AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment Reserved on : 28.06.2019

Judgment Delivered on : 12/09/2019

S.A. No. 274 of 1999

1. Lalchand Agrawal, aged 45 years,
2. Harbilas Agrawal (now dead)
3. Ashok Kumar Agarwal, aged 37 years
4. Ramoo Agarwal, aged 34 years

All S/o. Late Nanhooram Agarwal, Businessmen and resident of Surajpur, P.S. & Taahsil – Surajpur, District – Sarguja, M.P.

---- Appellants

Versus

1. Kunj Bihari, S/o. Roop Narayan, aged 20 yeas, Cultivator, R/o. Surajpur, Tehsil Surajpur, District – Sarguja M.P.
2. Laxman (now dead)
3. Ramesh Kumar, S/o. Shivnarayan, aged 28 years, Shopkeeper, R/o. Village Lakhanpur, Tehsil – Ambikapur, District – Sarguja, M.P.
4. Suresh Kumar, S/o. Shivnarayan, aged 23 years, Occupation-Cultivator, R/o. Village- Darripara, Tehsil Surajpur, District -Sarguja, M.P.
5. Shivnarayan (now dead)

   (5a) Kanti Bai, Wd/o. Late Shivnarayan, aged 68 years,

   (5b) Uma Devi, D/o. Late Shiv Narayan, aged 32 years,

   Both are r/o. Village – Darripara, Tahsil – Surajpur, District – Surguja (C.G.)
6. Roop Narayan, S/o. Late Sitaram Sahu, aged about 45 years, Cultivator, R/o. Surajpur, P.S. and Tehsil Surajpur, District – Sarguja, M.P.
7. Mohan, S/o. Late Sitaram Sahu, aged 35 years, Cultivator, R/o. Nagar, Thana & Tehsil – Surajpur, District – Sarguja, M.P.

-----Respondents

For Appellants : Mr. Sourabh Sharma, Advocate

For Respondents : Mr. Kishore Bhaduri, Advocate with
Mr. Pankaj Singh, Advocate

<u>Hon'ble Shri Justice Rajendra Chandra Singh Samant</u>

<u>C A V JUDGMENT</u>

<u>12/09/2019</u>

1. This second appeal has been preferred against the judgment and decree dated 18.12.1998, passed by the Additional District Judge, Baikunthpur, Camp Court – Surajpur, District – Sarguja, in Civil Appeal No.16-A/1998, whereby the judgment and decree passed by the learned Civil Judge, Class-II, Surajpur on 30.07.1991, in Civil Suit No.85-A of 1989 was set-aside.

2. The case of the plaintiffs is this, that the grand father of the plaintiffs No.1 to 4 and father of plaintiffs No. 5 to 7 namely Sitaram Sao had mortgaged the land bearing Kh. No.2170 area 0.4 acres, 2171 area 0.9 acres under his title and ownership in favour of the father of the defendants for a loan of Rs.600/- regarding which mortgage deed was executed on 01.05.1959 by handing over the possession of the property to father of the defendant Late Nanhu Ram Agrawal on the same date. The terms of the mortgage deed is this that after completion of one year, the amount will be repaid without interest and the possession of the property will be handed over back to the first party. It is pleaded in the plaint that because of financial difficulties, the mortgaged property could not be redeemed after payment of loan and Sitaram Sao expired on 20.02.1975. The plaintiffs came to know about the usufructuary mortgage deed dated 01.05.1959 for the first time on 19.05.1989 thereafter, offer was made from the plaintiffs side for repayment of loan of Rs.600/ and for redemption of the mortgage property, which was refused by the

defendants side. Hence, the suit was brought praying for grant of reliefs.

3. In written statement, the appellants/defendants denied the pleadings of the plaint and submitted that mortgage deed 01.05.1959 was a usufructuary mortgage valued at Rs.600/- and it was registered with conditions that, if the, other party is unable to redeem the same on 01.05.1960 then the property will be deemed as sold, hence, on this basis title has accrued in favour of the appellants/defendants. Prayer was made to dismiss the suit.

4. Trial Court framed issues and after completion of trial, passed the judgment and decree dated 30.07.1991 holding that respondents/ plaintiffs were not entitled for redemption of the suit property on the ground that suit was barred by limitation and further the finding was given in favour of the appellants/defendants that the title accrued in favour of the appellants from 01.05.1960 and right to redeem was closed.

5. The judgment and decree of the trial Court was challenged in the Civil Appeal No.16-A/1998. The appellate Court has reversed the finding of the trial Court holding that the deed Ex.P-14, was not a deed of part performance as provided under Section 53-A of Transfer of Property Act, therefore, it was a usufructuary mortgage deed. Further it was held that in accordance with the prevailing Article 61 of the Act, 1963, the limitation for filing suit of 30 years was available up to 01.05.1990, therefore, the suit filed on 20.07.1989 was well within limitation. On the basis of this finding,

the appellate Court has reversed the judgment and decree of the trial Court and passed decree granting reliefs of redemption of the suit property, possession of the suit property, along with costs and other reliefs. The judgment and decree of the First Appellate Court is under challenge before this Court by the appellants/defendants.

6. The second appeal was admitted for hearing and the following substantial questions of law were framed by this Court :-

> "(1) Whether the finding of the 1st appellate Court in reversing the finding of the trial Court by holding the said mortgage deed dated 01.05.1959 to be a usufructuary mortgage under Section 58 (d) of the Transfer of Property Act was correct ?
>
> (2) Whether the 1st appellate Court was justified in passing the final decree without complying with the provisions of Order 34 Rule 7 of C.P.C."
>
> (3) Whether suit for redemption itself is maintainable if the cause of action is not available to plaintiffs under the contract between the parties ?
>
> (4) Whether the first appellate Court was justified in rejecting the application filed under Order 6 Rule 17 of C.P.C."

7. It is submitted by the counsel for the appellants that the Ex.P-14 was in fact a deed of conditional sale. It is submitted that it is trite law of interpretation that intention of the parties should be gathered from recital of the documents itself. Therefore, recital of the documents, Ex.P-14 clearly indicates that it is a document of sale and this being so, no right of redemption accrues in favour of the

plaintiffs/respondents. Sitaram, who was predecessor of the plaintiffs died on 20.02.1975 and during his lifetime, he never offered repayment of Rs.600/- for redemption of property under the deed and neither any suit was filed by him, which further confirms that intention of Sitaram Sao was very clear in this respect that the transaction made was transaction for sale. It is further argued that according to the pleadings of the plaintiffs, Siataram Sao attempted to repay the loan amount, which was not accepted, which goes to show that since then the possession of the appellants became adverse to the interest of the defendants. Reliance has been placed in ***Dharmaji Shankar Shinde Vs. Rajaram Shripad Joshi (dead) Through Lrs.***, reported in ***AIR 2019 S.C. 2367*** and in ***Gowramma Vs. Kalingappa (D) represented by LRs***. reported in ***AIR 2019 SC 1012*** and prayed that the appeal be allowed.

8. Counsel for the respondents/plaintiffs submitted that the conclusion drawn by the Ex.P-14 is very clearly a documents of usufactulary mortgage and the respondents had right to redeem the same under the provisions of Section 60 and 62 of Transfer of Property Act. The grounds raised by the appellants that they have accrued right and title on the basis of the adverse possession is totally erroneous, without any basis and not applicable in this case, because the possession of the appellants had always been permissive till the date, the limitation was to expire and title on the basis of the adverse possession can not accrue before the period of limitation expires. Reliance has been placed in case of ***Khiarajmal & Ors. Vs. Daim & Ors.***, reported in ***1904 SCC OnLine PC 27*** and in case

of ***Mir Wajid Ali & Anr. Vs. Alidad Khan & Ors.***, reported in ***A.I.R. 1940 Patna 45*** and prayed that the appeal be dismissed.

9. I have heard the learned counsel for both the parties at length and perused the documents and evidence on record.

<u>Question No.1</u>

10. The trial Court had held that deed, Ex.P-14 was a mortgage deed by conditional sale, whereas, the appellate Court has held in reverse that Ex.P-14 was a usufracturary mortgage deed.

11. On plain reading of Ex.P-14, it appears that the title given is usufacturary mortgage, in which Sitaram Sao and Nanhuram Agrawal agreed to condition that if Sitaram Sao is unable to redeem the mortgage property by 01.05.1960, thereafter, he will make the sale of the mortgage property to Nanhuram Agrawal and opposite party will be further entitled to get the specific performance through Court. The mortgage by conditional sale and usufacturary mortgage are defined in Section 58 (c) & (d) of Transfer of Property Act, which reads as under :-

> ***"Section - 58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.—***
>
> (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 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.]

(d) ***Usufructuary mortgage***.—Where the mortgagor delivers possession [or expressly or by implication binds himself to deliver possession] of the mortgaged property to the mortgagee, and authorises him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property [or any part of such rents and profits and to appropriate the same] in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest [or] partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

12. On plain perusal of Section 58(c), it is found that conditions between the parties has to be this that on default of payment of the mortgage-money on a certain date the sale shall become absolute. This is relevant for the agreement between the parties in this case. There is no such condition in Ex.P-14 agreed by Sitaram Sao that on his failure to repay the loan by 01.05.1960, the deed for mortgage will be deemed as deed for sale, on the contrary the

condition is this that at any time after 01.05.1960, he will sell the property to the opposite party Nanhuram Agrawal for same consideration and on his failure to do so, the said Nanhuram Agrawal would be entitled for specific performance through civil Court.

13. The wordings of the condition in Ex.P-14 are not in consonance if the provisions under Section 58 (c) of Transfer of Property Act, first part, which specifically mentions that agreement should be in these words between the parties that on default of payment of mortgage money on a certain date, the sale shall become absolute, whereas the condition mentioned in Ex.P-14 shows that it is a separate agreement for sale on condition of failure on the part of Sitaram Sao to make repayment of the mortgage loan and there also had been a requirement that sale deed shall be executed separately by Sitaram Sao and on his failure to do so, the other party would be entitled for specific performance through Court. Therefore, it is clear that predecessor of the appellants had not acknowledged in clear terms that in case of default, the mortgage deed would become a sale deed.

14. The appellate Court has rightly held referring to Section 60 of the Transfer of Property Act that right to redeem has not extinguished in this case and the case will fall under the proviso to Section 60 of the Transfer of Property Act, 1882, which provided that nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been

allowed to pass. Thereafter the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

15. The facts and circumstances of the case relied upon by the appellants in *Dharmaji Shankar Shinde Vs. Rajaram Shripad Joshi (supra)* are different. In that case, it was very clearly held that the deed was in reality though documents for sale with a condition with to repurchase, which falls squarely under first condition of Section 58 (c) of Transfer of Property Act. Similarly, the facts and circumstances of other reliance in case of *Gowramma Vs. Kalingappa (D) (Supra)* subsequent to the mortgage deed, mortgagor has entered into an agreement for sale with mortgagee, thereafter, the suit for specific performance was filed, which was decreed in favour of mortgagee. On this basis it was held that right to redemption has extinguished. But in this particular case, the appellants/defendants never attempted to file any suit for specific performance although there was specific agreement in the mortgage deed itself for the sale of the property under mortgage. Therefore, the citations do not help the appellants in any manner. Hence, after considering all the facts and circumstances of this case, I am of this view that appellate Court has committed no error in holding that Ex.P-14 dated 01.05.1959 was usufactuary mortgage deed.

<u>Question No.2</u>

16. Order 34 Rule 7 of the Code of Civil Procedure, 1908 provides in a suit for redemption, if the plaintiff succeeds, the Court shall pass a

preliminary decree, which will mention the calculation of the amount of principal and interest to be repaid, cost of the suit, if any awarded to him and other costs charges and expenses, declaring the amount so due along with other directions. It was held by Bombay High Court in case of ***Smt. Radha Bai Yashwant Dhotre Vs. Abaji Janoji Haikodi and Ors.*** , reported in ***AIR 1995 Bombay 439***, that in absence of any dispute about mortgage amount or interest payable in redemption suit, passing of final decree without passing preliminary decree would not vitiate the final decree. In this case, there is no dispute that principal amount for repayment was Rs.600/-. The interest and other charges on the principal amount seem to have been adjusted by the enjoyment of the mortgaged property by mortgagor i.e. the appellants, therefore, it was usufacturary mortgage, hence, final amount which has to be paid to the appellants/defendants according to the mortgage deed was Rs.600/- only, regarding which there is mention in the decree of the appellate Court. Therefore I do not find any contravention of law or injustice for the reason that appellate Court has directly passed the final decree instead of passing preliminary decree.

Question No.3

17. This Court has affirmed the finding of the first appellate Court that Ex.P-14 was usufacturary mortgage deed and further that it was not a mortgage deed including terms of conditional sale as it is provided under Section 58(c) Part-I of the Transfer of Property Act. Therefore, the plaintiffs/respondents have a right in their favour under the

provisions of Section 60 and 62 of Transfer of Property Act to redeem the mortgage property. Therefore, I find that the suit filed by the plaintiffs/respondents was maintainable on the ground that cause of action was available to them under mortgage deed.

Question No.4

18. During the pendency of appeal before the Court below, an application was filed by the appellants under Order 6 Rule 17 of C.P.C. for incorporating amendment in the written statement. The substance of the amendment was this that according to the evidence present in the trial, it is undisputed that the appellants are in adverse possession of the property and the plaintiffs have not filed suit within 12 years of limitation, therefore, the appellants had acquired title by adverse possession. The first appellate Court after detailed discussions on the prayer made in the application has held that the appellants/defendants have never pleaded in defence that they had acquired title on the basis of adverse possession and after making other discussions have rejected the application.

19. Firstly, the appellants have never raised the defence of adverse possession in the written statement filed by them before the trial Court. Secondly, the possession of the appellants on the suit land can be regarded only as permissive possession, on the basis of this findings of the appellate Court, it has been confirmed by this Court that contract between Sitaram Sao and Nanhuram Agrawal was a usufacturary mortgage deed. The statement in plaint that on 01.05.1960 Sitaram Sao could not redeem the property after making

payment of the mortgage money subsequent to that opposite party stalled in receiving the mortgage money by itself had generated the cause of action on the part of the plaintiffs/respondents for filing suit for redemption. Therefore, cause of action for filing of the suit for redemption was available to the respondents/plaintiffs. No question arises to hold that possession of the appellants on the suit property had become adverse on the date, when the predecessor of the appellants refused to accept the redemption amount. Further the limitation and cause of action available to the respondents under Article 61 of the Limitation Act, 1963 can not be said to be taken away only for the reason that appellants have put forth the claim of adverse possession. Hence, the amendment proposed by the appellants to be incorporated in written statement was totally uncalled for and the appellate Court has rightly rejected the application.

20. Therefore, on the basis of the discussions made herein above and the findings arrived at on the substantial questions of law, which are all in negative, I do not find any substance in this second appeal, which is hereby dismissed.

Sd/-
(Rajendra Chandra Singh Samant)
Judge

Balram