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HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 444 of 2006

Judgment reserved on 07/01/2020

Judgment delivered on 20/01/2020

1. Gulab Gupta S/o Dileshwar Gupta (died) through Lrs. :-

(i) Partho Kumar Gupta, S/o Late Gulab Gupta, Aged about 48 years, Occupation Clerk R.E.S. Raigarh, Chhattisgarh.

(ii) Dashanand Gupta, S/o Late Gulab Gupta, Aged about 44 years, Occupation Agriculture, R/o Darripali, Raigarh, Chhattisgarh.

(iii) Sadanand Gupta S/o Late Gulab Gupta (died) through Lrs. :-

(a) Smt. Shubhlata Gupta, W/o Late Sadanand Gupta, Aged about 35 years.

(b) Ganesh Gupta, S/o Late Sadanand Gupta, Aged about 17 years.

(c) Ku. Pratima Gupta, D/o Late Sadanand Gupta, Aged about 16 years.

No. (iii) (b) and (c) are minor through Smt. Shubhlata Gupta.

All R/o Darripali, Tahsil Pusore, District Raigarh, Chhattisgarh.

(iv) Mangal Diwan W/o Phoolchand, Aged about 50 years, Occupation Nil, R/o Kondapali, Raigarh, Chhattisgarh.

(v) Kumati W/o Tajram Pradhan, Aged about 42 years, R/o Machida, Raigarh, Chhattisgarh.

(vi) Bhargavi W/o Banbas Pradhan, Aged about 36 years, R/o Chantipali, District Jharsugda, Orrissa.

---Appellants/Lrs. Of Defendant

Versus

1. Chandrashekhar Gupta S/o Ganesh Ram Gupta, Aged about 62 years.
2. Ghasiya Gupta S/o Ganesh Ram Gupta, Aged about 56 years.

   Both R/o Village Baghadola, Tahsil and District Raigarh, Chhattisgarh.

---Respondents/Plaintiffs

For Appellants	:-	Mrs. Hamida Siddiqui, Advocate
For Respondents	:-	Mr. N.K. Malviya, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the appellant/defendant (now, his Lrs.) was admitted for hearing on the following two substantial questions of law :-

   “1. Whether the finding recorded by both the Courts below that document dated 05-07-1993 is a mortgage, is contrary to law ?

   2. Whether both the Courts below erred in granting a decree for specific performance in favour of the respondent-plaintiff in the absence of specific pleading and proof that the plaintiff

> was always ready and willing to perform his part of the contract and to re-pay the amount of Rs.20,000/- to the appellant/defendant?"

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

2. The two plaintiffs instituted a civil suit for specific performance of contract stating *inter alia* that due to certain requirement, they borrowed a sum of ₹ 20,000/- from the defendant who agreed to extend the loan to them but only on the condition if plaintiffs mortgage their land in his favour, which they accepted and executed a sale deed on 05/07/1993 (Ex. D/1) thereby, mortgaging their lands bearing Khasra No. 540/1 area 0.049 hectare, Khasra No. 540/2 area 0.299 hectare, Khasra No. 540/3 area 0.129 hectare and Khasra No. 587 area 0.121 hectare in favour of the defendant which was registered on 06/07/1993. On the same day i.e. on 06/07/1993, defendant executed an agreement (Ex. P/1) in favour of the plaintiffs stating that if the plaintiffs return the loan amount of ₹ 20,000/- back to him till 30/12/1995, he would execute sale deed in favour

of the plaintiffs and return their land except for Khasra No. 587 area 0.121 hectare back to them. It was further pleaded that plaintiffs have been in continuous possession of the said land and it was only mortgaged to the defendant for security of loan and no such outright sale has been made in favour of the defendant. It was also pleaded that plaintiffs asked the defendant from time to time to accept repayment of the loan amount of ₹ 20,000/- and return their land to them by executing the sale deed in their favour as promised by him, but he avoided it and ultimately, on 26/10/1994, a legal notice was served upon him by the plaintiffs (Ex. P/5). Despite that, defendant did not return the disputed land to the plaintiffs and got his own name mutated in the revenue records on 26/12/1996 by the order passed by the Naib Tahsildar against which plaintiffs preferred an appeal before the Sub-divisional Officer, Raigarh wherein the earlier order passed by the Naib Tahsildar was set aside, therefore, plaintiffs are entitled to get the decree as claimed and defendant be directed to execute the sale deed in their favour and return the suit land back to them.

3. Defendant set up a plea by filing a copy of the sale deed (Ex. D/1) executed by plaintiffs in his favour on 05/07/1993 which was registered on 06/07/1993 stating *inter alia* that it was an absolute and outright sale deed executed by the plaintiffs in his favour and not a sale intended only for security of loan, as such, the suit deserves to be dismissed.

4. Learned trial Court, upon appreciating the oral and documentary evidence on record, held that the suit land was mortgaged by the plaintiffs in favour of the defendant and the sale deed (Ex. D/1) was executed for security of loan and plaintiffs were under obligation to repay the loan amount of ₹ 20,000/- to the defendant and get the suit land registered in their favour and ultimately, vide its judgment and decree dated 22/07/2005, the trial Court granted decree of specific performance of contract in favour of the plaintiffs on payment of ₹ 20,000/- to the defendant.

5. On appeal being preferred by the defendant, learned first appellate Court affirmed the findings recorded by the trial Court and vide its judgment and decree dated 25/08/2006, dismissed

his appeal against which this second appeal under Section 100 of the CPC has been preferred by the appellant/defendant (now, his Lrs.) wherein two substantial questions of law have been framed and set out in the opening paragraph of this judgment.

6. Mrs. Hamida Siddiqui, learned counsel for the appellant/defendant (now, his Lrs.) would submit that both the Courts below have committed grave legal error in holding that the impugned transaction is a mortgage, ignoring the sale deed dated 05/07/1993 which was registered on 06/07/1993 (Ex. D/1) in which no such condition is incorporated that the transaction in question is a mortgage and therefore, it is not in compliance of proviso to Section 58 (c) of the Transfer of Property Act, 1882 and relied upon the decision rendered by the Supreme Court in **Umabai and Anr. v. Nilkanth Dhondiba Chavan (dead) by Lrs. And Anr.**[1] and decision of this Court in **Second Appeal No. 350/2003** *(Jaswant Singh (dead) through Lrs. v. Tijiya Bai (dead) through Lrs. and Ors.)* decided on 15/01/2019. She would furthermore submit that there is no pleading and proof in line with Section 16(c) of

1 (2005) 6 SCC 243

the Specific Relief Act, 1963 that the plaintiffs are ready and willing to repay the loan amount of ₹ 20,000/- to the defendant and rely upon the decision of the Supreme Court in **L.K. Trust v. EDC Limited and Ors.**[2] stating that the second appeal deserves to be allowed by answering the substantial questions of law in favour of the appellant/defendant.

7. Mr. N.K. Malviya, learned counsel for the respondents/plaintiffs would submit that proviso to Section 58 (c) of the Transfer of Property Act is not applicable in the present case as the sale deed was executed by plaintiffs in favour of defendant (Ex. D/1) on 05/07/1993 and registered on 06/07/1993 and defendant himself executed agreement (Ex. P/1) in favour of the plaintiffs on 06/07/1993 which clearly shows that the agreement (Ex. P/1) is subsequent to the sale deed (Ex. D/1) which was executed on 05/07/1993 i.e. one day prior to the agreement. He would further place reliance upon the decision rendered by the Supreme Court in **Bishwanath Prasad Singh v. Rajendra Prasad and Anr.**[3] and

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2 (2011) 6 SCC 780
3 (2006) 4 SCC 432

Manjabai Krishna Patil (dead) by Lrs. v. Raghunath Revaji Patil and Anr.[4] and submit that the second appeal deserves to be dismissed as both the Courts below have rightly granted decree in favour of the plaintiffs.

8. I have heard learned counsel for the parties, considered their rival submissions made herein-above and perused 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."

4 (2007) 12 SCC 427

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 arising herein would be whether the 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 below have held that it is not an outright sale as it was executed for security of loan which is apparent from Ex. P/1.

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**[5] 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 posed for consideration was answered by Their Lordships in paragraphs 8, 9 and 13 as under :-

> "(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

5 AIR 1954 SC 345

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."

(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 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 **<u>Srinivasaiah v. H.R. Channabasappa (since dead) by his Legal Representatives and others</u>**[6].

15. Similarly, the Supreme Court in the matter of **<u>Umabai</u>** (supra) pointed out the distinction between mortgage by conditional sale and sale with condition of repurchase as under :-

> "20.In this case, admittedly, two documents were executed on the same day. In view of the express provisions contained in Section 58(c) of the Transfer of Property Act, indisputably the transaction in question was not a mortgage by way of conditional sale.
> 21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See *Pandit Chunchun Jha v. Sk. Ebadat Ali*[7], *Bhaskar Waman Joshi v. Narayan Rambilas Agarwal*[8], *K. Simrathmull v. S. Nanjalingiah Gowder*[9], *Mushir Mohammed Khan*[10] and *Tamboli Ramanlal Motilal*[11].)"

6 (2017) 12 SCC 821
7 AIR 1954 SC 345
8 AIR 1960 SC 301
9 AIR 1963 SC 1182
10 (2000) 3 SCC 295
11 1993 Supp (1) SCC 295

16. At this stage, it would be appropriate to notice here that firstly, plaintiffs executed sale deed dated 05/07/1993 (Ex. D/1) in favour of the defendant with respect to the suit land; which was registered on 06/07/1993 in the office of the Sub-Registrar. Examining Ex. D/1, it is quite vivid that the said document in question purports to be an absolute sale as it does not contain any stipulation for treating the sale as mortgage and in view of express provision contained in Section 58(c) of the Transfer of Property Act, transaction in question was not a mortgage by conditional sale.

17. Plaintiffs have relied upon Ex. P/1 executed on 06/07/1993 to claim that it was repurchase agreement, which states as under :-

इकरारनामा

मनके मैं गुलाब गुप्ता वल्द डिलेश्वर गुप्ता जाति कोलता निवासी ग्राम दर्री पाली तह० व जिला रायगढ़ का हूं जो कि ग्राम बाघाडोला प०ह०नं० 35 तह० व जिला रायगढ़ स्थित भूमि स्वामि हक की भूमि जिसका विवरण निचे दर्ज हे को धंसपा वल्द गणेशराम व चन्द्रशेखर वल्द गणेशराम गुप्ता जाति कोलता निवासी ग्राम बाघाडोला ने मेरे नाम पर जरिये बयनामा रजिस्ट्री के मु० 36000/- अक्षरांक छतीस हजार रुपये में बिक्री नामा कर दिया गया है जिसमें से खसरा नं० 540/1 रकबा 0.049 हे०, खसरा नं० 540/2 रकबा 0.299 हे० खसरा नं० 540/3 रकबा 0.129 हे० को आज से डेढ़ साल अर्थात दिनांक 30-12-1995 तक 20,000/- बीस हजार रूपये यदि चन्द्रशेखर द्वारा मुझे वापस

कर दिया जाता है तो मैं उपरोक्त भूमि को उन्हें रजिस्ट्री द्वारा वापस कर दूंगा म्याद पर रकम नही देने तथा जमीन वापस नही लेने पर 25000/- अक्षरांक पचीस हजार रूपये चन्द्रशेखर गुप्ता को देकर उपरोक्त भूमि को अपने नाम पर प्रमापीकरण करा लूंगा तथा खसरा नं० 587 रकबा 0.121 हे० को पूरा पूरा खरीदी कर लिया गया है उस पर किसी प्रकार का कोई वापसी करने या रकम वापस लेने का कोई नियम शर्त नही रखा गया है ।

इस वास्ते आज दिनांक 6-7-1993 दिन मंगलवार को अपने स्वेच्छानुसार यह इकरारनामा लिख दिया और अपना हस्ताक्षर कर दिया जो वक्त पर काम आवे ।

18. The sale deed (Ex. D/1) was executed on 05/07/1993 and registered on 06/07/1993, as such, it would relate back to 05/07/1993 the date on which it was executed, but the repurchase agreement (Ex. P/1) was executed on 06/07/1993 subsequent to sale deed dated 05/07/1993. In absence of any word in the sale deed which suggests or purports that transferer (plaintiffs) ostensibly sold the suit land on condition that in default of payment of consideration (loan) on a certain date, the sale shall become absolute or on condition that on such payment being made, the buyer (defendant) shall retransfer the property to the seller (plaintiffs), the document in question (Ex. D/1) cannot by an stretch of imagination be treated as mortgage by conditional sale. Repurchase agreement (Ex. P/1) also was not executed contemporaneously, but it was executed

subsequently on 06/07/1993. The entire transaction in question was outright sale, it was not conditional sale by way of mortgage as the Supreme Court in **Chunchun Jha** (supra) has clearly held in paragraph 8 that if the sale and agreement to repurchase are embodied in separate document, then the transaction cannot be a mortgage under Section 58(c) of the Transfer of Property Act, whether the documents are contemporaneously executed or not.

19. In view of the above-stated analysis, it is quite vivid that Ex. D/1 is an outright sale made by the plaintiffs in favour of the original defendant Gulab Gupta and it was not mortgage by conditional sale and it is held accordingly.

20. Their Lordships in the matter of **Umabai** (supra) have clearly held that plaintiff, in the suit for specific performance of contract, may raise an alternative plea that transaction is mortgage by conditional sale, but he must be ready and willing to repay the debt or pay the amount of consideration as agreed upon. It was also held by their Lordships that the plea of automatic redemption of mortgage and discharge from debt raised cannot stand with a plea of readiness and

willingness on his part to perform their part of contract.

21. In the instant case, while answering the substantial question of law No. 1, it has been clearly held that Ex. D/1 is an outright sale and it was not a conditional sale by way of mortgage in view of express provision contained under Section 58(c) of the Transfer of Property Act, therefore, the 2nd substantial question of law has to be answered in favour of the defendant and against the plaintiffs by holding that the impugned transaction was an outright sale transaction by the plaintiffs in favour of defendant and therefore, the question of specific performance of Ex. P/1 in favour of plaintiffs on establishing readiness and willingness to perform their part of contract does not arise for consideration; therefore, examining the plea of readiness and willingness of plaintiffs to perform their part of the contract is totally irrelevant.

22. In view of the above-stated legal analysis, both the Courts below are absolutely unjustified in holding that the impugned transaction (Ex. D/1) was conditional sale by way of mortgage and

plaintiffs, being ready and willing to perform their part of contract, are entitled for decree for specific performance of contract. Consequently, the judgment and decree of both the Courts below, being contrary to facts and law available on record, are hereby set aside and plaintiffs' suit stands dismissed in toto. No order as to cost(s).

23. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet