

**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No.33 of 2009****Judgment Reserved on :27.8.2021****Judgment delivered on:06.10.2021**

Bhaira (dead) through LR's

1a. Pyarelal S/o Late Bhaira, aged about 80 years

1b. Brijlal S/o Late Bhaira, aged about 70 years

1c. Rajnarayan S/o Late Bhaira, aged about 65 years

1d. Krishna Kumar S/o Late Bhaira, aged about 60 years

R/o Village Salouni, Tahsil – Baloda Bazar, District-Baloda Bazar – Bhatapara (CG)

**----- Appellants/LR's of the Defendant  
Versus**

1. Toran Lal, S/o Khelan Satnami, Aged about 34 years,

2. Urmila Bai S/o Khelan Satnami, Aged about 32 years,

3. Uttari Bai, S/o Khelan Satnami, Aged about 29 years,

4. Itwarin widow of Khelan Satnami,

The entire respondents are Resident of Village Salouni, Tahsil Baloda Bazar, Raipur and District Raipur (CG)

**----- Plaintiffs**

5. State of Chhattisgarh, Through Collector Raipur, District Raipur (CG)

**----- Respondents**

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For Appellants/LR's of the Defendant:

Mr. Prakash Tiwari, Advocate

For Respondents No.1 to 4/Plaintiffs:

Mr. Sudhir Kumar Verma, Advocate

For Respondent No.5/State:

Mr. Avinash Singh, P.L.

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**Hon'ble Shri Justice Sanjay K. Agrawal****C.A.V. Judgment**

1. The substantial question of law involved, formulated

and to be answered in this second appeal preferred by the appellants/legal representatives of the defendant is as under:-

"Whether the first appellate Court was justified in reversing the judgment and decree passed by the trial Court holding that the defendants are not title holders and the plaintiffs are entitled for the suit property by recording a finding which is perverse and contrary to the record?"

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

2. The suit property was originally held by father of plaintiffs No.1 to 3 and husband of plaintiff No.4 Khelan Satnami, which he said to have alienated in favour of defendant No.1- Bhaira (who died during pendency of this second appeal) on 27.4.68 vide Ex. P-D/1B. It is the case of the plaintiffs that the suit property was originally coparcenary property and Khelan Satnami had no right to alienate the said property in favour of defendant No.1-Bhaira in which they are in peacefully possession for last 30 years and acquired the title by way of adverse possession. It was further pleaded that in the year 1998, defendant No.1 filed an application before the Assistant Settlement Officer, Balodabazar for mutation

of his name in revenue records that he has purchased the suit property vide Ex.D/1B dated 27.4.1968, which was rejected by the Assistant Settlement Officer by order dated 20.6.2000 finding that it is not transaction of sale, but it was reversed by the Additional Collector, Balodabazar by its order dated 30.10.2002 (Ex.D-2) and the Tahsildar, Balodabazar by order dated 30.1.2003 (Ex.D-3) directed the land to be recorded in the name of defendant No.1 leading to filing of the suit for declaration of title and permanent injunction stating inter-alia that they are in possession of the suit land and they have perfected their title by way of adverse possession and order dated 30.10.2002 (Ex.D-2) passed in favour of defendant No.1 is not binding on them and they are entitled for declaration for declaration of title and permanent injunction.

3. Resisting the suit, defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia that it is real sale and he is in possession of the suit land having been purchased by registered sale deed dated 27.4.1968 vide Ex.D-1B and his name has duly been mutated in revenue records by the order of the Additional Collector, Balodabazar and sale deed is binding upon the plaintiffs, the

plaintiffs are not in possession of the suit land and the suit is barred by limitation, as such, the suit deserves to be dismissed.

4. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 31.12.2007, dismissed the suit holding that the plaintiffs have failed to prove adverse possession over the suit land and 27.4.1968 Ex.D1B is real sale deed and the suit is barred by limitation. On appeal being preferred by the plaintiffs, the first appellate Court reversed the judgment and decree of the trial Court and decreed the suit, against which this second appeal under Section 100 of the CPC has been filed by the appellants/legal representatives of the defendant, in which one substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment for sake of completeness.

5. Mr. Prakash Tiwari learned counsel for the appellants/legal representatives of the defendant, would submit that the first appellate Court went wrong in holding that Ex.D-1B is not real/outright sale and it was executed for security of loan ignoring the provisions contained in Section 58(c) of the Transfer of Property Act, 1882 (hereinafter called as 'TP Act')

particularly it has already been so held by the Additional Collector, Balodabazar by order dated 30.10.2002 (Ex.D-2), as such, the judgment and decree of the first appellate Court deserves to be set-aside and that of the trial Court be restored.

6. Mr.Sudhir Kumar Verma, learned counsel for respondents No.1 to 4/plaintiffs, would submit that the first appellate Court is absolutely justified in granting decree in favour of the plaintiffs as sale deed dated 27.4.1968 (Ex.D-1B) is not real/outright sale and it was executed for security of loan and as such, the second appeal deserves to be dismissed. He would further submit that mere production of sale deed would not amount of proof of sale deed as attesting witnesses of sale deed namely Pilwaram and Tirathram & Sub-Registrar were not examined to prove the sale deed as held by the Supreme Court in the matter of **Joseph John Peter Sandy v. Veronica Thomas Rajkumar & Anr.**<sup>1</sup>. He would also submit that defendant No.1-Bhaira was never in possession of the suit land, therefore, he cannot get title on the basis of Ex.D-1B.

7. I have heard learned counsel for the parties, considered their rival submissions made herein-above and also went through the records with utmost

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1 AIR 2013 SC 2028

circumspection.

8. The first appellate Court while allowing the appeal has clearly held that the plea of adverse possession has not been proved and the suit is within limitation, but sale deed dated 27.4.1968 (Ex.D-1B) has not been proved by defendant No.1 and therefore, the plaintiffs are in possession of the suit land and as such, they are entitled for decree of declaration of title and permanent injunction. The finding recorded by the first appellate Court that the suit is not barred by limitation is not in dispute as it has been held by the first appellate Court to be within limitation.
9. The main dispute relates to whether Ex.D-1B is a real sale or nominal sale deed and by that, whether title has been transferred in favour of defendant No.1.
10. The first appellate Court has recorded a finding that sale deed dated 27.4.1968 (Ex.D-1B) has not been proved in accordance with law. The plaintiffs in their plaint before the trial court did not question that sale deed has not been executed by their predecessor-in-title Khelan Satnami in favour of defendant No.1-Bhaira, but what has been questioned by the plaintiffs is that Khelan had no right to alienate the suit property in favour of defendant No.1, as such, execution of sale deed in favour of defendant No.1-

Bhaira by Khelan Satnami is not in dispute. What the plaintiffs have really questioned is that sale deed dated 27.4.1968 (Ex.D-1B) is not a real sale and it is executed for security of loan as defendant No.1 was moneylender and involved in business of money-lending, therefore, the argument by learned counsel for respondents No.1 to 4/plaintiffs that sale deed (Ex.D-1B) has not been proved in accordance with law deserves to be rejected.

11. In order to decide the plea whether Ex.D-1B is a real sale or it is only executed for security of loan, it would be notice to Section 58(c) of the TP Act which defines "mortgage by conditional sale" which 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."

**12.** 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.

**13.** The question is, whether the above-stated transaction contained in Ex.D-1B, which is in the nature of sale, is a mortgage by conditional sale or it is an outright sale ? The trial Court has held that it is an outright sale which the first appellate Court has reversed.

**14.** 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<sup>2</sup> 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."

15. 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".

(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)."

**16.** 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<sup>3</sup>.

17. Reverting to the facts of the present case in light of the proviso to Section 58(c) of the TP Act 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-1B, 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, as such, in absence of embodiment of such a clause in Ex.D-1B, the transaction cannot be regarded as security for loan, as no oral evidence is admissible to contradict Ex.D-1B, which is an outright sale transferring title by Khelan Satnami in favour of defendant No.1-Bhaira. Therefore, the transaction in question, in absence of embodiment as contained in the proviso to Section 58(c) of the TP Act, cannot be regarded as security for loan and it is held to be an outright sale. Even otherwise, the Additional Collector, Balodabazar in revenue proceedings has also held that sale dated 27.4.1968 (Ex.D-1B) is real sale and it was not executed for security of loan and that order has become final, as such, the first appellate Court has committed an legal error disbelieving Ex.D-

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3 (2017) 12 SCC 821

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**18.** The argument of learned counsel for respondents No.1 to 4/plaintiffs that sale deed (Ex.D-1B) has not been proved in accordance with law has already been rejected in foregoing paragraph as execution of sale deed in favour of defendant No.1 by Khelan Satnami, predecessor-in-title of the plaintiffs is not in dispute, as such, the judgment of the Supreme Court in the matter of Joseph John Peter Sandy (supra) is not applicable to the facts of the present case, as in that case, their Lordships of the Supreme Court have held that where the execution of document is denied or alleged to be due to undue influence/fraud, onus lies on propounder of document to prove it, as such, the submission raised by learned for respondents No.1 to 4/plaintiffs has no force and it deserves to be rejected.

**19.** As a fallout and consequence of the above-stated discussion, the judgment and decree of the first appellate Court cannot sustain and it is hereby set-aside and that of the trial Court is hereby restored. No order as to cost(s).

**20.** Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)  
Judge

B/-