Item-31. 27-09-2022

sg Ct. 8

SA 94 of 2022

Gouri Sankar Mondal
Versus
Nandalal Roy

The appeal was tendered in the year 1998 but no attempt was made to move this appeal for admission. The matter initially appeared in the warning list thereafter transferred to regular list on 9th September, 2022 and since then, the matter appearing in the list. The appellant is not represented nor any accommodation is prayed for on behalf of the appellant.

The appellate decree dated 20th June, 1997 affirming the decree of the trial court dated 30th May, 1991 is the subject matter of challenge in this second appeal in a suit for declaration that the impugned kobla as described in Ka/1 schedule of the plaint is a loan in substance and the principal defendant is the usufuctuary mortgagee before the trial court and a further prayer was made for redemption and accounting under section 38(1) of the Bengal Money Lenders Act and permanent injunction.

The plaint case, in brief is that in the RSROR the suit plot no. 430 measuring 42 decimals as described in the kha schedule of the plaint has been recorded in the name of the plaintiff as half share and defendant nos. 2 and 3 for the other half share but the same was not partitioned and the plaintiff filed a partition suit in respect of the suit in respect of the suit plot along with other non-suit ejmali property in the 2nd court of the ld. Asstt. District Judge, Midnapore bearing T.S. No. 46/1968. During the pendency of this partition suit the plaintiff required money for construction of pucca building in the month of Aswin, 1382 B.S. and proposed to defendant no.1 for taking loan for Rs.2000/-. The defendant no.1 was a money lender and still he is a money lender without licence. Previously, the plaintiff would borrow money time to time from the defendant no.1 and would repay the same with interest. But, this time he was agreed to give loan of Rs.2000/- on the basis of oral agreement held on 16th Aswin 1382 B.S. in presence of some persons.

On the basis of agreement the plaintiff executed a kobla in favour of defendant no.1 in respect of 21 decimal of his share in the suit plot on 6.10.75 showing Rs.2500/- as consideration money and he took loan of Rs.2000/- with interest at the rate of Rs.1% per and to repaid within Chaitra, 1384 B.S. and also agreed that defendant no.1 would possess the suit land in lieu interest and he will reconvey the suit land after repayment of loan with interest and he got the possession. The defendant no.1 in collusion with the scribe has mentioned in the impugned kobla the purpose of sale as for business purpose. It was also agreed that the cost of registration will be borne by the plaintiff and he has borne the same. At that time the market price of the suit land was R.3000/0. In the year 1976 the defendant no.1 prayed for addition of party under Order 1 Rule 10 C.P.C. in the partition suit at Midnapore in respect of the suit plot as purchasers of the suit land after expiry of the period of repayment admitting the existence of agreement and the plaintiff filed written objection against that petition denying the same and claimed that this is not an out and out sale and the defendant no.1 was added as defendant no.79 in that suit after hearing but the defendant no.1 did not file any written statement in that suit. In the last portion of Chaitra, 1384 B.S. and lastly in the month of Baishak, 1394 B.S. the plaintiff demanded for accounting and the defendant no.1 refused the same. Then, the plaintiff has filed this suit. Hence, the instant plaint case.

The defence case, in brief, is that the defendant no.1 is not a money lender and he had no such financial capacity to run that business. There was no oral agreement between the parties for the purpose of taking loan of Rs.2000/- and as security it was agreed to execute an ostensible sale deed showing consideration money of Rs.2500/-. After purchase the defendant got the possession and has been possessing the suit land since the and as no agreement was held, there is no question of usufructuary mortgage and the transaction is not a loan in substance. And no agreement for re-conveyance in favour of the plaintiff by the defendant no.1 was there. The suit land was sold at the actual market price.

In partition suit at Midnapore Court bearing T.S. No. 46/1968 filed by the plaintiff after purchase asked the defendant no.1 to file an application in that suit and he took the responsibility of filing the same and for that the defendant no.1 put L.T.I. on blank purpose and vokalatnama and at that time he gave the original deed to plaintiff and he did not return the same to the defendant no.1. The plaintiff filed a title suit in this court bearing No. 57/1982 against the defendant no.1 and other persons in respect of other non-suit land in that suit the plaintiff asked the defendant no.1 to file written statement in his favour but the defendant no.1 stated the truth and for this act the plaintiff being angry with the defendantno.1 stated the truth and for this act the plaintiff being angry with the defendant no.1 has filed this suit falsely. At the time of impugned kobla the plaintiff had business in 'Garan wook' at Geonkhali bazar and the defendant no.1 was an employee of the plaintiff and worked as labour for cultivation of plaintiff's land and at that time the plaintiff had about fifty bighas land and sold land to different person to reduce the landed property to avoid increase rent. Hence the instant defence case.

Both the parties adduced oral and documentary evidence. To determine whether the impugned transaction is an out and out sale or loan in substance, the real test is the intention of the parties together with the surrounding circumstances for which oral evidence can be let in, but subsequent conduct would be inadmissible in evidence. Whether the intention of the parties was to mortgage or to sell the following tests are to be applied:

i) the existence of a debt'

ii) the period of repayment – a short period being indicative of a sale and a long period of a mortgage;

iii) the continuance of the grantor in possession indicated a mortgage;

iv) a stipulation for interest on repayment indicates a mortgage;

v) a price below the true value indicates a mortgage.

The learned trial judge keeping in mind the aforesaid principles has reiterated in the case reported in AIR 1982 SC 57 and AIR 1984 Cal 130 scrutinized the pleadings and the business of the parties. PW-1 in his cross-examination has stated that he has no document to show that the defendant no.1 has money lending business nor he had seen any person taking loan from the defendant no.1. The defendant no.1 has 4/5 bighas of land except the suit land. He admitted to have taken loan twice from the defendant no.1 and he claimed to repay the loan from the month of Baisakh with interest. However, he could not produce any document to show that he had repaid any such loan. With regard to construction made in the property, the claim of the PW-1 in cross-examination has stated that he has sold away about 15/16 bighas of land out of 27/28 bighas of the ancestral land. It appears from the evidence that major portion of the fund for construction had come from the sale of the said property. The P.W-4 during his cross-examination has admitted that he could not say the source from which the plaintiff collected the monies for constructing the building started in 1378 B.S. The plaintiff appears to have purchased the stamp paper for the registration regarding the actual market price of the suit land at the time of the execution of the three deeds. P.W. 3 has deposed that the stated consideration of Rs.3000/- in respect of 12½ decimals and PW 1 had deposed in cross-examination that he has sold Aswini Bhowmik 8 kathas of land in lieu of Rs.2000/-. This 8 kathas is equal to 20 decimals.

From this evidence, the trial court has rightly come to the conclusion that the price is not low which completely destroyed the case of the plaintiff that it was in fact, a mortgaged. The appellate court in concurring with the decision of the trial court has taken into consideration the aforesaid evidence both oral and documentary and on re-appreciation of the evidence affirmed the order passed by the trial court.

The plaintiff also failed to establish the existence of any data or there was any relation of debtor and creditor between the parties.

On such consideration, we do not find any reason to admit the second appeal. The second appeal stands dismissed at the admission stage.

(Uday Kumar, J.) **(Soumen Sen, J.)**