

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 28 of 2004****Reserved on : 14.08.2018****Delivered on : 06.09.2018**

Smt. Leela Agrawal, wife of Late Gopal Prasad Agrawal, aged 50 years, R/o Kali Mandir Road, near Bus Stand, Manendragarh, Tahsil Manendragarh, District Korea (C.G.)

---- Appellant**Versus**

1. Smt. Sarkar, wife of Shri Satyabhushan Sarkar, aged about 65 years, R/o Ward No. 1, Manendragarh, P.S. & Tahsil Manendragarh, District Korea (C.G.)
2. State of Chhattisgarh through Collector, Korea, District Baikunthpur (C.G.)

---- Respondents

For Appellant	:	Mr. Ratnesh Kumar Agrawal, Advocate.
For Respondent No. 1	:	None.
For State/ respondent No.2	:	Mr. R.K. Jaiswal, Panel Lawyer.

Hon'ble Shri Justice Ram Prasanna Sharma**CAV JUDGMENT**

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 14.11.2003/ 02.12.2003 passed by Additional District Judge, Manendragarh, District- Korea (C.G.) in Civil Suit No. 26-A/2001, wherein the said court decreed the suit for redemption of mortgage related to land bearing Khasra No. 202/07 admeasuring 2 acres of Patwari Halka No. 10, Manendragarh (Near Hansiya River, Ward No. 1) and ordered the appellant to get amount of Rs. 1,20,000/- deposited by respondent on 29.11.2003 and get mutation of the said land in the name of respondent No. 1.
2. Respondent No. 1/plaintiff filed a suit stating inter alia that she is owner of the suit land/house situated at Patwari Halka No. 10, Manendragarh bearing

Khasra No. 202/07 total area 5.40 acre and out of said land, she mortgaged 2 acres of land to the appellant/defendant in the year 1990 for Rs. 75,000/- and mortgage deed was reduced in writing on 17.10.1990.

3. As per averment, it was agreed between the parties that respondent No. 1 will refund Rs. 1,20,000/- towards mortgage totaling the principal amount, Rs. 25,000/- as interest and Rs. 20,000/- towards expenses incurred in mortgaging the property.
4. As per averment of respondent No. 1/plaintiff, suit property was in possession of respondent No. 1 and when she made request to the appellant in the 1993 for redemption of mortgage, the appellant refused for redemption and it was replied that document is having force of sale.
5. As per case of the appellant, it was mortgaged by conditional sale with a condition that when mortgage money is not paid within three years, the documents will have the force of sale. Since respondent No. 1 failed to pay the amount of mortgage money with interest, the document has force of sale. It is further case of the appellant that Section 165 of the Chhattisgarh Land Revenue Code, 1959 (for short "the Code, 1959") is not applicable in the present case.
6. The first question for consideration by this Court is whether the transaction is mortgage by conditional sale or it is simple mortgage as held by trial court. Respondent No. 1 side adduced evidence of Satyabhushan Sarkar (PW-1), Paritosh Sarkar (PW-2) & Dhanai Ram (PW-3). As against this, the appellant side adduced evidence of Vijay Kumar Khedia (DW-1), Himmat La Chawda (DW-2) & Prakash Shukla (DW-3). Satyabhushan Sarkar (PW-1) is husband of respondent No. 1 who executed the alleged mortgage in favour of the appellant. As per evidence of this witness, he was present during course of mortgage and even after mortgage, respondent No. 1 was in

possession of the land in question by cultivation of paddy in the said land. Version of this witness is supported by Paritosh Sarkar (PW-2) & Dhanai Ram (PW-3). Vijay Kumar Khedia (DW-1) who was witness of appellant side admitted that respondent No. 1 is in possession of the land even after mortgage. From evidence of both side, it is established before the trial court that respondent No. 1 was in possession of the land in question after mortgage.

7. Simple mortgage is defined in Section 58 sub-clause (b) and mortgage by conditional sale is defined in Section 58 sub-clause (c) of the Transfer of Property Act, 1882 (for short "the Act, 1882") reads as under:-

"(b) **Simple mortgage**- Where, without delivering possession on the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(c) **Mortgage by conditional sale**- Where, the mortgagor ostensibly sells the mortgaged property-

on condition that on default of payment of the mortgage-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 mortgaged by conditional sale and the mortgagee a mortgagee by conditional sale."

8. In the present case, mortgaged property was not delivered to the appellant

therefore, it is not a case where property was ostensibly sold by respondent No. 1.

9. As per Section 54 of the Act, 1882, for sale delivery of possession of immovable property is must. As per provision of this Section, delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
10. In the present case, since possession was not delivered, it is not a case of ostensibly sale of the immovable property. When it is not mortgaged by conditional sale, it is mortgaged without delivering possession of the mortgaged property which falls in Section 58 (b) of the Act, 1882 defined as simple mortgage.
11. Learned counsel for the appellant submits that respondent No. 1 did not appear into witness box before the trial court and Satyabhushan Sarkar (PW-1) who is power of attorney holder had not dealt with the matter and in absence of evidence of respondent No. 1 presumption would be drawn against her.
12. Looking to the entire evidence of Satyabhushan Sarkar (PW-1), the argument is without substance. This witness is husband of respondent No. 1 and he had dealt with the matter right from day one of transaction till execution of document (Ex. D-2). He is not simple attorney holder having no personal knowledge of the transaction. He is a person having full knowledge of transaction and in every stage he was present during course of transaction of mortgage. From his evidence, all the facts regarding transaction is established and he has been subjected to searching cross-examination by appellant side and looking to his entire evidence, it is clear that he is the real witness to the transaction.
13. Case law cited on behalf of the appellant is clearly distinguishable as in the

present case, Satyabhushan Sarkar (PW-1) is having personal knowledge of details of transaction. On the basis of all relevant circumstances, it is clearly established that Satyabhushan Sarkar (PW-1) was witness to the transaction and therefore, argument advanced on behalf of the appellant is not sustainable.

14. It is contended on behalf of the appellant that Section 165 of the Code, 1959 has no application in the facts and circumstances of the present case, Section 165 (1) of the Code, 1959 reads as under :-

“165. Rights of transfer- (1) Subject to the other provisions of this section and the provision of section 168 a Bhumiswami may transfer any interest in his land.

(2) Notwithstanding anything contained in sub-section (1)-

(a) no mortgage of any land by a Bhumiswami shall hereafter be valid unless atleast five acres of irrigated or ten acres of unirrigated land is left with him free from any encumbrance or charge.”

15. In the present case, it is mentioned in para 6-A of the plaint that respondent No. 1 is having total 5 acres 40 dismal of unirrigated land to which the appellant made simple denial. As there is no rebuttal of the fact that respondent No. 1 is having less than 10 acres of unirrigated land, the mortgage of land was not valid as per the provision mentioned as above.
16. It is contended on behalf of the appellant that rate of interest was 4% per month and respondent No. 1 failed to deposit the interest as mentioned in Ex.D-2, redemption of property is not available. For answering this argument, Section 165 (3) of the Code 1959 reads as under:-

“(3) Where a Bhumiswami effects a mortgage other than a usufructuary mortgage of his land in pursuance of the provisions of sub-section (2), then notwithstanding anything contained in the mortgage deed, the total amount of interest

accruing under the mortgage shall not exceed half the sum of the principal amount advanced by the mortgagee.”

17. Even otherwise, rate of 4% per month or 48% yearly interest is not acceptable looking to the transaction regarding agricultural land, therefore, trial court is right in awarding Rs. 25,000/- as interest for the said mortgage and again in awarding Rs. 20,000/- for expenses of execution of mortgage. The total sum of Rs. 1,20,000/- has already been deposited by respondent No. 1 before the trial court and trial court is right in passing the decree for redemption of said mortgaged property.
18. The finding arrived at by the trial court is based on proper marshaling of oral and documentary evidence adduced before the trial court and the same is not liable to be interfered with invoking jurisdiction of the appeal.
19. Accordingly, the decree passed against the appellant and in favour of respondents on the following terms and conditions:
 - (i) The appeal is dismissed with cost.
 - (ii) The appellant shall bear cost of the respondent No. 1 throughout.
 - (iii) Pleaders' fee, if certified be calculated as per certificate or as per schedule whichever is less.
 - (iv) A decree be drawn accordingly.

Sd/-
(Ram Prasanna Sharma)
Judge