NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.224 of 2005

Santosh Kumar, son of Late Mohan Lal Halwayee, aged about 42 years, Occupation – handicapped from Right hand and agriculturist, resident of village Gaushalapara, Kharsiya, Distt. Raigarh (Chhattisgarh)

---- Appellant

Versus

1. Vishnu Prasad, son of Late Banwarilal Agrawal, aged about 44 years, Occupation-business (Sahukari)
2. Manish Kumar, son of Vishnu Prasad Agrawal, aged about 24 years, Occupation business
   Both are resident of Kharsia Station Chowk, Distt. Raigarh (Chhattisgarh)
3. State of Chhattisgarh through Collector, Distt. Raigarh (Chhattisgarh)
4. Nilambar, son of Late Shivnarayan Rathaur, resident of Telikot, occupation-employee, SECL, Kharsiya, Distt. Raigarh (Chhattisgarh)

---- Respondents

For Appellant: Mr.A.N.Bhakta, Advocate
For Respondents No.1 and 2:
None present
For Respondent No.3:
Mr.Priyank Rathi, Panel Lawyer
For Respondent No.4:
Mr.Ram Kumar Tiwari, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

25/07/2019

1. The instant second appeal preferred by the plaintiff has been admitted for hearing by formulating the following substantial question of law for determination: -

   > “ Whether in the fact and circumstance, it should have been held that the plaintiff/seller had in fact mortgaged the suit land in favour of defendant No.1 and had not sold the same particularly in the circumstance when the Courts below have recorded the finding that the possession of the land remained with the plaintiff through out ?”

   (For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. The plaintiff herein filed a suit for declaration of sale deed executed by him on 30.10.87 in favour of defendant No.2 through his guardian father defendant No.1 as null and void as it was not an outright sale, but it is mortgage deed and also claimed confirmation of possession.

3. Defendants No.1 and 2 filed their written statement denying the averments made in the plaint stating inter-alia that it is an outright sale and consideration amount has been fully paid by defendant No.2 through his guardian/father-defendant No.1 and defendant No.2 is in possession from the date of purchase vide Ex.P-1, as such, the plaintiff is not entitled for decree.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 28.11.2003 dismissed the suit holding that it is an outright sale, the suit is barred by limitation and sale deed is not null and void.

5. In appeal preferred by the plaintiff, the first appellate Court agreed with the finding of the trial Court and dismissed the appeal affirming the decree of the trial Court resulting into filing of this second appeal in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

6. Mr.A.N.Bhakta, learned counsel for the appellant/plaintiff, would submit that the Courts below concurrently erred in holding that Ex.P-1 is an outright sale and not mortgage deed, as such, the judgment and decree of two Courts below deserves to be set aside.

7. Mr. Ram Kumar Tiwari, learned counsel appearing for respondent No.4/defendant No.4, would submit that both the Courts below are absolutely justified in holding the sale deed Ex.P-1 to be an outright

sale . Therefore, the second appeal deserves to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

9. Section 58(c) of the Transfer of Property Act, 1882 defines "mortgage by conditional sale", and reads as under: -

> "**58. (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 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."

10. The effect of this proviso is that no document of sale can be treated as mortgage unless the document effecting the sale itself contains a recital to that effect. The whole object is to exclude or shut out the oral evidence to be adduced in the case when such a condition is contained in a separate document. Thus, if the document effecting a sale does not contain a stipulation regarding the conversion of the sale into a mortgage and such a stipulation is contained in a separate document, in such a case, it is not at all open in law to enquire into the nature of the transaction and to take extrinsic evidence for holding that the document which purports to be an absolute sale is in reality, a mortgage.

11. The question is, whether the above-stated transaction contained in

Ex.P-1, which is in the nature of sale, is a mortgage by conditional sale or it is an outright sale? Both the Courts have concurrently held that it is an outright sale and dismissed the suit of the plaintiff.

12. The question so posed for consideration is no longer res integra and stood adjudicated authoritatively by Their Lordships of the Supreme Court which may be referred herein usefully and profitably as well. The Supreme Court in the matter of **Chunchun Jha v. Ebadat Ali and another**[1] considered the matter by posing a question in paragraph 5 as under: -

> "(5) 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."

13. The question so passed for consideration was answered by Their Lordships in paragraphs 9 and 13 as under: -

> "(9) The document with which we are concerned (Ex. A) is in the following terms and our first duty is to construe the language used and see whether it is ambiguous. (We have paragraphed the document for convenience of construction and have omitted unnecessary words.)
>
> > (1) "Rs. 634 principal with interest under a registered rehan bond " (simple mortgage) "dated the 6th May 1927 is justly due .... by us the executants. Now we further require Rs. 65-6-0 more to meet costs of the suit under section 40." (Bihar Tenancy Act.)
> >
> > (2) "and at present there is no other way in view rather it seems impossible and difficult to arrange for the money without selling the property let out in rehan " (simple mortgage) "under the above mentioned bond".
> >
> > (3) "Therefore, we the executants declare .... that we ….

1 AIR 1954 SC 345

sold and vended the properties detailed below on condition (given below) for a fair and just price of Rs. 700......."

(4) "That we set off Rs. 634-10-0 against the consideration money " (torn) "payable under the aforesaid bond in favour of the said vendee and received Rs. 65-6-0 in cash from the said vendee. In this way the entire consideration money was realised from the said vendee."

(5) "and we put the said vendee in possession and occupation of the vended property detailed below and made him an absolute proprietor in our places."

(6) "If we, the executants, shall repay the consideration money to the said vendee within two years .... the property vended under this deed of conditional sale attached shall come in exclusive possession and occupation of us, the executants."

(7) "If we do not pay the same, the said vendee shall remain in possession and occupation thereof, generation after generation, and he shall appropriate the produce thereof."

(8) "We, the executants, neither have nor shall have any objection whatsoever in respect of the vended property and the consideration money. Perchance if we do so it shall be deemed null and void in Court."

(9) "and we declare also that the vended property is flawless in every way and that if in future any kind of defect whatsoever be found on account of which the said vendee be dispossessed of a portion or the entire property vended under this deed of conditional sale and will have to pay the loss or damage, in that event we, the executants,

> (a) shall be liable to be prosecuted under the possession against the said vendee or his
>
> (b) we shall pay the entire consideration money together with loss and damage and interest at the rate of Rs. 2 per mensem per hundred rupees from the date of the execution of this deed till the date of realisation from our person and other properties
>
> (c) and we shall not claim the produce of the vended property for the period of vendee's possession against the said vendee or his heirs and representatives."

(10) "Therefore we, the executants .... have executed this deed of conditional sale so that it may be of use in future."

> (13) We next turn to the conditions. The ones relevant to the present purpose are contained in Clauses (6) and (7). Both are ambiguous, but we have already said that on a fair construction clause (6) means that if the money is paid within the two years then the possession will revert to the executants with the result that the title which is already in them will continue to reside there. The necessary consequence of that is that the ostensible sale becomes void. Similarly, clause (7), though clumsily worded, can only mean that if the money is not paid, then the sale shall become absolute. Those are not the actual words used but, in our opinion, that is a fair construction of their meaning when the document is read as a whole. If that is what they mean, as we hold they do, then the matter falls squarely within the ambit of Section 58(c)."

14. The decision rendered in **Chunchun Jha** (supra) has been followed by Their Lordships of the Supreme Court in the matter of **Srinivasaiah v. H.R. Channabasappa (since dead) by his Legal Representatives and others**[2].

15. Reverting to the facts of the present case in light of the proviso to Section 58(c) of the Transfer of Property Act, 1882 and in light of the principles rendered by Their Lordships of the Supreme Court in **Chunchun Jha** (supra) followed in **Srinivasaiah** (supra), examining Ex.D-1, it is quite vivid that the document in question purports to be an absolute sale, as it does not contain any stipulation for treating the sale as mortgage. The agreement of re-conveyance is neither embodied in a separate document, it is said to be agreed orally and it is not recorded in the document as such, in absence of embodiment of such a clause in Ex.P-1, the transaction cannot be regarded as mortgage, as no oral evidence is admissible to contradict Ex.P-1 which is an outright sale transferring title by the plaintiff in favour of defendant No.2. Therefore, the transaction in question, in absence of embodiment as contained in the proviso to Section 58(c) of the Transfer of Property Act, 1882, cannot be regarded as mortgage and it

2 (2017) 12 SCC 821

is held to be an outright sale. The substantial question of law is answered in favour of the defendants and against the plaintiff.

16. Accordingly, the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

17. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-