AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 179 of 2003

- Virendra Kumar S/o. Maluram Agarwal aged about 41 years R/o Village – Khamhariya, Tahsil – Bemetara, Distt. - Durg.

---- Appellant

Versus

1. Dakbar Das S/o. Gajendra Das Vaishnav, aged about 52 years
2. Kadam Bai W/o Gajendra Das Vaishnav, Aged about 70 years

   Both R/o Village – Ghotwani, Tah.-Bemetara, at present Saja, Distt. - Durg.
3. a). Koushlaindra @ Kumar S/o Madhuban Das aged about 45 years

   b) Tarkeshwar @ Munna S/o Madhuban Das aged about 35 years

   c) Keja Bai W/o of Madhuban Das Aged about 70 years

   All R/o village – Ghotwani, Tah.-Bemetara, Distt. - Durg

   d) Shail Bai D/o Madhuban Das, aged about 30 years, R/o Village – Bhanpuri, Ahead Musra Station Bhanpuri.
4. State of Chhattisgarh Through : Collector, Durg, District – Durg.

---- Respondents

For Appellant	:	Shri Shubhank Tiwari, Advocate under instructions from Shri Manoj Paranjpe, Advocate
For Respondent No.1	:	Shri B.S.Rajput, Advocate
For State	:	Shri Vaibhav Singh, Panel Lawyer

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

13/11/2019

This Second Appeal arises out of appellate judgment and decree dated 07/02/2003 passed by the 2nd Additional District Judge, (FTC) Bemetara, District -

Durg in Civil Appeal No.40A/2002 arising out of judgment and decree dated 22/01/1983 passed by the Additional Civil Judge, Class II, Bemetara in Civil Suit No.36A/1980 by which, the learned lower Appellate Court has affirmed the judgment and decree of the Trial Court dismissing suit of the plaintiff. This is plaintiff's appeal.

2. The appellant / plaintiff filed a suit seeking declaration of title, recovery of possession and permanent injunction against defendants on the pleadings *inter alia* that the plaintiffs had purchased land admeasuring 3.06 acres situated in khasra no.47 and land admeasuring 4.60 acres situated in khasra no.52/1 in village – Mahantpur for a consideration of Rs.1,000/- from the defendant – Dakbar Das vide sale deed dated 18/03/1966, which was duly registered and the defendant and the plaintiff, after obtaining possession, were cultivating the land. Plaintiff's case was that later on, defendant No.1, in order to deprive the plaintiff of his title, which he had acquired by virtue of sale deed, executed deed of transfer in favour of his own mother / defendant No.2 - Kadam Bai and later on, the property was recorded in the name of Kadam Bai in revenue records and then Kadam Bai sold it to third person Madhubandas vide registered sale deed. The plaintiff having come to know of such transaction, filed an appeal before the Sub-Divisional Officer. Later on, on 20/01/1971, the defendants sought to dispossess the plaintiff and a dispute arose leading to filing of suit.

3. The case of the defendants, in the written statement filed by defendants 1 and 2, it was pleaded that there was no intention of selling the property in dispute. According to these defendants, plaintiff's father was engaged in lending money as money lender. In the written statement, it was pleaded that though the sale deed was executed, there was a separate oral agreement between the parties that after

the loan amount is repaid, the plaintiff would execute reconveyance deed in favour of defendant No.1. According to defendants 1 and 2, there was no out and out sale as claimed by the plaintiff but the true nature of transaction was that of mortgage and that the deed (Ex.P/1) was a mortgage deed as intended by the parties. Defendant No.3, the purchaser filed a separate written statement claiming the owner of the property on the basis of registered sale deed executed in his favour in respect of part of the disputed property.

4. Learned Trial Court framed issues mainly centered around as to whether the transaction was an out and out sale or mortgage. All the issues were decided against the plaintiff and in favour of the defendants holding that the true nature of transaction was mortgage and not an out and out sale. Aggrieved by the judgment and decree, the plaintiff preferred an appeal which too was dismissed vide impugned judgment giving rise to this appeal.

5. This appeal was admitted on following two substantial questions of law -

> "1. Whether the Trial Court was justified in dismissing the suit of the plaintiff by holding that sale deed dated 18/03/1966 (Ex.P/1) executed by defendant No.1 in favour of the plaintiff is a mortgage deed and not an outright sale by ignoring the fact that no such condition was incorporated in the sale deed as provided in Section 58 (c) of the Transfer of Property Act, 1882 by recording perverse finding ?
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> 2. Whether the first appellate Court has committed illegality in affirming the judgment and decree so passed by the Trial Court by recording perverse finding ?"

6. The contention of learned counsel for the appellant is that the defendants'

case that there was a separate oral agreement of reconveyance upon repayment of loan amount, is liable to be rejected at the threshold as there was no clause of conditional sale embodied in the sale deed itself, as required under Section 58 (c) of the Transfer of Property Act, 1882 (for short 'the Act of 1882'). Relying upon decision of the Supreme Court in the case of **Chunchun Jha v. Ebadat Ali, AIR 1954 SC 345** and recent judicial pronouncement in the case of **Srinivasaiah v. H.R. Channabasappa, (2017) 12 SCC 821** and also judgment of this Court in the case of **Jaswant Singh (dead) through LRs. and ors. v. Tijiya Bai (dead) through LRs** (Second Appeal No.350/2003) decided vide order dated 15/01/2019, it is argued that defendants' case of there being separate oral agreement of reconveyance of the property is liable to be rejected because the sale deed does not contain any clause of conditional sale. Therefore, in view of proviso to Section 58 (c) of the Act of 1882, transaction shall not be deemed to be mortgage and the argument of there being separate oral agreement ought to be rejected by the Courts below.

7. On the other hand, learned counsel for the respondents / defendants would argue that both the Courts below have recorded concurrent finding that the true nature of transaction was that of mortgage, taking into consideration that the sale consideration was inadequate, plaintiff's father was engaged in money lending, number of suits were filed by the plaintiff's father for recovery of possession. It has also been argued that the Courts below, in order to arrive at the conclusion that the transaction was essentially that of mortgage and not an out and out sale, had also taken into consideration that the plaintiff did not take immediate steps to get mutated his name in revenue records and the defendants continued to enjoy the possession of the property. Learned counsel for the respondents placed reliance on the decision of the Supreme Court in the case of **P.L. Bapuswami v.**

N. Pattay Gounder, 1996 (2) SCR 918.

8. I have heard learned counsel for the parties and perused the records.

9. The entire case of the plaintiff is based on registered sale deed (Ex.P/1). The sale deed is dated 18/03/1966. The sale deed is in respect of out and out sale of land admeasuring 7.66 acres situated in khasra no.47 and 52/1. Defendant No.1 – Dakbar Das executed this sale deed in favour of the plaintiff – Virendra Kumar. It also states that the sale deed has been executed in respect of the land for a sale consideration of Rs.1,000/- which was paid to the plaintiff. The sale deed apart from being registered, its execution has not been denied by the vendor / defendants – Dakbar Das. In this regard, it is important to note the pleadings of defendants 1 and 2 in the written statement.

> ''1. xxxxxxxxx
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> 2. यह कि वाद कंडिका नं.2 पूर्णतः अस्वीकार है । यह अस्वीकार है कि वादी ने प्रतिवादी क्रमांक 1 से वादग्रस्त भूमि 1,000/– में खरीदी व कास्त व कब्जा पाया। सत्य यह है कि वादी से प्रतिवादी क्रमांक 1 ने कोई बातचीत या सौदा उपरोक्त वादग्रस्त भूमि के संबंध में नहीं किया है। वादी के बाबा श्री प्रभूलाल जी साहूकारी करते हैं और साहूकारी के संबंध में जमीन का बिक्रीनामा लिखा लेते थे और मासिक करार करते हैं कि रकम पट जाने पर बिक्रिशुदा जमीन उलट बयनामा कर देंगे। इसी शर्त पर से प्रतिवादी क्र.1 ने वादग्रस्त जमीन का विक्रय पत्र जो वास्तव में रहननामा था लिख दिया था।''

10. A perusal of the aforesaid pleading would show that the defendants have denied the nature of transaction being out and out sale, though has been admitted that such a deed was executed, coupled with pleadings that there was a separate oral agreement between the parties that after payment of the amount, a reconveyance deed would be executed by the plaintiff in favour of the defendants

and therefore, according to the defendants, it was a transaction of mortgage and not sale. From this pleading of the defendants, it is crystal clear that the defendants, while admitting execution of sale deed in favour of the plaintiff, have come out with a pleading of separate oral agreement of reconveyance after repayment of loan amount. However, in the written statement, there is no whisper as to what was the amount which was allegedly taken by the defendants from the plaintiff or plaintiff's father.

11. The question which arises for consideration is whether the nature of transaction was that of a mortgage or it was an out and out sale.

As early as in the year 1954, the aforesaid issue fell for close scrutiny before the Supreme Court in the case of **Chunchun Jha v. Ebadat Ali and anr., AIR 1954 SC 345.** The Supreme Court examined question as to what constitutes, "*a mortgage by conditional sale or a sale out and out with a condition of repurchase* "

In para 1, it was observed as below –

> "1. This is a plaintiff's appeal in a suit for redemption of what the plaintiff calls a mortgage dated 15/04/1930. The only question for determination is whether this is "a mortgage by conditional sale or a sale out and out with a condition of repurchase. If the former the plaintiff succeeds. If the latter he is out of Court".

The Supreme Court, thereafter, examined question in the context of several leading English authorities on the subject and Section 58 (c) of the Act of 1882 and laid down determinative test for deciding the true nature of the document as below -

> "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.

6. The first is that the intention of the parties is the determining factor: see **Balkishen Das v. Legge, 1899 SCC OnLine PC 32**. 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 *Alderson v. White, (1858) 2 De G & J 97* :

> "…..The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to show 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 Lordships of the Privy Council applied this rule to India in *Bhagwan Sahai v. Bhagwan Din, 1890 SCC OnLine PC 3* and in *Jhanda Singh v. Wahid-Ud-din, 1916 SCC OnLine PC 61*

7. 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.

8. 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."

This issue has been considered in great detail by Their Lordships in the Supreme Court in the case of **P.L. Bapuswami** (supra). In that case also, the plea was set up against the sale deed that it was essentially in the nature of transaction of mortgage. A four judges Bench of the Supreme Court in the aforesaid decision, examined legal position with reference to the provisions contained in Section 58 (c) of the Act of 1882 as below –

> ….The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts.

In the aforesaid case, apart from many other circumstances, the Supreme Court found that as required by the proviso to Section 58 (c) of the Act of 1882, the condition for re-purchase was embodied in the same document. Therefore, on facts, in view of such condition, the Supreme Court took into consideration other circumstances of inadequacy for consideration, non-transfer of patta, continued payment of installment, and recorded finding that the true nature of transaction was that of a mortgage and not sale.

12. The aforesaid principles of law laid down by the Supreme Court in aforesaid two decisions in the case of **P.L. Bapuswami** (supra) and **Chunchun Jha** (supra) were again considered in a recent judgment in the case of **Srinivasaiah** (supra). Relying upon determinative test laid down in para 5, 6, 7 and 8 in the case of **Chunchun Jha** (supra), the Supreme Court in the aforesaid case examined whether the transaction in question in that case was an out and out sale or the transaction of mortgage. In that case, on facts, it was found that the clause of conditional sale was embodied in the sale deed itself. It was on those considerations that the Supreme Court, coupled with other circumstances, recorded a finding that transaction was that of mortgage and not an out and out sale.

13. This Court also examined the aforesaid legal position in the factual background which are identical in the case of **Jaswant Singh** (supra). In that case, a deed of out and out sale was registered. Later on, the vendor set up a case that the true nature of transaction was not that of sale but mortgage. In that case, however, this Court noted that there was no condition of re-purchase embodied in the agreement itself as required under proviso to Section 58 (c) of the Act of 1882. Taking into consideration the law laid down in the case of **Chunchun**

Jha (supra) and **Srinivasaiah** (supra), it was held that the transaction in question has to be held to be a sale out and out and not mortgage. In taking this view, this Court relied upon law laid down in the aforesaid two decisions of the Supreme Court and provisions contained in Section 58 (c) of the Act of 1882. Where there is no clause of conditional sale of repurchase embodied in document itself as required under Section 58 (c) of the Act of 1882, transaction shall not be deemed to be a mortgage. It was held that the oral agreement of re-purchase would not also be admissible. It was held as below -

> "16. 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.D-1, the transaction cannot be regarded as mortgage, as no oral evidence is admissible to contradict Ex.D-1 which is an outright sale transferring title by the plaintiffs in favour of defendant No.1. 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 is held to be an outright sale."

14. The submission of learned counsel for the respondents that there were other circumstances relied upon by the Court below that the true nature of transaction was that of a mortgage, cannot be accepted because in view of authoritative pronouncement of the Supreme Court in the aforesaid two decisions and this Court, in the absence of there being any condition of repurchase

embodied in the document itself, as required under Section 58 (c) of the Act of 1882, the vendor cannot be allowed to set up a case of existence of separate oral agreement of reconveyance.

15. The Supreme Court in the case of **Chunchun Jha** (supra) noted legislative history of incorporation of proviso to Section 58 (c) of the Act of 1882 in the background that because of welter of confusion caused by the multitude of complexity in cases, where difficulty used to arise whether transaction was that of mortgage or out and out sale, the legislature stepped in and amended Section 58 (c) of the Act of 1882 and incorporated proviso that no such transaction shall be deemed to be mortgage unless a condition of re-purchase is embodied in the document that effects or purports to effect the sale.

16. Reliance on the decision in the case of **P.L.Bapuswami** (supra) is also misconceived on facts because that case is distinguishable on facts. In that case, the Supreme Court found that the document did incorporate the condition of repurchase. Taking note of the fact, though coupled with other proved circumstances, transaction was held to be that of mortgage and not an out and out sale. In this case, the document does not contain any condition of re-purchase. Therefore, in such cases, the defendants' case that there was a separate oral agreement of re-purchase, has to be rejected.

17. In the result, the two questions of law are answered in affirmative in favour of the appellant and against the respondents.

The appeal is accordingly allowed. The impugned judgment and decree of the Court below is set aside and plaintiff's suit is decreed in terms of relief sought in so far as the disputed property admeasuring 7.66 acres situated in khasra no.47 and 52/1 in village – Mahantpur, Tahsil – Bemetara is concerned. It is held that the plaintiff acquired valid title in respect of the aforesaid land by virtue of registered sale deed dated 18/03/1966 and all the transaction carried out by the defendants in respect of that property and entries made in the revenue records entering the name of defendants 2 and 3 are of no effect and inoperative in law.

The plaintiff is also entitled to recovery of possession. The defendants are restrained from interfering with plaintiff's possession in respect of the property in dispute. Let appellate decree be accordingly drawn. Parties shall bear their respective costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Deepti