

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.361 of 2005**

- Kaleshree Bai Wd/o Late Bhurwa Rajput Aged About 72 Years R/o Maharpur, Tehsil Lormi, District- Bilaspur, Chhattisgarh.....(Plaintiff), District : Bilaspur, Chhattisgarh

---- Appellant/Plaintiff**Versus**

1. Laxman (Died) Through Legal Hairs As Per Honble Court Order Date- 18-01-2019 And 14-12-2018.
1(A) Nohar Singh Rajput S/o Late Laxman Aged About 60 Years R/o Village Sardha, Tahsil-Lormi, District- Mungeli, Chhattisgarh., District : Mungeli, Chhattisgarh
1(B) Giriwar Singh Rajput S/o Late Laxman Aged About 55 Years R/o Village Sardha, Tahsil-Lormi, District- Mungeli, Chhattisgarh., District : Mungeli, Chhattisgarh
1(C) Top Singh Rajput S/o Late Laxman Aged About 45 Years R/o Village Sardha, Tahsil-Lormi, District- Mungeli, Chhattisgarh., District : Mungeli, Chhattisgarh
1(D) Aati Bai W/o Etwari Rajput Aged About 48 Years R/o Village Semariya, Tahsil Lormi, District- Mungeli, Chhattisgarh., District : Mungeli, Chhattisgarh
1(E) Shiv Kumari Bai W/o Bhaiyaram Rajput R/o Village Semariya, Tahsil Lormi, District- Mungeli, Chhattisgarh.
1(F) Aasha Bai W/o Gore Rajput R/o Village Shardha, Tahsil Lormi, District- Mungeli, Chhattisgarh.
1(G) Ram Kumari Bai W/o Jagdesh Rajput R/o Village Gadhghoda, Tahsil Lormi, Disrtict- Mungeli, Chhattisgarh.
2. Jai Singh S/o Laxman Singh R/o Village Sardha, Tehsil Lormi, District- Bilaspur, Chhattisgarh., District : Bilaspur, Chhattisgarh
3. Bhaggu S/o Bhurwa Rajput R/o Village Maharpur, Tehsil Lormi, District- Bilaspur, Chhattisgarh., District : Bilaspur, Chhattisgarh
4. Horilal S/o Bhurwa Rajput R/o Village Maharpur, Tehsil Lormi, District- Bilaspur, Chhattisgarh., District : Bilaspur, Chhattisgarh
5. Bhagwati Bai W/o Shri Krishan Ballabh Yadav Aged About 34 Years R/o Behind Maharani Laxmi Bai School, Wright Town, Jabalpur, Madhya Pradesh., District : Jabalpur, Madhya Pradesh
6. State Of Chhattisgarh Through Collector, Bilaspur, Chhattisgarh., District : Bilaspur, Chhattisgarh

---- Respondents/Defendants**Present:-**

Shri V. K. Pandey, counsel for appellant.

Shri S. S. Rathore, counsel for legal heirs of respondent No.1.

Shri Ishan Verma, Panel Lawyer for respondent No.6/State.

Single Bench : Hon'ble Shri Justice Manindra Mohan Shrivastava

JUDGMENT ON BOARD

04/03/2020

Heard.

1. This is plaintiff's appeal. This second appeal is directed against the impugned judgment and decree dated 30-04-2005 passed by the Second Additional District Judge, (FTC), Mungeli in Civil Appeal No.19-A/2004, by which, the learned lower appellate Court has dismissed the plaintiff's suit, reversing the judgment and decree dated 30-07-2003 passed by the learned trial Court in Civil Suit No.50-A/1993.

2. The appellant-plaintiff filed a suit praying for declaration and possession, on the pleadings, inter alia, that the property in dispute belonged to her late husband-Bhurwa Rajput. Bhurwa was not keeping well and he was in need of money and therefore, approached defendant No.1-Laxman Singh for grant of loan. Laxman Singh agreed to advance loan on the condition of execution of security document in the form of nominal sale deed. According to the plaintiff's pleading, her husband prepared and executed nominal sale deed dated 29-06-1973, Ex.D-11, which was only intended as security towards repayment of loan of Rs.1,000/-. According to the plaintiff's case, loan amount having repaid, the document became void, but the defendants started claiming title over the property in dispute, which led to various litigations in other forum, giving rise to cause of action for filing of suit.

The defendant's case was that the deceased-Bhurwa executed outright sale deed dated 29-06-1973 in favour of Jai Singh S/o defendant No.1-Laxman Singh for a valid consideration and thereafter, after death of Bhurwa, his wife is raising false claim.

3. Learned trial Court framed specific issue as to whether the sale deed dated 29-06-1973, Ex.D-11 was an outright sale or merely a sham transaction, intended to be only as security towards repayment of loan. On this specific issue, learned trial Court recorded a finding that the sale deed was nominal one and decreed the suit.

4. Aggrieved by the judgment and decree passed by the learned trial Court, an appeal was filed. Learned lower appellate Court re-appreciated the evidence and held that the transaction was an outright sale and could not be held to be nominal sale deed. On such finding, the plaintiff's suit was dismissed, giving rise to this appeal.

5. This appeal was admitted for hearing on the following substantial question of law:-

“Whether the first appellate Court was justified in reversing the well reasoned findings recorded by the trial Court that sale deed dated 29-06-1973 was a nominal sale deed?”

6. Learned counsel for the appellant argued that the learned lower appellate Court has reversed the well reasoned judgment of the trial Court, wherein learned trial Court recorded a specific finding on Issue No.1 that Bhurwa never intended to sell his property and the sale deed dated 29-06-1973, Ex.D-11 was a nominal one. He would argue that the findings of the learned lower appellate Court is based on patent misreading of the evidence of the witnesses, who have clearly stated that Bhurwa never intended to sell his property. He was taking loan from Laxman Singh and Laxman Singh stated that unless some document is executed in his favour, he will not advance loan. It is submitted that the learned lower appellate Court has also recorded a perverse finding by ignoring that the trial Court had examined in extenso the proved circumstances of the

case that the possession of the property was never handed over, mutation in revenue records was done without notice and knowledge of the plaintiff, original sale deed was not produced and that the value of the land, at the time of the transaction, was much more than that the amount, on which, the property is said to have been sold by Bhurwa in favour of Jai Singh S/o defendant No.1-Laxman Singh.

7. On the other hand, learned counsel for the respondents submits that it is not necessary for this Court to enter into this enquiry, in view of the authoritative pronouncement of the Supreme Court and this Court in plethora of decisions, wherein it has been held that unless conditions incorporated in proviso to Section-58(C) of the Transfer of Property Act are fulfilled, a party cannot be permitted to lead evidence that the outright sale deed was nominal sale deed or that it was initially mortgage of the nature stated in the provision.

8. After hearing learned counsel for the parties, in the considered opinion of this Court, the issue raised in this case is squarely covered by the decisions of the Supreme Court in the case of ***Chunchun Jha vs. Ebadat Ali and another***¹, ***P. L. Bapuswami vs. N. Pattay Gounder***², ***Srinivasaiah vs. H. R. Channabasappa (Since Dead) by his legal representatives and others***³ as also judgment dated 13-11-2019 passed by this Court in Second Appeal No. 179 of 2003 (***Virendra Kumar vs. Dakbar Das and others***) as also judgment of Coordinate Bench dated 15-01-2019 passed in Second Appeal No.350 of 2003 (***Jaswant Singh (Dead) through L.Rs vs. Tijiya Bai (Dead) through Legal Representative and others***) and judgment dated 20-01-2020 passed in Second Appeal No.444 of 2006 (***Gulab Gupta(Dead) through L.Rs vs. Chandrashekhar Gupta and others***).

1 AIR 1954 SC 345

2 1996 (2) SCR 918

3 (2017) 12 SCC 821

9. Tracing the history of the legislation, particularly the amendment carried out in Section 58(C) of the Transfer of Property Act and the decisions of the Supreme Court referred to above, this Court in the case of ***Virendra Kumar*** (supra), held, as below:-

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.”

10. The legal position, therefore, stands very well settled. The conditions, in which, the challenge could be laid have not been fulfilled, as per requirements

of the proviso to Section 58(C) of the Transfer of Property Act and there is nothing in the contents of Ex.D-11 stating conditions of mortgage so as to make further enquiry into the matter.

11. The question of law framed by this Court is answered in the manner that the learned lower appellate Court was well justified in reversing the judgment of the learned trial Court and for the reason that it was not open for the plaintiff to challenge outright sale deed as one being in the nature of mortgage on the condition that upon repayment being made, the sale shall become void.

12. In the result, the appeal fails and is hereby dismissed. Parties to bear their respective costs. Let appellate decree be drawn.

SD/-
(**Manindra Mohan Shrivastava**)
JUDGE