NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Second Appeal No. 89 of 2008

1. Hiralal Sahu S/o Tikaram Sahu, Aged about 50 years.
2. Damuradhar Sahu S/o Tikaram Sahu, Aged about 43 years.
3. Khushiram Sahu, S/o Tikaram Sahu, Aged about 37 years.

   All R/o House No. 270/1 and 270/2, Baikunthpur, Old Raigarh, Tahsil and District Raigarh, Chhattisgarh.

---Appellants/Plaintiffs

Versus

1. Kehar Singh (died) through Lrs. :-

   (a). Taranjeet Singh S/o Late Keher Singh, Aged about 56 years, R/o Nayaganj, Gaurishankar Mandir Road, Raigarh, Tahsil and District Raigarh, Chhattisgarh.
2. Rukmini Bai W/o Gajanand Sah, Aged about 59 years, R/o Kodatarai, Tahsil and District Raigarh, Chhattisgarh.
3. Bhubaneshwari Bai W/o Khubchand Sahu, Aged about 45 years, R/o Jute Mill Raigarh, Chhattisgarh.
4. Ravi Bai W/o Late Murlidhar sahu, Aged about 42 yars, R/o Rambhata, Kailash Nagar, Raigarh, Chhattisgarh.

--- Respondents/Defendants

For Appellants	:-	Mr. Ashish Shrivastava and Mr. Aman Saxena, Advocate
For Respondents	:-	Mr. H.s. Patel, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

10/02/2020

1. Heard on admission and formulation of substantial question of law in this second appeal preferred by the appellants/plaintiffs under Section 100 of the CPC against the impugned judgment and decree passed by the first appellate Court affirming the judgment and decree by which learned trial Court dismissed the suit finding no merit.

2. Mr. Aman Saxena, learned counsel for the appellants/plaintiffs would submit that both the Courts below have concurrently erred in dismissing the suit of the plaintiffs by recording a finding which is perverse and contrary to record holding that plaintiffs are not entitled for decree for declaration and sale deed dated 13/06/1972 executed by their father original defendant No. 2 Tikaram in favour of defendant No. 1 is an outright sale and not a sale intended for security of loan, as such, the

appeal deserves to be admitted by formulating substantial question of law in this regard.

3. The suit property was originally held by defendant No. 2 i.e. Tikaram Sahu. He alienated the suit property in favour of defendant No. 1 by registered sale deed dated 13/06/1972 (Ex. P/3) and delivered its peaceful possession to him.

4. Plaintiffs, who are the sons of Tikaram sahu, filed a suit seeking declaration that the alienation made by their father (defendant No. 2) in favour of defendant No. 1 is not binding upon them and set up a plea that the sale deed (Ex. P/3) is not a real sale deed, it was intended for security of loan and therefore, it has not conveyed any title in favour of defendant No. 1 to which the defendants opposed by filing their written statement stating that it is an outright sale which is binding upon the plaintiffs.

5. Learned trial Court, after appreciating the oral and documentary evidence on record, dismissed the suit holding that sale deed dated 13/06/1972 (Ex. P/3) is an outright sale deed and it has conveyed title upon defendant No. 1 which the first

appellate Court also did not interfere with in the appeal preferred by the plaintiffs.

6. Defendant No. 2 alienated the suit property in favour of defendant No. 1 vide Ex. P/3 which clearly shows that it nowhere contains a stipulation regarding conversion of sale into mortgage as provided in Section 58(c) of the Transfer of Property Act, 1882 which clearly provides that no such transaction shall be deemed to be a mortgagee, unless the condition is embodied in the document which effects or purports to effect the sale.

7. The question arising herein would be whether the transaction contained in Ex. P/3, 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 Ex. P/3 executed by defendant No. 2 in favour of defendant No. 1 is an outright sale as it was not intended for the purpose of security of loan.

8. 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 **<u>Chunchun Jha v. Ebadat Ali and another</u>**[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."

9. The question so posed for consideration was answered by Their Lordships in paragraphs 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 <u>section 58(c)</u> 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

1 AIR 1954 SC 345

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)."

10. 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].

2 (2017) 12 SCC 821

11. 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/3, 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. Therefore, the transaction in question (Ex. P/3) in absence of embodiment as contained under Section 58(c) of the Transfer of Property Act, 1882 cannot be regarded as it was executed for security of loan and it is held to be an outright sale.

12. The next contention of learned counsel for the appellants/plaintiffs is that the sale in question was for legal necessity and it is not an outright sale. From the pleadings and evidence on record, it is apparent that no such pleading *qua* legal necessity was either raised before the trial Court or before the first appellate Court, therefore, such a plea cannot be permitted to be raised for the first time before this Court. In view of the aforesaid legal discussion, I do not

find any merit much less any substantial question of law for consideration herein.

13. The second appeal deserves to be and is accordingly dismissed *in limine* without notice to the other side. No cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet