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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No. 31 of 2009

Judgment reserved on 21.08.2020

Judgment delivered on 17.09.2020

1. Pundas, S/o Sakhichand, aged about 55 years, Resident of Village Tora, P.H. No. 1, Tahsil Simga, Raipur, District Raipur (C.G.)

---- Appellant/Defendant No. 1

Versus

1. Itwari, S/o Khorbahra Satnami, aged about 60 years, Resident of Village Tora, P.H. No. 1, Tahsil Simga, Raipur, District – Raipur (C.G.)

2. Munshi, S/o Khorbahara, Aged about 55 years, Resident of Village Tora, P.H. No. 1, Tahsil Simga, Raipur, District – Raipur (C.G.)

3. State of Chhattisgarh, Through Collector Raipur, District Raipur (C.G.)

---- Respondents/plaintiffs

For Appellant : Shri Ravindra Agrawal, Advocate
For Respondent No. 1 : Shri N.K. Malviya, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment [C.A.V.]

(1) Final hearing of this second appeal has been conducted through video conferencing.

(2) The substantial questions of law involved, formulated and to be answered in this second appeal preferred by defendant No. 1/appellant herein state as under:

"1. Whether the first appellate Court was justified in holding that the proceeding executed by the plaintiff, dated **22.04.1978** (Exhibit D/1), is a nominal sale deed by recording a finding which is perverse to the record ?

2. Whether the first appellate Court was justified in reversing the judgment and decree of trial Court by recording a finding which is perverse and contrary to the record ?

(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).

(3) The suit property was earlier held by plaintiff-Itwari and his brother Munshi. They alienated the suit property in favour of defendant No. 1 - Pundas on 22.04.1978 vide Ex.D-1. On the basis of said sale deed dated 22.04.1978 (Ex.D-1), defendant No. 1 got his name mutated in the revenue records, which was allowed by Tahsildar, Simga vide order dated 09.04.2002. The plaintiff preferred appeal there-against before the Sub Divisional Officer (Revenue), Bhatapara and the Sub Divisional Officer (Revenue), Bhatapara set aside the order of mutation in favour of defendant No. 1 passed by the Tahsildar, Simga. Further appeal preferred there-against before the Additional Commissioner, Raipur, is pending and the same has been transferred to the Board of Revenue. Thereafter, defendant No. 1 initiated the proceeding under Section 145 of the Cr.P.C. before the Sub

Divisional Magistrate, Bhatapara and, then on 17.03.2003 only Itwari (plaintiff) instituted a suit for declaration of title and permanent injunction stating *inter alia* that in the year 1978 his village was drought affected and plaintiff, being in need of money, borrowed Rs.1,000/- from defendant No. 1 and executed a nominal sale deed on 22.04.1978 vide Ex.D-1 as a security for repayment of the loan and it was settled between them that when the plaintiff will return his money, defendant No. 1 would return the sale deed and would execute agreement and in the meantime, possession of the land would remain with defendant No. 1. It is further case of the plaintiff that he has paid Rs.1,425/- to defendant No. 1 on 25.5.1981 vide Ex. P-1 and he executed an agreement but defendant No. 1 got his name mutated in the revenue record, which was set aside at his instance by filing appeal before the Sub Divisional Officer (Revenue), Bhatapara and since defendant No. 1 has initiated the proceedings under Section 145 Cr.P.C. before the Sub Divisional Magistrate, Bhatapara, cause of action and necessity has arisen to file the suit for declaration of title stating *inter alia* that sale deed dated 22.4.1978 (Ex.D-1) be given effect to and the plaintiff is entitled for decree of permanent injunction restraining defendant No. 1 from interfering with his possession over the suit land.

(4) Defendant No.1, by filing his written statement, has

denied the plaint averments stating inter-alia that he has purchased the suit land from plaintiff Itwari and his brother Munshi way back on 22.4.1978 vide Ex.D-1 by making payment of full consideration amount and there was no condition of return of the amount and neither it was returned nor defendant No. 1 has signed the agreement dated 25.5.1981(Ex.P-1). It was also pleaded that since the plaintiff has not impleaded his brother Munshi as a party defendant in the suit, the suit is bad for non-joinder of necessary party and also the suit is barred by limitation.

The defendant No. 1 has also filed counter claim for permanent injunction stating inter alia that pursuant to the registered sale deed dated 22.4.1978 (Ex.D-1), he is in possession of the suit property and, therefore, the plaintiff be restrained from interfering with his possession.

(5) The trial Court, upon appreciation of oral & documentary evidence on record, dismissed the suit holding that sale deed dated 22.04.1978 (Ex.D-1) executed by plaintiff and his brother Munshi in favour of defendant No. 1 is real sale deed and not a nominal sale deed executed for security of loan and decreed the counter claim by granting permanent injunction in favour of defendant No.1 and against the plaintiff.

(6) The plaintiff preferred first appeal there-against before the first appellate Court. The First Appellate Court, by its impugned judgment & decree dated 19.11.2008, reversed the judgment & decree of the trial Court and decreed the suit and dismissed the counter claim filed by defendant No. 1, against which, this second appeal has been preferred by the appellant/defendant No. 1, in which substantial questions of law have been formulated and set out in the opening paragraph of the judgment.

(7) Mr. Ravindra Agrawal, learned counsel appearing for the appellant/defendant No. 1 would submit that in the registered sale deed dated 22.4.1978 (Ex.D-1), there is no condition that after alleged refund of money, sale deed would be returned to the plaintiff and also there is no mention about the loan transaction in the said sale deed. He would further submit that plaintiff (PW-1) has admitted in his statement before the Court that he has executed the registered sale deed dated 22.4.1978 (Ex.D-1) in favour of defendant No. 1 but further stated that it was mortgaged. Likewise, Shivprasad (PW-3) has also admitted that the plaintiff has informed him that he and his brother Munshi have sold the suit land in favour of defendant No. 1 - Pundas for a cash consideration of Rs.1,000/-. He would further submit that the plaintiff has not proved the execution of agreement dated 25.5.1981 (Ex.P-1) by defendant No. 1 by leading any evidence, as such, even

execution of agreement dated 25.5.1981 (Ex.P-1) by defendant No. 1 in favour of plaintiff has not been proved and, therefore, the judgment & decree of the first appellate Court deserves to be set aside.

(8) Mr. N.K. Malviya, learned counsel appearing for respondent No. 1 herein/plaintiff, would support the judgment & decree of the first appellate Court and would submit that the first appellate Court has rightly decreed the suit of the plaintiff and dismissed the counter claim filed by defendant No. 1, which is strictly in accordance with law and no interference is warranted and the substantial question of law be answered in favour of the plaintiff.

(9) I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.

(10) 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."

(11) 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.

(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?

(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 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."

(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".

1 AIR 1954 SC 345

(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)."

(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) Similarly, in the matter of **Dharmajit Shankar Shinde and others v. Rajaram Shripad Joshi (dead) through legal representatives and others**[3], their Lordships of the Supreme Court has considered the provisions contained in Section

2 (2017) 12 SCC 821

3 (2019) 8 SCC 401

58(c) of the Transfer of Property Act, 1882 and has held that sale with a mere condition of re-transfer is not mortgage. It was further held that if the sale and agreement to repurchase are embodied in the separate documents then the transaction cannot be a "mortgage by conditional sale" irrespective of whether the documents are contemporaneously executed. It was further held that in case of single document, real character of the document is to be ascertained from the provisions of the deed viewed in the light of the surrounding circumstances and intention of the parties.

(17) Aforesaid judgment of the Supreme Court in the matter of **Dharmajit Shankar Shinde and others** (supra) has been followed with approval by the Supreme Court in the matter of **Sopan (DEAD) through his legal representatives v. Syed Nabi**[4]

(18) 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 the Supreme Court in the afore-cited cases (supra), examining Ex.D-1, it is quite vivid that Ex.D-1 purports to be an absolute sale and it does not contain any stipulation for treating the sale as mortgage. The agreement is said to have been executed separately vide Ex.D-1 but it has not been proved by examining any of its witnesses and in

4 (2019) 7 SCC 635

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 plaintiff and his brother in favour of defendant No.1. Therefore, the transaction in question, in absence of embodiment as contained in 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 first appellate Court has committed legal error in holding that Ex.D-1 is a nominal sale executed for security of land and no title has been transferred in favour of defendant No. 1. Thus, the finding recorded by the first appellate Court in this regard is contrary to the facts and law available on record.

(19) Consequently, the judgment & decree of the first appellate is set aside. The suit stands dismissed and counter claim of the defendant No. 1 stands decreed. Substantial question of law is answered accordingly in favour of defendant No. 1 and against the plaintiff.

(20) The second appeal is allowed to the extent indicated hereinabove. No order as to costs.

(21) A decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-