

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.350 of 2003

Jaswant Singh (Dead) Through LRs

(LR of original Defendant 1, Melasingh)

1. Shanti Bai, Wd/o Late Jaswant Singh, aged about 70 years
2. Dharamveer Khurana, S/o Late Jaswant Singh, aged about 40 years
3. Bhupendra Singh Khurana, S/o Late Jaswant Singh, aged about 38 years
4. Tej Kaur, W/o Late Jaswant Singh, aged about 36 years
5. Satnam Kaur, D/o Late Jaswant Singh, aged about 30 years

All R/o Nawagarh, Distt. Durg (C.G.)

---- Appellants

Versus

1. Tijiya Bai (Dead) Through LR

(Plaintiff 1)

Bhudhara Bai, Wd/o Dularwa Ram, aged 33 years, R/o Lalganjpara, Nawagarh, Distt. Durg (C.G.)

2. a) Smt. Sundari Bai Satnami, aged about 45 years, Village Chamari, Near Setganga, Post Setganga, Tah. Mungeli, District Bilaspur (C.G.)
- b) Smt. Sundaria Bai @ Jogam, aged about 43 years, Village Katai, Post Badnara, Tah. Nawagarh, District Durg
- c) Omprakash, S/o Luddh Satnami, aged about 41 years, Village Bordahi, Near Katai, Post Badnara, Tah. Nawagarh, District Durg
- d) Ramkisun, S/o Luddh Satnami, aged about 39 years, Village Bordahi, Near Katai, Post Badnara, Tah. Nawagarh, District Durg
- e) Smt. Indira Bai, aged about 37 years, Village Chamari, Near Setganga, Tah. Mungeli, District Bilaspur
- f) Kisan, S/o Luddh Satnami, aged about 35 years, Village Bordahi, Near Katai, Post Badnara, Tah. Nawagarh, District Durg
- g) Smt. Kera Bai, aged about 30 years, Village Risa Amli, Post Nawagarh, Tah. Nawagarh, District Durg

(LRs of Plaintiff 2, Rahi Bai)

3. State of C.G., Through Collector, Durg

(Defendant 2)

4. Bhagat Singh (Died and deleted)

5. Gurubachan Singh, S/o Melasingh, aged 66 years
6. Jagdishsingh, S/o Melasingh, aged 59 years,
7. Harbansh Singh, S/o Melasingh, aged 50 years,
8. Kishan Singh (Died and deleted)

Nos.5 to 7 R/o Village Nawagarh, Post & Tah. Nawagarh, District Durg (C.G.)

(Nos.4 to 8 are the rest of LR's of original defendant 1, Melasingh)
---- Respondents

For Appellants: Mr. Manoj Paranjpe and Mr. Anurag Singh, Advocates.
 For Respondents No.1 and 2(a) to 2(g): -
 Mr. Rakesh Pandey and Mr. Vivek Tripathi, Advocates.
 For Respondent No.3 / State: -
 Mr. Vimlesh Bajpai, Govt. Advocate.
 For Respondents No.5 to 7: -
 Mr. Malay Kumar Bhaduri and Ms. Sareena Khan,
 Advocates.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

15/01/2019

1. The instant second appeal preferred by the legal representatives of defendant No.1 has been admitted for hearing by formulating the following substantial questions of law for determination: -

“(1) Whether the trial Court was justified in decreeing the suit in favour of plaintiffs by holding that sale deed dated 31.12.1969 (Ex.D-1) was a mortgage deed and not a 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?

(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?”

(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 original plaintiffs namely, Tijiya and Rahi Bai instituted a civil suit on 3-7-1973 seeking declaration to the effect that the sale deed Ex.D-1 executed by them in favour of Mela Singh – original defendant No.1

for consideration of ₹ 2,500/- was in fact mortgage and not the real sale deed, as he was the money lender and he was also running a grocery shop and he had given ₹ 600/- loan to the plaintiffs and there was balance of ₹ 600/- of grocery shop and in lieu of the loan amount, alleged sale deed Ex.D-1 was executed. It was further pleaded that there was oral agreement to re-conveyance of the suit property between the parties and the loan amount was repaid with interest in presence of witnesses on or about 15-4-1973. It was also pleaded that the suit land remained in the possession of defendant No.1 for two years and thereafter, possession was handed over to the plaintiffs. The plaintiffs sought relief that defendant No.1 has no right over the suit property and further sought the relief of cancellation of sale deed.

3. Original defendant No.1 Mela Singh filed his written statement denying the plaint averments pleading specifically that the suit land was not mortgaged, as the same was sold by defendant No.1 for consideration of ₹ 2,500/- on 31-12-1969 in presence of witnesses. It is an out-and-out sale. It was further pleaded that the suit land is in his possession and his name has also been mutated in revenue records and there was no oral agreement to re-convey the suit property after payment of loan amount and therefore the suit deserves to be dismissed.
4. The trial Court framed as many as nine issues and decided the same in favour of the plaintiffs and against defendant No.1 holding that the sale deed was mortgage deed and it was not an outright sale, there was oral agreement for re-conveyance of the suit property. It has further been held that a valuable land of area 2.67 acres was purchased for a meager amount of ₹ 2,500/- and therefore the sale deed is void and granted decree in favour of the plaintiffs.
5. In appeal preferred by defendant No.1, 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 two substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

6. Mr. Manoj Paranjpe, learned counsel for the appellants/defendants, would submit that both the Courts below are absolutely unjustified in holding Ex.D-1 as mortgage deed in absence of any condition embodied in the sale deed Ex.D-1 that it is a mortgage deed with a condition of re-purchase in view of the proviso to Section 58(c) of the Transfer of Property Act, 1882. Therefore, judgments & decrees of the two Courts below are liable to be set aside.
7. Mr. Rakesh Pandey, learned counsel appearing for the plaintiffs / respondents No.1 and 2(a) to 2(g), would submit that both the Courts below are absolutely justified in holding the sale deed Ex.D-1 to be the mortgage deed, as there was oral agreement between the parties that Ex.D-1 is only a mortgage deed with a condition of re-payment on payment of loan amount which has been repaid and possession is already with the plaintiffs. 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. Original plaintiffs Tijiya and Rahi Bai both had executed a document Ex.D-1 in favour of original defendant No.1 Mela Singh. The recital attached to the sale deed states as under: -

बय नामा किमती २५०० रूपया

नाम बेचने वाला- मुस्मात तिजीया उमर 50 साल
वौ मुस्मात राही उमर 30 साल पीसरान
खुनवा सतनामी पेशा खेती साकिन नवागढ़ तह०-
बेमेतरा जिला दुरुग ।

नाम खरीद दार- मैलासिंह वल्द सन्तराम पंजाबी
पेशा खेती साकिन नवागढ़ तह०-बेमेतरा, जिला-

दुरुग ।

तफसील जाय दाद- बय सुदाभूमि मौजा नवागढ़ तह० बेमेतरा जिला

दुरुग मौजा नम्बर ३०७ प०ह०नं०१६ मौजा

नवागढ़ - - - नवागढ़ ब्लाक पंचायत है ।

नाम मौजा	हक्क	नम्बर	रकबा	हेक्टारे	लगान
नवागढ़	भूमिस्वामी	१०५७	०-४०	०-१६२	३-३५ नया पैसा
		१०६७	१-१७	०-४७४	
		१०७१	१-११	०-४५०	
मीजान,		३	२-६८	१,०७६	३-३५ नया पैसा

मावजा विवरण- कीमत का रूपया नगदी २५०० रूपया आपस में मर पाया हूं ।

यह कि कर्ज अदा करने के लिये बैला भैंसा खरीदने के लिये अपन के ऊपर लिखे भूमि जिस पर हम लोग कावीज है जो किसी के पास बय बकशीस रहना नहीं की गई है उसको खरीद दार के पास नगदी मावजामर पाकर बेचकर दखल कब्जा खरीद दार को दे दी खरीद दार बय सुदा भूमि पर कावीज होकर काशत करे लगान पटावे सरकारी रिकॉर्ड पर नाम पर दर्ज करावे अब मैं या मेरे वार सान साथ खरीद दार से किसी किसम के दावा या उजर करे तो मावजा का रकम फसल की नुकसानी जमीन की तरक्की आदि खरीद दार को मैं या मेरे वार सान को देनी होगी लिहाजा बय नामा खुशी से लिखा दिये कि सनद रहे वक्त पर काम आवे तारीख ३१/१२/६९

टा० शिवनंदन प्रसाद तिवारी बेमेतरा

नि० तिजीया

नि० राही

गवाहन

1. गुरु बक्श सिंह करतार सिंह नवागढ़
2. दप्रकुदास वल्द दल्लुदास, मिमपुरी

12. The question is, whether the above-stated transaction contained in Ex.D-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 a mortgage and not an outright sale and decreed the suit of the plaintiffs / respondents No.1 and 2(a) to 2(g) herein.

13. 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 another¹ 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.”

14. 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 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

¹ AIR 1954 SC 345

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\(c\)](#).”

15. 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.
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. Both the Courts below are absolutely unjustified in holding the sale deed dated 31-12-1969 (Ex.D-1) as mortgage in absence of incorporation in the said document Ex.D-1

² (2017) 12 SCC 821

that it is a mortgage as provided in the said proviso. As such, the finding recorded by the two Courts below in this regard is contrary to facts and law available on record.

17. Consequently, judgments & decrees passed by both the Courts below are hereby set aside and the suit would stand dismissed. The substantial questions of law are answered accordingly and the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

18. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma