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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.218 of 2012

Judgment reserved on: 2-3-2021

Judgment delivered on: 9-3-2021

Lalit Kumar Sahu, aged about 40 years, S/o Latel Sahu, Occupation Service, R/o Ravanbhatha, Pithora, Tahsil & Distt. Mahasamund (C.G.)
(Defendant)
---- Appellant

Versus

Sajjan Kumar Agrawal, aged about 43 years, S/o Gopiram Agrawal, Occupation Business, R/o Pithora, Tahsil & Distt. Mahasamund (C.G.)
(Plaintiff)
---- Respondent

For Appellant / Defendant: -
Mr. Y.C. Sharma and Mr. Sachin Nidhi, Advocates.
For Respondent / Plaintiff: -
Mr. Govind Ram Miri, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. **This second appeal preferred by the defendant / appellant herein was admitted by formulating the following substantial question of law:**

   > **"Whether the finding of both the Courts below is perverse with regard to issue No.5 (A) & (B)?"**

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

2. **The suit property bearing Khasra No.276/1, area 0.045 hectares (4,785 sq.ft.) situated at Village Pithora, Patwari Halka No.22, Revenue Inspector Circle Pithora, Tahsil and District Mahasamund, was purchased by the plaintiff for a cash**

consideration of ₹ 48,000/- on 4-3-1997. It is the case of the plaintiff that he is the owner, title holder and possession holder of the suit land and the defendant has started constructing over the suit land and as such, decree for possession be granted for removing / dismantling the construction so made by the defendant by declaring his title and also the defendant be restrained from interfering with his possession in which the defendant set up the plea that the said transaction was mortgage by conditional sale and / or the sale is condition of purchase which was entered into between the plaintiff and the defendant vide Ex.D-1 in which it was agreed that the defendant will pay ₹ 83,000/- on or before 13th April, 1997, then the plaintiff will execute sale deed in favour of the defendant, as such, the transaction is mortgage by conditional sale, therefore, the plaintiff is not entitled for decree for declaration of title, permanent injunction and possession.

3. The trial Court after appreciating oral and documentary evidence available on record decreed the suit holding that execution of sale deed by the defendant in favour of the plaintiff has been proved, it is an outright sale and the defendant has failed to prove Ex.D-1 i.e. agreement to sale alleged to be executed by the plaintiff in favour of the defendant. On appeal being preferred by the defendant, though the first appellate Court partly recorded finding in favour of the defendant that the defendant has also proved agreement Ex.D-1 in respect of the suit land in favour of the plaintiff, but held that it would not change the result of suit and dismissed the appeal against which this second appeal has been preferred by the defendant

in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment for the sake of completeness.

4. Mr. Y.C. Sharma, learned counsel for the appellant herein / defendant, would vehemently submit that it is a mortgage by conditional sale and it is not outright sale, though the first appellate Court has rightly recorded finding that the defendant has also proved the execution of agreement to sale dated 4-3-1997 in favour of the defendant with respect to the said land. He would further submit that amount of ₹ 15,000/- has been paid on 23-3-1997 and ₹ 30,000/- has been paid on 27-4-1997 to the plaintiff and as such, the plaintiff is not entitled for decree for declaration of title, permanent injunction and possession. He would also submit that suit for redemption of mortgage can be filed within 30 years, as such, the suit deserves to be dismissed. He would rely upon the decisions of the Supreme Court in the matters of **Ganpati Babji Alamwar (dead) by Legal Representatives Ramlu and others v. Digambarrao Venkatrao Bhadke and others**[1] and **Vithal Tukaram Kadam and another v. Vamanrao Sawalaram Bhosale and others**[2] to buttress his submission.

5. Per contra, Mr. Govind Ram Miri, learned counsel for the respondent herein / plaintiff, would submit that the condition of repurchase or re-transfer has not been mentioned in the sale deed Ex.P-1, therefore, in no stretch of imagination it can be mortgage by conditional sale by virtue of Section 58(c) of the Transfer of Property Act, 1882. He would further submit that on

1 (2019) 8 SCC 651
2 AIR 2017 SC 3853

own showing the defendant has failed to make payment of ₹ 83,000/- on or before 13th April, 1997, as such, it is not a mortgage by conditional sale and it is an outright sale. Therefore, the second appeal deserves to be dismissed. He would rely upon the decisions rendered by this Court in the matters of **Jaswant Singh (Dead) Through LRs v. Tijiya Bai (Dead) Through LR Bhudhara Bai and others**[3], **Gulab Gupta (died) through LRs v. Chandrashekhar Gupta and another**[4], **Kaleshree Bai v. Laxman (Died) through Legal Heirs**[5] and the decision of the Supreme Court in the matter of **C.S. Venkatesh v. A.S.C. Murthy (D) by LRs and others**[6], to buttress his submission.

6. 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.

7. In order to decide the question, it would be appropriate to notice Section 58(c) of the Transfer of Property Act, 1882 which defines "mortgage by conditional sale" 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,

3 S.A.No.350/2003, decided on 15-1-2019
4 S.A.No.444/2006, decided on 20-1-2020
5 ILR 2021 Chhattisgarh 198 : AIR OnLine 2020 Chh 1140
6 AIR 2020 SC 930 : (2020) 3 SCC 280

> 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."

8. Section 58(c) of the Transfer of Property Act, 1882 contains mortgage by conditional sale. In a "mortgage by conditional sale", the transfer is made as a security to a loan taken by the mortgagor-owner; whereas in a "sale with a condition to repurchase", the sale is made by the vendor-owner reserving with himself a right to repurchase it within a stipulated time.

9. The proviso to Section 58(c) was added by Act 20 of 1929. Prior to the amendment, there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The conflict was resolved by adding proviso to Section 58(c).

10. Considering the scope of proviso to section 58(c) and pointing out the distinction between "mortgage by conditional sale" and "sale with agreement to repurchase", the Supreme Court in the matter of <u>Bhaskar Waman Joshi v. Narayan Rambilas Agarwal</u>[7] held as under in paragraph 7: -

> "7. The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the

7 AIR 1960 SC 301

> condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property."

11. According to the proviso to Section 58(c), 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; but the converse does not hold good.

12. In the matter of **Chunchun Jha v. Sk. Ebadat Ali**[8], it has been held by their Lordships of the Supreme Court that the mere fact that there is only one document, it does not necessarily mean that it must be a mortgage and cannot be a sale, and observed

8 AIR 1954 SC 345

in paragraphs 6, 7 and 8 as under: -

> "6. The first is that the intention of the parties is the determining factor: see *Balkishen Das v. Legge*[9]. But there is nothing special about that in this class of cases and here, as in every other case, where a document has to be construed, the intention must be gathered, in the first place, from the document itself. If the words are express and clear, effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. As Lord Cranworth said in *Alderson v. White*[10]: (ER p. 928)
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>> "… The rule of law on this subject is one dictated by commonsense; that prima facie an absolute conveyance, containing nothing to shew that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case the question is, what, upon a fair construction, is the meaning of the instruments?"
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> Their Lordships of the Privy Council applied this rule to India in *Bhagwan Sahai v. Bhagwan Din*[11], IA at p. 102 and in *Jhanda Singh v. Wahid-Ud-Din*[12], IA at p. 293.
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> 7. The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity. Unfortunately, they form the bulk of this kind of transaction.
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> 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

9 1899 SCC OnLine PC 32 : (1899-1900) 27 IA 58
10 (1858) 2 De G & J 97 : 44 ER 924
11 1890 SCC OnLine PC 3 : (1889-90) 17 IA 98
12 1916 SCC OnLine PC 61 : (1915-16) 43 IA 284

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.

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.

(emphasis supplied)

13. Similarly, in the matter of **Vithal Tukaram Kadam v. Vamanrao Sawalaram Bhosale**[13], the Supreme Court has pointed out the essentials of agreement to qualify as a "mortgage by conditional sale". It was held as under: -

"14. The essentials of an agreement to qualify as a mortgage by conditional sale can succinctly be broadly summarised. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The execution of a separate agreement for reconveyance, either contemporaneously or subsequently, shall militate against the agreement being mortgage by conditional sale. There must exist a debtor and creditor relationship. The valuation of the property and the transaction value along with the duration of time for reconveyance are important considerations to decide

13 (2018) 11 SCC 172

> the nature of the agreement. There will have to be a cumulative consideration of these factors along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner."

14. The aforesaid decisions of the Supreme Court have been followed in the matter of **Dharmaji Shankar Shinde and others v. Rajaram Shripad Joshi (Dead) Through Legal Representatives and others**[14]. In **Ganpati Babji Alamwar** (supra), essential requirements to find out whether a particular transaction is mortgage by conditional sale or absolute sale, have been pointed out.

15. Similarly, in the matter of **Umabai and another v. Nilkanth Dhondiba Chavan (Dead) by LRs. and another**[15], the Supreme Court has pointed out the distinction between mortgage by conditional sale and sale with condition of repurchase in paragraphs 20 and 21 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.
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> 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

14 (2019) 8 SCC 401
15 (2005) 6 SCC 243

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*[8], *Bhaskar Waman Joshi v. Narayan Rambilas Agarwal*[7], *K. Simrathmull v. S. Nanjalingiah Gowder*[16], *Mushir Mohammed Khan*[17] and *Tamboli Ramanlal Motilal*[18].)"

16. Reverting to the facts of the case, admittedly, in the instant case, in Ex.P-1 sale deed, condition for re-transfer is not embodied and therefore it cannot be mortgage by conditional sale by any stretch of imagination and if there is an agreement to sale in favour of the defendant, it only confers personal right which can be enforced strictly in accordance with the terms of the deed and at the time agreed upon. As such, the first appellate Court has not committed any illegality or infirmity in affirming the judgment and decree of the trial Court warranting interference in the impugned judgment. The substantial question of law is answered accordingly. I do not find any merit in the second appeal, it deserves to be and is accordingly dismissed. No order as to cost(s).

17. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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16 AIR 1963 SC 1182
17 (2000) 3 SCC 536
18 1993 Supp (1) SCC 295