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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.268 of 2010

Bhaira (died) through LR's

(a) Pyarelal aged about 70 years, son of Late Bhaira.

(b) Jasmani aged about 35 years, son of Late Guljarilal

(c) Brijlal aged about 65 years, son of Late Bhaira
(d) Rajnarayan aged about 60 years, son of Late Bhaira

(e) Rajkumar aged about 58 years, son of Late Bhaira

(f) Krishna Kumar aged about 56 years, son of Late Bhaira

All the resident of Village Saloni Tahsil and District Baloda Bazar, Chhattisgarh

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

Versus

1. Taran, aged about 33 years, Son of Late Dhansingh,
2. Pancharam, aged about 28 years, Son of Late Dhansingh,
3. Prem Bai, aged about 30 years, Daugher of Late Dhansingh,

All are Resident of Village Saloni, Tahsil Balodabazar, District Raipur (CG)

---- Plaintiffs

4. State of C.G. through The Collector Raipur, Distt.Raipur (CG)

---- Respondents

For Appellants/LR's of the Defendant:
Mr.M.D.Sharma, Advocate
For Respondents No.1 to 3/Plaintiffs No.1 to 3:
Mr.Satyaprakash Verma and Mr.Ajay Chandra, Advocates
For Respondent No.4/State:
Mr.Ravi Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

9/2/2021

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 Court below has committed an error of law in not accepting the sale deed dated 1.5.1969 as a proper sale deed and the basis of the finding arrived at is perverse or not ?"

[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 Budhwarinbai and her son Dhansingh, which they sold by registered sale deed dated 1.5.1969 (Ex.D-2) to defendant-Bhaira (who died during pendency of this second appeal) and placed him in possession. Late Shri Bhaira applied for mutation of his name before the Assistant Settlement Officer, Balodabazar on the strength of sale deed dated 1.5.1969, which was rejected by order dated 26.6.2000 (Ex.P-12), against which, defendant-Bhaira preferred appeal before the Additional Collector, Balodabazar. The Additional Collector, Balodabazar by order dated 30.11.2002 (Ex.P-11) held that sale deed dated 1.5.1969 is real/outright sale and it is not

executed for security of loan and directed for recording of name of defendant-Bhaira in revenue records. Thereafter, on 12.11.2002 legal representatives of Dhansingh i.e. plaintiffs herein filed a suit for declaration of title and permanent injunction stating inter-alia that sale deed dated 1.5.1969 (Ex.D-2) is not real/outright sale and it is executed for security of loan and the plaintiffs have perfected their title by way of adverse possession over the suit land, their father Dhansingh had no right and title to alienate the suit property and order of the Additional Collector, Balodabazar dated 30.11.2002 (Ex.P-11) is not binding on them. Therefore, the plaintiffs are entitled for decree of declaration of title and permanent injunction.

3. Resisting the suit, Defendant-Bhaira filed his written statement and denied the averments made in the plaint stating inter-alia that sale deed executed by Budhwarinbai and her son Dhansingh in favour of him is real and outright sale, which has already been held by the Additional Collector, Balodabazar by order dated 30.10.2002 (Ex.P-11) and 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 22.11.2002, dismissed the suit holding that sale deed dated 1.5.1969 (Ex.D-2) is real/outright sale and Dhansingh had right to alienate the suit property and order of the Additional Collector, Balodabazar dated 30.10.2002 (Ex.P-11) is binding on the plaintiffs. On appeal being preferred by the plaintiffs, the first appellate Court by the impugned judgment and decree interfered with said findings of the trial Court and allowed the appeal and thereby granted decree in favour of the plaintiffs, 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.M.D.Sharma, learned counsel for the appellants/legal representatives of the defendant, would submit that the first appellate Court went wrong in holding that Ex.D-2 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.P-11), 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.Satyaprakash Verma, learned counsel for respondents No.1 to 3/plaintiffs No.1 to 3, would submit that the first appellate Court is absolutely justified in granting decree in favour of the plaintiffs as sale deed dated 1.5.1969 is not real/outright sale and it was executed for security of loan and as such, the second appeal deserves to be dismissed.

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

8. Section 58(c) of the TP Act defines "mortgage by conditional sale", and states 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.”

9. 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.

10. The question is, whether the above-stated transaction contained in Ex.D-2, 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 and the first appellate Court has held that it was executed for security of loan.

11. 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.”

12. 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.)

1 AIR 1954 SC 345

(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)."

13. 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].

14. 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-2, 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-2, the transaction cannot be regarded as security for loan, as no oral evidence is admissible to contradict Ex.D-2 which is an outright sale transferring title by Budhwarinbai and Dhansingh in favour of defendant-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, Baloda Bazar in revenue proceedings has also held that sale dated 1.5.1969 (Ex.D-2) is real

2 (2017) 12 SCC 821

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 in holding so.

15. Accordingly, the impugned judgment and decree passed by the first appellate Court is hereby set aside and that of the trial Court is hereby restored and the suit would stand dismissed by answering the substantial question of law in favour of the defendant and against the plaintiffs.

16. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

17. Appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-