

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 10-8-2018

Judgment delivered on 27-8-2018

FA No. 109 of 2003

1. Hasmatlal aged about 45 years, s/o. Tharamal Tejwani.
 2. Chhattumal, aged about 30 years, s/o. Tharamal Tejwani.
- Both residents of Patankar Colony, Durg, District Durg, Chhattisgarh.

---- Appellants.

Versus

1. Bholaram Dewangan aged about 47 years.
 2. Babulal Dewangan, aged about 38 years.
 3. Jivanlal Dewangan, aged about 34 years.
- All sons of late, Bhikham Singh, r/o. Village Nankathhi, Tehsil and District Durg, Chhattisgarh.
4. Devkumari, aged about 58 years, w/o. Kisanlal, r/o. Baibvgapara, Dist. Durg, Chhattisgarh.
 5. Gita Bai, aged about 50 years, w/o. Bholaram Dewangan, r/o. Bosepra, District Rajnandgaon, Chhattisgarh.
 6. Vaidin Bai, aged about 44 years, w/o. Janaklal, r/o. Polsaipara, District Durg, Chhattisgarh.
 7. Radha Bai, aged about 40 years, w/o. Ganesh Ram, r/o. Mathhpara, District Durg, Chhattisgarh.
 8. Saraswati, aged about 38 years, w/o. Kumar Dewangan, r/o. Palari, district Raipur, Chhattisgarh.

---- Respondents

For appellants	:	Mr. B.D.Guru, Advocate.
For respondents	:	Mr. H.B. Agrawal, Sr. Advocate with Smt. Prabha Sharma, Advocate.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment and decree dated 25-2-

2003/28-2-2003 passed by the 7th Additional District Judge (FTC), Durg, (CG) in Civil Suit No. 2-A/2003 wherein the said court has cancelled the sale deed executed by the Sub-Registrar in favour of the appellant for purchasing the land bearing Survey No.41/2 area 3.346 hectares situated at village Nankathhi, Patwari Halka No. 34/50 Bandobust No. 305, Tahsil and District Durg (CG).

2. As per averment made before the trial Court late Bhikham Singh, who was originally plaintiff whose legal representatives are respondent in the present appeal was in need of Rs.35,000/- for his daughter's marriage in the month of September and October, 1985 and he met one Jayaram for loan and the present appellant provided him loan of Rs.33,000/- but a sham sale deed was executed for providing the loan.
3. As per the appellant, said Bhikham Singh sold his land in question and executed sale deed willingly and after that transaction he became wiser on the advice of the villager and tried to get back the land after selling it.
4. Learned counsel for the appellant submits as under
 - i) The trial Court erred in holding that the land in question was valued to Rs.1.25 lacs on the date of execution of the sale deed.
 - ii) As per pleading in plaint, the land got mortgaged, if it is so, suit for redemption of mortgage should

have been preferred.

- iii) Oral evidence in contradiction of documentary evidence cannot be considered as evidence in view of the provision of Sections 91 and 92 of the Indian Evidence Act.
- iv) Having held that the appellant are entitled to amount of loan together with interest, the court failed to pass a decree in this term.

In support of his arguments, he placed reliance on the decision of Hon'ble Supreme Court in the matter of **Janak Dulari Devi and another vs. Kapildeo Rai and another, reported in (2011) 6 SCC 555.**

5. The first question for consideration of this Court is whether sale is completed in the facts and circumstances of the case. Section 54 of the Transfer of the Property Act, 1882 commands that the sale is completed when the seller after registration of sale deed places the purchaser or legal representatives into possession of the property. Unless possession is delivered to the purchaser the sale is not completed.
6. In the present case, Bhikham Singh (PW/1) deposed before the trial Court that the transaction was sham as the same is document of security of loan. As per his statement he is in possession of the land in question even after execution of the sale deed by sowing Brinjal and Chilli on the said land. Version

of Bhikham Singh is supported by the evidence of Jugal Pandey (PW/2). Again, the appellant (DW/1) admitted before the trial Court (para 22) that he has made statement before the Settlement Officer that he is not in possession of that land. One Nirakar (DW/2) was examined before the trial Court as witness of the appellant but he has not stated that he ever cultivated the land of Bhikham Singh as per direction of the appellant. Again, a notice was served by Bhikham Singh to appellant as per Ex.P/3 dated 17-11-1986 that he is tendering the loan amount with interest and after this notice one proceeding of mutation was started by appellant and decided *ex parte* on 28-3-1987 by Asst. Settlement Officer as per Ex.P/5. The trial Court elaborately discussed regarding valuation of the property and found that it was valued to Rs.1.25 lacs on the date of alleged transaction and when the possession of the property is not delivered, the sale is not completed and the document executed in favour of the appellant is sham transaction. The finding of the trial Court is based on proper marshalling of the evidence of oral and documentary evidence and the argument advanced on behalf of the appellants is not sustainable.

7. Considering all the facts and evidence on record, this court is of the opinion that the case law cited by learned counsel for the

appellants is distinguishable from the facts and circumstances of the present case.

8. The second question for consideration of this court is whether the transaction was mortgage. From the evidence, it is nowhere established that the property was mortgaged to the appellants. From the evidence it is established that the document is executed only to save the loan amount. If it would have been a case of mortgage, the recital of deed must have been of that effect, but that is not the case here. Case of the appellants is beyond purview of Section 58 of the Transfer of Property Act, 1882 and it is no ones case that dispute is regarding mortgage and therefore, the trial Court could not have been made out a new case contrary to the pleading of the parties. Argument of learned counsel for the appellants that oral evidence cannot be led against the recital of sale deed has no force, the trial Court discussed the same at length and it is settled that oral evidence can be led to show that transaction was not a sale but it was a deed of security against the loan.
9. No suit was filed by the appellants before the trial court. The suit was filed by Bhikham Singh for cancellation of sale deed and it was not a suit for recovery of loan amount. The appellants cannot blow cold and hot at the same time. Before the trial Court they pleaded that transaction is a sale and there is nothing

like transaction of loan in their pleading, therefore in the said judgment, the trial Court was not in a position to pass a decree regarding loan in favour of the appellants. All the grounds raised by the appellants are not sustainable looking to the facts and circumstances of the case, evidence on record and elaborate discussion on each of the issue by the trial Court.

10. Accordingly, the decree is passed in favour of respondents and against the appellants as under:

- (I) The appeal is dismissed with cost.
- (ii) Appellants to bear the cost of respondents through out.
- (iii) Pleader's fee., if certified, be calculated as per Schedule or as per certificate whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
Judge

Raju