: some cogent evidence or material should be on the record. The facts in *Smt. Bhagwan Devi (supra)* -again cited by the defendant are that the court held that the ostensible sale was not really meant to convey the property, because the vendor continued to receive rent from existing tenants; there existed a document supporting the claim of the original vendor that the ostensible vendee had taken the property on rent. Likewise, in *Gangabai (supra)*, there were circumstances to support the plaintiff's claim that the sale deed was not meant to convey property, but was a sham; the trial court and the High Court permitted *parol* evidence and the Supreme Court affirmed the decree. *Tyagaraja Mudaliar (supra)* was a case where the plaintiff, a widow with separate maintenance rights in view of the factual partition between her late husband and his brother, agreed to execute a document signifying undivided status on the assurance that her pre-existing maintenance rights would be maintained. She, however, was forced to leave the joint family matrimonial home and as a result of the previous partition, took back the jewels which fell to her share. Upon the death of her husband's brother, she sued his widows, for arrears of maintenance. The evidence overwhelmingly pointed out to a partition between her late husband in his life time; the courts, including the High Court upheld her contention and

disregarded the document. The Privy Council affirmed the concurrent decree, holding that Section 92 did not operate to exclude evidence presented by the plaintiff.

30. Since the defendant has urged that the sale deed really embodied a mortgage transaction that was meant to be conveyed back, it would be useful to notice that this situation is governed by Section 58 (c) of the Transfer of Property Act, 1882. The said provision enacts as follows:

"58. (c) Where the mortgagor ostensibly sells the mortgaged property-on condition that on default of payment of the mortgaged-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

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."

31. In *Bal Kishan Das v. Legge*¹⁵, the respondent purported to sell his estate to his former creditors, including the appellant, for ₹1,50,000. Part of the sale consideration was paid by wiping off a previous mortgage debt in favour of the vendees, dated 8th April 1872. The balance was retained by the vendees for financing expenses of conducting certain factories. The vendees executed a second document in favour of the vendor, whereby they agreed to resell the property to him, if he paid a sum of ₹ 1,65,000 on 1st March 1876. It was further stipulated that if the estimate of the expenses on the indigo factories should be altered from year to year by the concurrence of the

¹⁵ [1900] 22 All. 149

parties, the vendor should be liable to pay, along with the sum specified above, whatever sum may be found due at this time. The High Court held that the transaction amounted to a mortgage by conditional sale. The judgment is reported in *Bal Kishan Das v. Legge*¹⁶. The Privy Council affirmed the decision except in one particular. It was held by the Privy Council that the case had to be decided on a consideration of the documents themselves with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts-oral evidence for the purpose of ascertaining the intention of the parties to the deeds being inadmissible under Section 92, Evidence Act, and that there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. *Jhanda Singh v. Wahiduddin*¹⁷ was an appeal to the Privy Council from a Full Bench decision of the Allahabad High Court (I.L.R. 33 All. 585). A document purporting to be an out and out sale deed was executed on a certain date, and seven days later, a second document was executed by the vendee, whereby he had covenanted to reconvey the property if the vendors paid back the purchase money after the lapse of nine or ten years from the date of that sale deed. The two deeds were separately stamped and were registered on different dates. On a first appeal in a majority view it was held that the transaction did not amount to a mortgage. The Privy Council held that the timing of the agreement to reconvey, i.e its execution formed two separate and independent transactions, not two connected and interdependent parts of one and the

¹⁶ [1897] 19 All. 434

¹⁷ A.I.R. 1916 P.C. 49

same transaction. The Court held that the transaction was an out and out sale and not a mortgage by conditional sale.

32. An important judgment on the interface between Section 58 (c) of the Transfer of Property Act and Section 92 of the Evidence Act, was rendered by a four judge Bench of the Supreme Court in *Pandit Chunchun Jha vs Sheikh Ebadat Ali*¹⁸. The Court held as follows:

*"The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. 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. The first is that the intention of the parties is the determining factor: see *Balkishen Das V. Legge* (27 I.A. 58.). But there is nothing special about that in this class of cases and here, as in every other case 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 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. As Lord Cranworth said in *A Aderson v. White* (44 E.R. 924) : "The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show*

¹⁸ AIR 1954 SC 345

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? Their Lord-ships of the Privy Council applied this rule to India in Bhagwan Sahai v. Bhagwan Din (17 I.A. 98) and in Jhanda Singh v Wahid-ud-din (43 I.A. 284 at 293). The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction. Because of the welter of confusion caused by a multitude of conflicting decisions the Legislature stepped in and amended Section 58(c) of the Transfer of Property Act. Unfortunately that brought in its train a further conflict of authority. But this much is now clear. If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are, contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the -sale, then it is a matter for construction which was meant. The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage.

Another four judge Bench of the Supreme Court considered the same question in *P.L Bapuswamy v N. Pattay Gounder*¹⁹ thus: (four judges)

"that there were several circumstances to indicate that the document was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place, the condition for repurchase was embodied in the same document. In the second place, the consideration for the transaction was Rs.4,000/- while the real value of the property was Rs.8,000/-. In the third place, the patta was not transferred to the 1st defendant after the execution of the document by Palani Moopan. The kist for the land was also continued to be paid by Palani Moopan and after his death, by his sons. Lastly, the consideration for reconveyance was Rs.4,000/-, the same amount as the consideration for the original transaction. The plaintiff was entitled to preliminary decree for redemption under O.34, R.7, Civil Procedure Code, for taking accounts and for declaration of the amounts due to the 1st defendant under the document."

A more recent judgment, *Umabai & Anr v Nilkanth Dhondiba Chavan (dead) by LRs & Anr*²⁰ held that:

"19. It may be true that level of a document is not decisive. The true nature of transaction must be determined having regard to the intention of the parties as well as the circumstances attributing thereto as also the wordings used in the document in question.

21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and

¹⁹ AIR 1966 SC 902

²⁰ (2005) 6 SCC 243

borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See Pandit Chunchun Jha v Sk. Ebadat Ali (1955) 1 SCR 174, Bhaskar Waman Joshi v Narayan Ramblidas Agarwal (1960) 2 SCR 117, K. Simrathmull v S. Nanjalingaiah Gowder 1962 Supp (3) SCR 476, Mushir Mohammed Khan v Sajeda Bano, (2000) 3 SCC 536 and Tamboli Ramanlal Moti v Chanchi Chimanlal Keshavlal, 1993 Supp (1) SCC 295."

33. What then is the correct position? It appears to be that firstly, where the law compels a document to be in writing, that and that alone will be determinative of what the parties intend. It is where the terms are ambiguous that extrinsic evidence is permitted. The exception to this rule is the one carved out in *Tyagaraja Mudaliyar* (supra) and subsequently affirmed in *Gangabai* (supra), i.e where the document's professed identity is impeached as a sham or that it is a façade, the real intention of the parties being something else, oral evidence is not precluded. However, in each of those decided exceptions, there was a welter of evidence to support the claim that the document impeached was sham. The second principle is that where the transaction is said to be a mortgage by conditional sale, proviso to Section 58 (c) enjoins that a sale deed would not be deemed a mortgage "*unless the condition is embodied in the document which effects or purports to effect the sale.*"

34. In the present case, as concluded earlier, the lack of specificity in the written statement and counter claim render the pleadings vague; also, there

is no material or document to support any circumstance pointing to the loan transaction entailed with the condition to reconvey after repayment of all amounts: as alleged by the appellant counter claimant. These omissions are fatal to any claim of the kind made by him. No doubt, the court, while exercising its power and jurisdiction would not enter into an evidential assessment expedition; that task is best left to trial. However, the limited jurisdiction it possesses, enables it to see if at all any cause of action is either made out (i.e exists) or any cause of action alleged, is barred. In the present case, this Court is unpersuaded by the defendant's arguments that such conditions exist and that the trial should proceed. As remarked earlier, the counter claim and written statement does not assert a claim of sham- which is essential for the exception carved out by the Supreme Court in *Gangabai (supra)* to operate. Even such averments have to be specific and particular; they are not in this case. Moreover, it strains one's credulity to accept at face value that the defendant, an educated man and a lawyer, would have unquestionably acquiesced to a transaction without any written guarantee about the reconveyance, particularly when the provision - Section 58 (c) of the Transfer of Property Act, enjoins that the whole of the transaction should be in writing. For all these reasons, it is held that the impugned judgment is sound as far as it held that the defendant's counter claim about the real nature of the sale transaction being based on a sham document, was barred and the plaint had to be rejected under Order VII Rule 11 CPC.

35. The next question is whether in the circumstances of the case the Learned Single Judge could have decreed the suit for possession as he did in the present case. Here the defendant urges that the admission if any is not unambiguous; he invokes to his aid various decisions of the Supreme Court

to say that in the absence of a conscious, deliberate and unambiguous (or unequivocal) admission courts should not decree any suit under Order XVI Rule 6 CPC. As a proposition of law there can be no dispute that the court's power under Order XVI Rule 6 CPC is circumscribed. Firstly the power is discretionary and not compulsive. Secondly the power is to be exercised upon an overall assessment of the record-it is not confined to examination of the pleadings alone; the inquiry can extend to admissions arising from oral evidence or the documents placed in the record. The third and in the present context important, condition which qualifies the use of the power to decree a suit on admission-is that unless the admission is apparent, clear and unequivocal, courts should not invoke that discretion. This is based upon the principle that every litigant who approaches the court has a right to be heard and the right to lead evidence in a full-fledged trial.

36. The facts essential for a decree of possession are: title to the property, possession of the defendant and refusal or omission to hand over possession of the property to the plaintiff. In the present case there is no dispute that the amount to be paid as consideration was indeed paid; it is not disputed that the sale deed was registered in favor of the plaintiffs; it is not disputed that when the plaintiff did file the suit he was not in possession. The nature of the transaction was central to the defendant's case. The defendant's leitmotif or keynote in the written statement and counterclaim was that although the document evidencing the sale was registered, nevertheless concurrently there was an oral agreement by which the parties agreed to the seeds of destruction of the registered sale deed. This plea was central and in a sense essential for the defense to the suit for possession. As discussed earlier this defense of another agreement rendering the written agreement or the sale

deed a sham has been discarded. The court has already ruled that the findings of the learned Single Judge are sound and justified in the circumstances on that point. In the circumstances what is left for the defendant to really argue and lead evidence on during the trial? According to this Court there is practically nothing. Besides contesting that the Possession slip, which is a part of the record-was never signed by him and, therefore is a forgery, the defendant has produced nothing to support this plea. There is no document or even a written complaint leading to any criminal proceeding claiming that the possession slip executed by the defendant, is indeed a forgery and that the defendant did not sign it. Such being the circumstance the mere plea of denial is insufficient, in the opinion of the Court to bring the defense into the zone of a contested claim.

37. This Court holds the arguments on behalf of the plaintiff as substantial; the task of discerning which is a genuine cause or dispute that requires detailed scrutiny under trial, has to be delicately and diligently gone into. The courts have been armed at various stages with the power to summarily reject or decree suits as the case may be based upon the materials on the record. The first one is at the stage of consideration of the suit-here the court's power is narrower. It has to confine its inquiry into the pleadings and the documents filed by the plaintiff. If at that stage it is satisfied that the claim is barred or that the court lacks territorial jurisdiction, the court can stop the matter from entering its docket. The next stage is after both parties have filed their pleadings and documents; if the court feels that an appropriate order, either of dismissing or decreeing the claim in part or whole can be entered having regard to the admissions of one party or the other, it may proceed to do so. The third stage – with which this court is not

concerned for the present-is where the parties have admitted each of those documents and it is called upon to frame issues. In light of the existing materials on the record and on applying the concerned provisions of law if the court feels that there is no issue which requires a trial it may proceed straight away to judgment. All these powers exist because of one reason alone - furtherance of justice. What is apparent is that the court has to be vigilant and should ensure that matters do not linger longer than expected, having regard to the heavy workload. It is in these circumstances and background that the Supreme Court has repeatedly cautioned the courts that only those causes or cases which warrant trial should be allowed to proceed and others like the present one are to be weeded out. Having regard to the totality of circumstances this Court is of the opinion that barring the plea made out in the counterclaim and the further contention that the possession slip was never executed by the defendant or that possession was never demanded by the plaintiff, there was no defense of the kind which required a trial. On the aspects, this Court is of the opinion that the learned Single Judge's findings and conclusions do not call for interference.

38. For the foregoing reasons the Court holds that the appeal is unmerited and has to be dismissed. It is, therefore, dismissed with costs quantified at ₹ 75,000 to be paid to the Plaintiffs/respondents within two weeks from today.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

JANUARY 29, 2016