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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.460 of 1991

Tikaram (dead) through LRs
(Defendant)

1(a) Hiralal Sahu, aged about 58 years, S/o late Tikaram Sahu, alias Tiknuram

1(b) Damrudhar Sahu, aged about 54 years, S/o late Tikaram Sahu, alias Tiknuram

1(c) Khushiram Sahu, aged about 48 years, S/o late Tikaram Sahu, alias Tiknuram

All above R/o Baikunthpur, District Raigarh (C.G.)
---- Appellants

Versus

Keher Singh (since dead) through LRs. Taranjeet Singh, S/o Late Keher Singh, aged about 56 years, R/o Nayaganj, Gaurishankar Mandir Road, Raigarh, Tahsil & District Raigarh (C.G.)
(Plaintiff)
---- Respondent

For Appellants / LRs of Defendant: -
Mr. Ashish Shrivastava and Mr. Anurag Verma, Advocates.
For Respondent / LR of Plaintiff: -
Mr. Hari Agrawal, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

20/01/2021

1. **This second appeal preferred by the defendant (now LRs) was admitted for hearing on 1-4-1992 by formulating the following substantial question of law: -**

> **"Whether, in view of the facts and circumstances of the case, particularly the fact that the sale in favour of the respondent by the appellant was claimed to be nominal, a decree for eviction under Sections 12(1)(a) and (c) of the M.P. Accommodation Control Act is legal and valid?"**

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

2. The suit accommodation bearing House Nos.270/1 & 270/2 situated at Old Ward No.22, Baikunthpur, Raigarh, with connected land was earlier owned by defendant Tikaram. He by registered sale deed dated 14-6-1972 (Ex.P-1A) sold it in favour of the plaintiff and placed him in possession and thereafter on the same day executed a *kirayanama* Ex.P-2 taking the suit accommodation on rent. Plaintiff Kehar Singh on 11-4-1983 filed a suit for eviction against the defendant stating inter alia that though the defendant is his tenant vide Ex.P-2 on monthly rent of ₹ 60/- commencing from 1st of every month and ending on 30th/ 31st of each month with effect from 14-6-1972, but he has not paid rent from January, 1976 to April, 1983 i.e. 88 months amounting to ₹ 5,280/- despite service of notice which is ground for eviction under Section 12(1)(a) of the Madhya Pradesh / Chhattisgarh Accommodation Control Act, 1961 (for short, 'the Act of 1961') and the suit accommodation is required for bona fide need of the residence of his youngest son – the respondent herein and the accommodation which he is having is insufficient and he has no other residential accommodation in the township of Raigarh except the suit accommodation, therefore, the suit accommodation is bona fidely required under Section 12 (1)(e) of the Act of 1961. He also pleaded that the suit accommodation is required bona fidely by the plaintiff – landlord for the purpose of building or rebuilding or making thereto substantial additions or alterations and further pleaded that rebuilding or repairing cannot be carried out without the accommodation being

vacated under Section 12(1)(h) of the Act of 1961. One additional ground has also been taken that the defendant has denied his title by which he has suffered substantial damage which is the ground under Section 12(1)(c) of the Act of 1961. As such, the plaintiff is entitled for possession of the suit accommodation under Section 12(1)(a), (c) and (h) of the Act of 1961.

3. **Resisting the suit and controverting the plaint allegations, the defendant filed written statement stating inter alia that the sale deed Ex.P-1A is not an outright sale, it was only a sale deed executed for security of loan and it was mortgaged for security of loan and it was agreed that after payment of loan amount, the suit accommodation will be re-transferred in favour of the defendant. However, the defendant admitted the fact of execution of *kirayanama* Ex.P-2 in favour of the plaintiff. It was further pleaded that relationship between the plaintiff and the defendant was only that of a debtor and a creditor. It was also stated that the plaintiff was at that time, involved in the business of money-lending and used to get such kind of sale deeds executed in his favour for the purpose of security of loan, as such, the plaintiff is not entitled for decree for eviction.**

4. **The defendant after service of summons did not make payment of arrears of rent and consequently, application under Section 13(6) of the Act of 1961 was made for striking off the defence. Ultimately, by order dated 2-11-1983, the trial Court struck-off the defence of the defendant – tenant and held that the defendant will only be entitled to raise defence based on title.**

5. **The trial Court after appreciating and analysing the oral and**

documentary evidence available on record, decreed the suit of the plaintiff on the ground under Section 12(1)(a), (e) & (h) of the Act of 1961 and also held while answering issue No.6 that the plaintiff will be entitled for decree under Section 12 (1)(c) of the Act of 1961. The judgment & decree of the trial Court granting decree for eviction was called in question by the defendant before the first appellate Court under Section 96 of the CPC and the first appellate Court by its impugned judgment & decree partly modified the judgment & decree of the trial Court holding that the plaintiff is not entitled for decree of eviction under Section 12(1)(e) & (h) of the Act of 1961, however, maintained the decree under Section 12(1)(a) & (c) of the Act of 1961. Questioning that part of judgment, this instant second appeal has been preferred by the defendant under Section 100 of the CPC in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment for the sake of completeness.

6. During the pendency of appeal, the sole defendant died and his legal representatives have been brought on record.

7. Mr. Ashish Shrivastava, learned counsel appearing for the appellants herein / LRs of the defendant, would submit that the first appellate Court is absolutely unjustified in affirming the judgment & decree of the trial Court holding that grounds under Section 12(1)(a) & (c) of the Act of 1961 are made out ignoring the fact that the alleged sale made by the defendant vide Ex.P-1A in favour of the plaintiff was not an outright sale, but it was a mortgage by conditional sale as the defendant has taken an amount of ₹ 3,000/- and for security of loan, such a document

was executed, therefore, both the Courts below have erred in holding that it was an outright sale and granted decree in favour of the plaintiff which deserves to be set aside by answering the substantial question of law in favour of the defendants (LRs).

8. Mr. Hari Agrawal, learned counsel appearing for the respondent herein / LR of the plaintiff, would submit that the defendant's defence was struck-off by the trial Court on 2-11-1983 and therefore the ground raised under Section 58(c) of the Transfer of Property Act, 1882 (for short, 'the TP Act') is not available to the defendant and even otherwise, it was an outright sale as there is total non-compliance of the proviso to Section 58(c) of the TP Act. It was further submitted that both the Courts have concurrently held that the plaintiff is entitled for eviction under Section 12(1)(a) & (c) of the Act of 1961, as admittedly, the defendant has not paid any single penny towards rent after January, 1976 and even Section 13(1) of Act of 1961 has not been complied with and as such, the ground under Section 12(1)(a) of the Act of 1961 is clearly made out. Even otherwise, the defendant has denied the title of the plaintiff, therefore, the ground under Section 12(1)(c) of the Act of 1961 is also made out and as such, the appeal deserves to be dismissed.

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

10. As noticed herein-above, the suit house was purchased by the plaintiff from the defendant vide Ex.P-1. Simultaneously, on the same breath, on the same day, document Ex.P-2 *kirayanama* was executed between the plaintiff and the defendant in which it

has been stated that since the defendant has no other alternative accommodation, therefore, it is being given on rent to the defendant on monthly rent of ₹ 60/- which according to the plaintiff, defendant has paid up to January, 1976, but thereafter, failed to make further payment of rent leading to filing of suit on 11-4-1983 on the ground under Section 12(1)(a), (c), (e) and (h) of the Act of 1961, after service of notice for making payment of arrears of rent which were not paid.

11. It is correct to say that during the pendency of suit, the trial Court struck-off the defence of the defendant – tenant holding that he has not paid rent in compliance with Section 13(1) of the Act of 1961 and further held that he would be entitled to raise defence based on title.

12. The Supreme Court in the matter of **M/s. Paradise Industrial Corpn. v. M/s. Kiln Plastics Products**[1] while considering the phrase "defence struck off" employed in Section 11(4) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, held as under: -

> "The phrase "defence struck off" or "defence struck out" is not unknown in the sphere of law. Indeed it finds a place in Order 11, Rule 21, C.P.C. The phrase is more advantageous to the defendant. Even when a defence is struck off the defendant is entitled to appear, cross-examine the plaintiff's witnesses and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him, ..."

13. Similarly, in the matter of **Modula India v. Kamakshya Singh Deo**[2], while considering similar provision contained in Section 17(3) of the W.B. Premises Tenancy Act, 1956, which also

1 AIR 1976 SC 309
2 AIR 1989 SC 162

provides for striking off of defence, their Lordships of the Supreme Court held as under: -

> "For the above reasons, we agree with the view of Ramendra Mohan Datta, ACJ, that, even in a case where the defence against delivery of possession of a tenant is struck off under Section 17(4) of the Act, the defendant, subject to the exercise of an appropriate discretion by the Court on the facts of a particular case, would generally be entitled :
>
> (a) to cross-examine the plaintiff's witnesses; and
>
> (b) to address argument on the basis of the plaintiff's case.
>
> We would like to make it clear that the defendant would not be entitled to lead any evidence of his own nor can his cross-examination be permitted to travel beyond the very limited objective of pointing out the falsity or weaknesses of the plaintiff's case. In no circumstances should the cross-examination be permitted to travel beyond this legitimate scope and to convert itself virtually into a presentation of the defendant's case either directly or in the form of suggestions put to the plaintiff's witnesses."

14. In view of the aforesaid legal position, the defendant/appellants herein are not entitled to claim protection against ejectment on the grounds enumerated under Section 12(1) of the Act of 1961, however, he is not precluded from contesting the suit on other issues, which are away from the grounds enumerated under Section 12(1) of the Act of 1961. In the instant case, the defendant has raised a plea that Ex.P-1 is not an outright sale, but it is mortgage by conditional sale.

15. At this stage, it would be appropriate to notice Section 58(c) of the TP Act which defines "mortgage by conditional sale" and which 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."

16. 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.

17. The question arising herein would be whether the transaction contained in Ex.P-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 an outright sale.

18. 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.

19. The Supreme Court in the matter of **Chunchun Jha v. Ebadat Ali and another**[3] 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."

20. 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 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.
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> The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of

3 AIR 1954 SC 345

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)."

21. 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**[4].

22. Similarly, the Supreme Court in the matter of **Umabai and another v. Nilkanth Dhondiba Chavan (dead) by LRs. and another**[5] 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*[6], *Bhaskar Waman Joshi v. Narayan Rambilas Agarwal*[7], *K. Simrathmull v. S. Nanjalingiah Gowder*[8], *Mushir Mohammed Khan*[9] and *Tamboli Ramanlal Motilal*[10].)"

23. Also, in the matter of **Dharmaji Shankar Shinde and others v. Rajaram Shripad Joshi (dead) through Legal Representatives and others**[11], their Lordships of the Supreme Court explained the content and binding effect of proviso to Section 58(c) of the TP Act.

4 (2017) 12 SCC 821
5 (2005) 6 SCC 243
6 AIR 1954 SC 345
7 AIR 1960 SC 301
8 AIR 1963 SC 1182
9 (2000) 3 SCC 295
10 1993 Supp (1) SCC 295
11 (2019) 8 SCC 401

24. Reverting to the facts of the case in light of the aforesaid legal position, it is quite vivid that the defendant executed sale deed Ex.P-1 in favour of the plaintiff with respect to the suit house which was registered on 14-6-1972 in the office of the Sub Registrar. A bare and minute examination of the sale deed Ex.P-1 would reveal that the said document in question purports to be an outright and absolute sale as it does not contain any stipulation for treating the sale as mortgage and in view of the express provision contained in Section 58(c) of the TP Act, it was required to be embodied in the said document Ex.P-1 which is absolutely lacking in the sale deed. Apart from this, the defendant was examined before the Superintendent, Land Records on 4-10-1980 (Ex.P-8) in which though in the examination-in-chief he has stated that he has mortgaged the land in favour of the plaintiff, but in cross-examination, he has clearly stated that he has executed sale deed in favour of Kehar Singh – the plaintiff herein and he has not executed any document with regard to mortgage deed. He has also admitted the signature on the said document and also admitted the fact of executing *kirayanama* in favour of the plaintiff. Apart from this, in his statement before the Court, he has been confronted with the document Ex.P-8. Therefore, the document in question vide Ex.P-1 cannot be, by any stretch of imagination, treated as mortgage by conditional sale, it is an outright sale.

25. Both the Courts below in this regard after analysing the oral and documentary evidence available on record, have came to a specific conclusion that the document Ex.P-1 is an outright sale and it is not mortgage by conditional sale. On the basis of the

discussion made herein-above, this Court is also of the considered opinion that Ex.P-1 is an outright sale made by the defendant in favour of the original plaintiff. As such, the finding recorded by the two Courts below that Ex.P-1 is an outright sale is a finding of fact based on the evidence available on record, it is neither perverse nor contrary to record.

26. Since it is admitted position on record that the defendant has not paid any rent from January, 1976 and not complied with Section 13(1) of the Act of 1961 during pendency of suit, that is why his defence has been struck-off by the trial Court by order dated 2-11-1983 which remained unchallenged throughout and attained finality, and even after receipt of notice seeking payment of rent within two months vide Ex.P-5, the defendant failed to make payment of rent which clearly attracts the ground enumerated under Section 12(1)(a) of the Act of 1961. Similarly, the defendant has categorically denied the title of the plaintiff in para 2 of the written statement holding that the transfer so made was mortgage by conditional sale, it is not a real and outright sale. Both the Courts below have come to a clear conclusion that it is an act done which is likely to effect adversely and substantially the interest of the landlord plaintiff. As such, both the Courts below have rightly decreed the suit of the plaintiff based on Section 12(1)(a) & (c) of the Act of 1961. I do not find any perversity or illegality in the said finding. Consequently, the substantial question of law is answered against the defendant and in favour of the plaintiff and resultantly, the second appeal is dismissed. However, the plaintiff will be entitled for cost throughout.

27. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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