NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.94 of 2005

1(A). Hem Lal S/o Jhumar Singh, aged-36 yrs.
1(B). Sant Ram S/o Jhumar Singh, aged-34 yrs.
1(C). Jhul Singh S/o Prem Prakash, aged-45 yrs.
1(D). Lal Singh S/o Prem Prakash, aged-43 yrs.
1(E). Helwa S/o Prem Prakash, aged-34 yrs.
All 1(A) to 1(E) are by caste-Satnami, R/o Sonikapara Maro, Tahsil-Navagarh, Distt.-Durg (CG)
1(F) Smt. Prem Bai W/o unknown, D/o Prem Prakash, Aged-58 yrs.
1(G). Adan Bai D/o Prem Prakash, aged-38 yrs.
Both are by caste-satnami, R/o village-Bharatpur, P.O.-Nipaniya (Bhatapara), Distt.-Raipur (CG)
1(H). Sagar Bai D/o Prem Prakash, aged about 55 yrs., caste-Satnami, R/o Village Madaku Baitulpur, Distt.-Bilaspur (CG)

---- Appellants/Defendants

Versus

1. Jawahar Pandey S/o late Gokul Prasad Pandey, aged-54 yrs. R/o Village Maro, Bemetara, Tahsil-Navagarh, Distt.-Durg (CG)
(Plaintiff)

2. Paras Ram S/o Basawan Satnami, Aged-70 yrs. R/o Parasadaa, Tahsil Navagarh, Distt.-Durg (CG)
(Defendant No.2)

3. State of Chhattisgarh through-Collector, Durg (CG)

---- Respondents

For Appellants/Defendants: Mr. Sanjay Patel, Advocate
For Respondent No.1/Plaintiff: None present
For Respondent No.3 / State: Mr.Arun Shukla, Government Advocate

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Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

22/07/2019

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 lower appellate Court was not justified in reversing the finding of the trial Court that the sale deed dated 01.7.1975 (Ex.P.1) was executed in security of a

loan?

(2) Whether the lower appellate Court was not justified in holding the sale deed dated 01.7.1975 (Ex.P.1) as an absolute sale deed in favour of the purchaser?"

(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. Plaintiff-Jawaharlal Pandey brought a suit for declaration of title and permanent injunction with respect to the suit land stating inter-alia that he has purchased the suit land from Budhriyabai and Galarabai by way of registered sale deed dated 1.7.1975 and came into possession of the suit land, but defendant No.1 being daughter of Galarabai and defendant No.2 being son of Budhriyabai started interference with the suit land and got the suit land attached under Section 145 of the CrPC, by which clouds have been raised on his title, therefore, he is entitled for declaration of title and permanent injunction.

3. Defendants No.1 and 2 filed their written statement pleading inter-alia that sale deed dated 1.7.1975 (Ex.P-1) is not an outright sale, it was executed in security of loan, which the trial Court accepted and dismissed the suit, however, in appeal preferred by the plaintiff, the first appellate Court reversed the judgment and decree of the trial Court and held that sale deed dated 1.7.1975 (Ex.P-1) was outright sale deed and it was not executed for security of loan and allowed the appeal by decreeing the suit, against which, this second appeal under Section 100 of the CPC has been filed by the appellants/defendants, in which two substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

4. Mr.Sanjay Patel, learned counsel for the appellants/defendants, would submit that the first appellate Court is absolutely unjustified in holding the sale deed to be real sale deed and not for security of loan or

mortgage by recording perverse finding, which deserves to be set aside.

5. None present for respondents No.1 and 2 though served.

6. I have heard learned counsel for the appellants/defendants and considered his submissions made herein-above and also went through the records with utmost circumspection.

7. 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.”

8. 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.

9. Recital of sale deed dated 1.7.1975 (Ex.P/1) executed by Budhriyabai and Galarabai in favour of the plaintiff would show that the said sellers sold the suit land as they were need of money for making payment of loan for cash consideration of ₹ 6300/- and delivered peaceful possession to the purchaser therein/plaintiff herein. The trial Court has held that it is executed for security of loan and not an outright sale, whereas the first appellate Court has held that it is an outright sale.

10. Now the question of consideration would be whether sale deed dated 1.7.1975 (Ex.P-1) executed by Budhriyabai and Galarabai in favour of Jawaharlal Pandey is for security of loan or it is an outright sale ?

11. 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."

12. 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)

1 AIR 1954 SC 345

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 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)."

13. 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].

14. 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.P-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

2 (2017) 12 SCC 821

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 Budhriyabai and Galarabai in favour of the plaintiff. 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, as such, the finding recorded by the first appellate Court in this regard is strictly in accordance with law, which is neither perverse nor contrary to record. The substantial questions of law are answered in favour of the plaintiff and against the defendants.

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

16. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-