IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.184 OF 1988

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned Addl. District Judge, Jeypore, in Title Appeal Nos.21 of 1986 & 12 of 1986 by confirming the judgment and decree passed by the learned Sub-Ordinate Judge, Gunupur. The other suit i.e. T.S. No.21 of 1982.

Kintali Biswanatham (Since Dead) through his LRs ::: ***Appellant***

-versus-

Manjit Kaur (Since Dead) through her LRs. And Others. ::: ***Respondents***

Appeared in this case by Hybrid Arrangement (virtual/physical mode)

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For Appellant ***::::*** M/s. N.C. Pati, B.K. Swain, B. Das, Advocate.

For Respondents - M/s. A. Pal & associates, Advocates.

CORAM:
MR. JUSTICE D.DASH

DATE OF HEARING::05.07.2022, DATE OF JUDGMENT:: 18.07.2022

The legal representatives of the original Appellant namely, Chintali Biswanathan in this Appeal under Section-100 of the Code of Civil Procedure (for short, 'the Code')have assailed the common judgment and decrees passed by the learned Additional District Judge, Jeypore in Title Appeal Nos. 21 of 1986 and Title Appeal No.12 of 1986.

One Smt. Manjit Kaur and her husband Jagjit Singh as the Plaintiffs had filed Title Suit No. 52 of 1982 against the sole Defendant namely, Chintali Biswanathan who is now represented by the legal representatives for redemption of mortgage, delivery of possession, direction for furnishing account and mesne profit.

Chintali Biswanathan arraigned as the sole Defendant in the above noted suit had filed Title Suit No.21 of 1982 for a decree of permanent injunction restraining the Plaintiffs in the above noted suit, namely, Smt. Manjit Kaur and Jagjit Singh arraigned as Defendants therein from interfering with his possession and enjoyment of the suit land. The learned Sub-Ordinate Judge, Gunupur dismissed the Title Suit No.54 of 1982 refusing to pass the decree for redemption of mortgage, delivery of possession etc. The other suit i.e. T.S. No.21 of 1982 being tried in the Court of Munsif, Gunupur was also dismissed. So, two Appeals under section-96 of the Code had been filed by the respective unsuccessful Plaintiffs and those were numbered as Title Appeal No.21 of 1986 (at the instance of these Respondents) and Title Appeal No.12 of 1986 (at the instance of the predecessors in interest of these Appellants).

The First Appellate Court has allowed the Title Appeal No.12 of 1986 by setting aside the judgment and decree passed by the learned

Sub-Ordinate Judge in Title Suit No.54 of 1982 and has passed a decree for redemption of mortgage on payment of Rs.6,000/- within three months directing the Defendants to deliver of possession of the suit land to the Plaintiffs with other stipulations. The Title Appeal No. 21 of 1986 has however been dismissed. Said dismissal of the Title Appeal No.21 of 1986 has however not been further challenged by carrying separate Second Appeal.

2. In the present Appeal, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to as per the position assigned to them in Title Suit No.54 of 1982, the suit seeking redemption of mortgaged, delivery of possession etc.

3. It is the Plaintiffs case in (Title Suit No.54 of 1982) that they borrowed sum of Rs.6,000/- from the Defendants and mortgaged the property under Khata No.131, Plot No.969 and 11/60 at Nuladola measuring an area of Ac.9.43 cents. On 29.10.1968 they executed deed of mortgage with a condition that if within three years i.e. by 29.10.1971, they clear up the amount, the Defendants would in re-convey the property in their favour. It is stated that despite several requests from the side of the Plaintiffs, the Defendants did not accept amount of Rs.6,000/- so offered and did not come forward to re-convey the property in their favour. It is further stated that on some pretext or other, the Defendants avoided to re-convey property to the Plaintiffs and deliver possession of the properties to them. Therefore, the suit for a decree of redemption of mortgage with other prayers was filed.

4. The Defendant in the written statement denied the said transaction to be of mortgage and asserted it to be sale out and out. Defendant claimed that Plaintiffs have sold the property to him for a consideration of Rs.6,000/- and has delivered possession of the same. According to him, that was the prevailing market price of the land.

The Defendant being the Plaintiff in the other suit (Title Suit No.21 of 1982) on the aforesaid basis sought for a decree for permanent injunction against the Plaintiffs arraigning them as the Defendants to restrain them from interfering with his possession of the suit land.

5. The Trial Court coming to answer the crucial issue as to the nature of transaction, held the said transaction to be an outright sale with a condition to repurchase and not a mortgage by conditional sale.

6. The First Appellate Court on going through the evidence on record in the backdrop of the rival pleadings and examining the recital of the most important document i.e. Ext.A, further keeping in view the position of law holding the field as declared in several decisions of the Apex Court as well as this Court has held that the transaction in question vide the document admitted in evidence and marked Ext.A is the mortgage by conditional sale and not a sale with condition to repurchase. With such finding, both the Appeals being disposed of; the same is now under challenge in this Second appeal.

7. The present Appeal has been admitted on the following substantial question of law:-

(i) Whether the transaction under the document Ext.A is a mortgage by conditional sale and not a sale out and out with condition to repurchase?

8. Learned Counsel for the Appellant submitted that the recitals of the documents, Ext. A being seen with the evidence on record, the finding of the First Appellate Court that it is a mortgage by conditional sale and not a sale out and out is wholly erroneous. He submitted that the First Appellate Court has not properly appreciated the evidence keeping in view the settled position of law in proper perspective in arriving at the above conclusion and as such the finding is unsustainable.

9. Learned Counsel for the Respondents supported the finding of the First Appellate Court. According to him, the First Appellate Court having made the right approach to the subject upon examination of all the relevant factual settings as emerging from the evidence has committed no mistake in passing the decree of redemption mortgage etc. in the suit filed by the Plaintiffs i.e. Title Suit No. 54 of 1982.

10. Keeping in view the submissions made, I have gone through the judgments passed by the Courts below. I have also read the pleadings and have travelled through the evidence on record both oral and documentary as let in.

11. The entire dispute revolves around whether the document dated 29.10.1968 is a document of conditional sale or a mortgage?

12. Before adverting to the nature and terms of the document, it is felt apposite to take note of the principles of law, Section 58(c) of the Transfer of Property Act, 1882 (for short, 'the T.P. Act') was amended in the year 1929 by introduction of a proviso that "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".

13. In ***Pandit Chunchun Jha v. Sheikh Ebadat Ali & Anr.*;**AIR 1954 SC 345 the Plaintiff's suit for redemption was dismissed by the High Court but Appeal allowed by THE Hon'ble Apex Court construing the deed as mortgage. The question answered was whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase. It was held that 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 were indicated. The Hon'ble Court found that the document had no clause for retransfer and instead says (clause 6) that if the executants pay the money within two years, the property shall come in exclusive possession and occupation with the transferors. The document had no clause for retransfer. In these circumstances, the Apex Court held as under:-

> "12. The next step is to see whether the document is covered by Section 58(c) of the Transfer of Property Act, for, if it is not, then it cannot be a mortgage by conditional sale. The first point there is to see whether there is an "ostensible sale". That means a transaction which takes the outward form of a sale, for the essence of a mortgage by conditional sale is that though in substance it is a mortgage it is couched in the form of a sale with certain conditions attached. The executants clearly purported to sell the property in clause (5) because they say so, therefore, if the transaction is not in substance a mortgage, it is unquestionably a sale: an actual sale and not merely an ostensible one. But if it is a mortgage, then the condition about an "ostensible sale" is fulfilled.
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> 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).
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> 20. …………It is true this can also be read the other way but considering these very drastic provisions as also the threat of a criminal prosecution in sub-clause (a), we think the transferee was out to exact more than his pound of flesh from the unfortunate rustics with whom he was dealing and that he would not have agreed to account for the profits: indeed that is his own case, for he says that this was a sale out and out. In these circumstances, there would be no need to keep a reasonable margin between the debt and the value of the property as it ordinarily done in the case of a mortgage. Taking everything into consideration, we are of opinion that the deed is a mortgage by conditional sale under Section 58 (c) of the Transfer of Property Act."

14. In case of ***Shri Bhaskar Waman Joshi** v.* ***Shri Narayan Rambilas Agarwal;*** AIR 1960 SC 301, the Hon'ble Apex Court, a Bench of this Court has upheld the right of redemption. The argument advanced by the transferor that the property transferred was intended to be mortgage under a deed of conditional sale, was countered by the transferees in saying that the deed was absolute sale and that the conveyance was subject to a condition of repurchase. It was, inter alia, held that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which affects or purports to affect the sale. It was held that the 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. The Court held as under:-

> "7. …………….. 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.
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> …………………… The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. It there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the

covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.

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13. Counsel for the transferees sought to rely upon the evidence of subsequent conduct of the transferors as indicative of the character of the transaction as a sale, but as already observed, that evidence is inadmissible."

15. In another judgment reported as ***P.L. Bapuswami** v. **N. Pattay Gounder***; AIR 1966 SC 902, the Cart this Court decreed the suit for redemption though the same was dismissed by the High Court. The High Court held that the transaction was an outright sale and not a mortgage by conditional sale. The alternative plea based on the covenant for re-conveyance, the High Court considered that there was no proof that the plaintiff had tendered the amount within the period stipulated in the document. In appeal, the Hon'ble Apex Court held that the distinction between the conditional sale and mortgage is the relationship of debtor and creditor and the transfer being a security for the debt. The Court held as under:-

"5. …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 property within the period specified. The distinction between 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 question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the document viewed, in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts…"

16. In the backdrop of the above setout principles in the judgments referred to above, now let us examine the facts and circumstances of present case. The deed in question is Ext. A=Ext.3.

On 29.10.1968, the Plaintiffs had executed the document in question which has been admitted in evidence and marked Ext.A, on being produced by the Defendant and its certified copy has been proved by the Plaintiffs as Ext.3. The question is whether it is a mortgage by conditional sale or outright sale with a condition to repurchase. The document has been titled as a 'କଣ୍ଟି କ୍ରୟ୍ କବଲା ମିଆଦ ତିନି ବର୍ଷ" (Kanta Miada Bikraya Kabala Miada-Tini Barsa) meaning 'sale with a clog, the term being three years'. The condition imposed therein is that the Defendant shall enjoy the property and if the Plaintiffs would pay

Rs.6,000/- by the sunset of 29.10.1971, the Defendant shall return back the property and reconvey the properties in their favour with the delivery of possession of the land to the Plaintiffs and in default of payment of Rs.6,000/- by 29.10.1971, the Defendant shall continue as the title holder and pay rent etc. in the office of the Zamindar.

17. A perusal of the aforesaid document would show that:-

(i) the Plaintiffs have borrowed a sum of Rs.6,000/- from the Defendant in respect of the land which was in his possession;

(ii) The possession of land was handed over to the Defendant on the condition that the possession will be given back to him within three years from the date of conditional sale deed;

(iii) The Defendant is bound to retransfer the land to the Plaintiffs when they repay the amount of Rs.6,000/-; and.

(iv) If the amount is not paid within the stipulated period, the sale deed may be taken as a permanent one.

18. The document being read shows that a sum of Rs.6,000/- was taken as a loan from the Defendant to meet urgent expenses. The same was to be returned and in that event the Defendant was bound to retransfer the land. It was the further condition that if the Plaintiffs are not able to pay the loan amount within three years, the document will be taken as a permanent sale deed which is the contentious clause between the parties.

19. In view of the judgments cited above, the intention of the parties has to be seen when the document is executed. It here stands undisputed that the condition of retransfer is a part of the same document (Ext.

A=Ext. 3). Such is the condition inserted by an amendment in the year 1929 as expressed by the proviso of Section 58(c) of the T.P. Act. As held in ***Pandit Chunchun Jha(supra)***, a transaction which takes the outward form of a sale but in essence the document is of a mortgage, though it is couched in the form of a sale. The Hon'ble Apex Court has held that it is impossible to compare one case with another. Each case must be decided on its own factual settings. The document has to be read as a whole and if any word is ambiguous, then the Court would have to find out the intention of the parties when such document was executed.

20. At the cost of repeatation, adverting to the given case, a reading of the document itself would show that the document was executed for the reason that the Plaintiffs have borrowed a sum of Rs.6,000/- to meet urgent expenses and the Defendant is bound to retransfer the land if the amount is paid within three years. The advance of loan and return thereof are part of the same document which creates a relationship of debtor and creditor. Thus, it wholly stand covered by proviso in Section 58(c) of the T.P. Act. At this stage, some other judgments of the Hon'ble Apex Court interpreting the proviso in Section 58(c) of the Act also be placed.

21. The Hon'ble Apex Court in ***Umabai & Anr.*** *v.* ***Nilkanth Dhondiba Chavan (Dead) by LRs & Anr***.;(2005) 6 SCC 243 had the occasion to examine contemporaneous documents executed on 30.12.1970 whereby the plaintiff had agreed to sell the property for consideration of Rs.45,000/-. A sale deed was executed as well. Another agreement to sale was executed between the parties on the same date where the defendants agreed to reconvey the property on receipt of Rs.45,000/-. It was, thus, held that the benefit of Section 58(c) of the T.P. Act would not be available to the plaintiff as the document of reconveying the property was not part of the same document. It was held:-

> "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 Section58(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. ………………".

But facts of our case are distinguishable on material particulars.

22. In ***Tulsi & Ors. v. Chandrika Prasad & Ors***.; (5006) SCC 322; the Hon'ble Apex Court held that a distinction exists between a mortgage by way of conditional sale and a sale with condition to repurchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter, the transaction does not evidence an arrangement of lending and borrowing, thus, right to redeem is not reserved. The circumstances which weighed with the High Court holding are that the transaction in question was mortgaged by way of sale, it reads thus:-

> "9. The following circumstances weighed with the learned trial court as well as the High Court in arriving at the finding that the transaction in question was a mortgage by way of a conditional sale:
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> (i) The husband of Appellant 1 was a tenant in respect of the property and he continued to occupy the same in the same capacity.
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> (ii) The appellants bore the costs of stamp duty which is not the normal practice in a case of absolute sale.
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> (iii) The transaction essentially was a Baibulwafa viz. mortgage by conditional sale.
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> (iv) The land was required to be kept in the existing condition.
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> (v) The transferor had an option to repay the entire consideration in one instalment whereupon a deed of reconveyance was to be executed by the transferor in her favour. For the said purpose a specific date was fixed viz. 30-12-1971 and on obtaining such amount the transferee was to restore possession of the land to the plaintiff and only in the event of default on her part to repay the same was the sale to become absolute and perfect.
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> (vi) In the margin of the deed, the transferor categorically stated that he had executed a deed of Baibulwafa in respect of two parts of the shop.
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> (vii) The amount has been received by the transferor in the presence of the husband of the transferee."

In view of the factors mentioned in above, the defendants appeal was dismissed and, the decree for redemption was maintained.

23. In ***Vithal Tukaram Kadam & Anr. v. Vamanrao Sawalaram Bhosale & Ors***.;(2018) 11 SCC 172, the suit for redemption was decreed by setting aside the judgment of the High Court. It was held that:-

> "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 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".

24. In ***Ganpati Babji Alamwar (Dead) by LRs Ramlu & Ors. v. Digambarrao Venkatrao Bhadke & Ors***.; (2019) 8 SCC 651, the decree in a suit for redemption was maintained by the High Court. The Court held as under:-

> "10. Whether an agreement is a mortgage by conditional sale or sale with an option for repurchase is a vexed question to be considered in the facts of each case. The essentials of an agreement, to qualify as a mortgage by conditional sale, can succinctly be 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 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. The language used in the agreement may not always be conclusive."

25. In case of ***Dharmaji Shankar Shinde & Ors. v. Rajaram Shripad Joshi (Dead) through LRs & Ors***.;(2019) 8 SCC 401, the defendants appeal was allowed by the Hon'ble Apex Court and the suit for redemption was dismissed. It was, inter alia, held that if the sale and agreement to repurchase are embodied in 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 held good. The Court held as under:-

"22. ………………. Considering the contemporaneous conduct of the parties, it is clear that Shankar Shinde and thereafter the appellants were dealing with the suit property as if they were the owners of the land. The clause in Ext. P-73 that if the amount is not paid within a period of five years, the transaction will become a permanent sale deed and thereafter, the transferee will have the absolute right over the property are consistent with the express intention of parties making the transaction a conditional sale with option to repurchase."

The facts of the above cited case have no similarity with our given facts and circumstances as obtained in evidence.

26. Here the document contains a clause which keeps flow of title from the hands of the executants to the hands of the of the recipient burdened thereunder to reconvey property in question within three years at the same value. The area of the land is quite huge, which comes to Ac.9.43 cents and the valuation given is sum Rs.6,000/- which is said to be the borrowed money and whose valuation as per the evidence of witness of the Plaintiff during the suit was Rs.80,000/- and at the time of mortgage, Rs.30,000/-. The Defendant having taken steps to mutate the suit land in his name has failed. The First Appellate Court on detail analysis of evidence and making a comparative study of the consideration involved in other transactions of the land in the area appears to have rightly arrived at, taken a view of the valuation of the land in question as on the date of transaction was at the minimum of Rs.20,000/- and to differ with that, this Court finds no such infirmity much less to say perversity.

27. ***Sopan (Dead) through his LR v. Syed Nabi;*** (2019) 7 SCC 635, was a case where the registered sale deed was executed on 10.12.1968 and on the same date, a separate agreement was executed whereby the Plaintiffs have agreed to repay the amount and secure reconveyance of the property. Since the two separate documents were executed, it was found that it is not a document of mortgage but of conditional sale which is not covered by the proviso to Section 58(c) of the T.P. Act.

28. The said judgment does not help the Defendant, as the document in the present case clearly stipulates that the amount of Rs.6000/- was borrowed by the Plaintiffs and on return of same amount, a mandate to Defendant No. 1 to execute reconveyance of suit land was asked for which was refused by Defendant no.1.

29. In the wake of aforesaid discussion, this Court answers the substantial question of law in the affirmative that the transactions under the document Ext.A=Ext.3 is a mortgage by conditional sale and not outright sale with condition to repurchase. Thus, I find that the judgment of the First Appellate Court accepting the Appeal of the Plaintiffs and decreeing their suit for redemption with other reliefs with all the stipulations has to stand.

30. Resultantly, the Appeal stands dismissed with cost all throughout.

(D. Dash),
Judge.

Narayan