

IN THE HIGH COURT OF ORISSA AT CUTTACK

S.A. NO.116 OF 2002

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 Additional District Judge (First Track Court-2), Bhubaneswar, in Title Appeal No.26/16 of 2000-2001 setting aside the judgment and decree passed by the learned Civil Judge (Junior Division) Bhubaneswar, in Title Suit No.195 of 1998.

Lala Prahalad Lala (Since Dead) Appellant.

-versus-

Sk. Tajmul Hossein and Others Respondents.

(Appeared in this case by Hybrid Arrangement (Virtual/ Physical) Mode):

For Appellant - M/s.S.K. Dash, Sr. Advocate,
S.Dash, D. Priyanka, S. Kar,
Advocates.
M/s. S.P. Misra, Sr. Advocate
S.K.Mishra, S. Modi,
S.K. Sahoo, B. Mohapatra,
B.S. Panigrahi, S. Mishra,
Advocates.
M/s. B.P. Mohapatra,
Miss A. Dhalasamanta,
Advocates

For Respondents - M/s.Akhil Mohapatra,
Sr. Advocate.
G. Mukherji, Sr. Advocate.
B. Mallik, R.C. Sahoo,
P. Mukherji, S.R. Patra,
S. Patnaik, Advocates.
M/s. J.K. Patra, A. Pradhan,
A. Panda, Advocates.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::14.02.2022, DATE OF JUDGMENT::16.03.2022

The Appellant by filing this Appeal under Section 100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the

judgment and decree passed by the learned Additional District Judge (First Track Court-2), Bhubaneswar in Title Appeal No.26/16 of 2000/2001.

By the same, the judgment and decree passed by the learned Civil Judge (Junior Division), Bhubaneswar in Title Suit No.195 of 1998 have been set aside.

The Appellant as the Plaintiff had filed the suit for declaration that the Defendant had no right, title and interest over the suit land described in Schedule-‘B’ of the plaint with further prayer of recovery of the property described in Schedule-A and A-1 which are part of Schedule-‘B’ property.

The suit having been decreed, the Defendant being aggrieved by the same, filed the Appeal under Section-96 of the Code. The Appeal being allowed, the judgment and decree passed by the Trial Court have been set aside and the Plaintiff has thus been non-suited.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The Plaintiff’s case is that he and his three sons are the owners of the suit land described under Schedule-C of the plaint. Their name finds so recorded in the records of 1965 settlement in respect of three plots in total measuring Ac.0.235 decimals. They have their residential house

with the backyard on two plots. They have constructed some houses over the three plots in order to rent out. It is stated that Defendant is residing as the tenant over an area Ac.0.19 decimals out of Ac.0.50 decimals under Plot No.108 as shown in Schedule-A and has been paying rent to the Joint Hindu family of the Plaintiff.

Lala Jagannath and Lala Jaman being in need had borrowed a sum of Rs.1,200/- (Rupees one thousand two hundred) from the Defendant. For the purpose, they had executed the deed mortgage with conditional sale in respect of Schedule-B land. There was no prior partition of the joint family property and therefore, there was no delivery of possession of Schedule-B property pursuant to the said transaction. It is stated that before expiry of the mortgage period of two years, the Plaintiff on 25.03.1975 returned the mortgage money of Rs.1,200/- to the Defendant through his brother. The redemption was endorsed by the Defendant on the back page of the deed and then the Defendant returned the original deed of mortgage to the Plaintiff and his brother. After that the Defendant however continued to remain as a tenant in so far as Schedule-A property is concerned. The Plaintiff who having the ownership as of his 1/4th share became full owner of the suit land described in Schedule-C when the other co-owners alienated their 3/4th share to him by registered sale-deed dated 27.06.1977. The property described in Schedule-A & B of the plaint are part of the

Schedule-C property. The Plaintiff has made repair work in the house standing on the western portion of the land under Plot No.108 from which the tenant was evicted through Court. One P. Keshav Rao who is the tenant in the room on the western portion of Plot No.108, vacated his house on 25.05.1998, which the Plaintiff kept under lock and key. It is stated that when he had been to Vishakhapatnam with his family to attend the marriage function, the Defendant forcibly occupied the said house and did not vacate despite demand. Sometime in the month of December, 1997, the Plaintiff requested the Defendant to vacate the suit house as it was badly needed for repair and his personal use thereafter. The Defendant then stopped paying monthly rent to the Plaintiff and advanced claim of his right, title, and interest over the same by virtue of the mortgage deed dated 17.06.1974. The Plaintiff terminated the tenancy, serving notice under section-106 of the Transfer of Property Act, 1882 (for short, the 'TP Act')

It is further stated that the Plaintiff is in peaceful possession over the Schedule land and Defendant is a tenant having no right, title and interest over the property described in Schedule-B.

4. The Defendant entering appearance contested the suit, disowned the relationship of the landlord and tenant as pleaded by the Plaintiff. It is described that he has been possessing the portion of the house from 17.06.1974 on the strength of conditional mortgage deed executed by

the Lala Jagannath and Lala Jaman being so delivered with the physical possession of the land measuring Ac.0.117.1/2 decimals. It is stated that there was no redemption of the mortgage by payment of Rs.1,200/- and there was no instrument of re-conveyance. He alleged that the Plaintiff stealthily took away the original mortgage deed and claiming title over the said property without any basis. The Defendant asserted to have never handed over the possession of the land under mortgage deed. In this way, the Defendant claims to have been in possession of the said land for more than 12 years.

5. The Trial Court on the above rival pleadings framed as many as eight issues.

First coming to answer issue no.5 as to the relationship of landlord and tenant between the Plaintiff and Defendant as pleaded and upon examination of evidence on their assessment, answer has been recorded that the Defendant was a tenant under the Plaintiff's joint family property.

Next proceeding to answer issue no.6 as to the claim of right, title and interest as advanced by the Defendant on the strength of the registered deed of mortgage (Ext.2); taking into consideration the oral evidence let in by the parties and on through the documents mainly Ext.2 and other related documents, the answer has been recorded against the case/ claim of the defendant.

6. Above answers have led the Trial Court to decree the suit by the following order:-

ORDER

“The suit is decreed on contest against the Defendant, but without cost. It is hereby declared that the Defendant has no right, title interest over the Schedule-B land as per the mortgage deed executed on 17.6.74. The defendant is hereby directed to handover the vacant possession of the suit house as per the Schedule-A and Schedule-A/1 to the Plaintiff within three months hence, failing which, the Plaintiff shall be at liberty to recover the same through process of law.”

7. The Defendant being aggrieved by the same having filed the First Appeal has been successful in non-suiting the Plaintiff. The Appellate Court has first of all taken the view that the disputed endorsement Ext.2/a which purports to extinguish the mortgage since has not been registered, the redemption is invalid. It has next said that the Defendant has come to possess the suit property by virtue of the deed of mortgage and not as a tenant.

Having concluded as above, the suit filed by the plaintiff has been dismissed.

8. The Appeal by order dated 02.02.2009 has been admitted on the following substantial question of law:-

“(a) Whether the mortgage created by the Plaintiff in favour of the Defendant over a portion of the suit property can be treated to be redeemed without

execution and registration of a deed of re-conveyance
as contemplated under the mortgage deed?

9. Learned Counsel for the Appellant inviting the attention of the Court to Ext. 2/a, the endorsement at the back of the document submitted that the entire mortgage money here has been repaid within a period of two years and as endorsed by the Defendant, there being acknowledgement of the receipt of the mortgage money by him and return of the original document to the Plaintiff, the same has been produced and proved. He submitted that when the Defendant has said that the deed had been stealthily taken away from him, he has utterly failed to prove the same by leading acceptable evidence. He therefore submitted that the First Appellate Court having not taken all the above aspects into consideration, has taken the views which are wholly contrary to law. According to him, the First Appellate proceeded to decide the dispute without keeping in view the law holding the field. It was submitted that in view of the evidence on record, the deed of mortgage Ext.2 having spent all its legal force on repayment of the mortgage money much ahead of the period fixed, the Trial Court had rightly granted the reliefs to the Plaintiff as prayed for. He further submitted that even if it is said that the Plaintiff and Defendant had no such relationship of landlord and tenant; the Defendant's having no right

to possess the suit land when undisputedly the title of the suit land rests with the Plaintiff; the reliefs as prayed for are to be allowed.

10. Learned Counsel for the Respondent submitted all in favour of the views taken by the First Appellate Court. He submitted that the First Appellate Court has rightly taken the view that the endorsement Ext.2/a is not to be taken cognizance of as the same is not in accordance with law and that should have been by a separate registered instrument.

11. In order to find out the answer to the substantial question of law first of all the contents of the document in question, Ext.2 are to be gone through. The document contains the recital to the effect that the money had been lent/ advanced as against the mortgage of Schedule-B property and the money if not paid within a period of two years; the transaction would be treated as that of sale. So, when the deed/ transaction is a mortgage with a conditional sale and not a sale with the condition to repurchase; here the execution and registration of any conveyance by the mortgager do not stand as the legal need.

The endorsement on the back of the document Ext.2/a and 2/b reveal that the entire money has been repaid well within the stipulated period of two years and that has been so endorsed by the Defendant himself. So, the contingency that it would amount to sale if the Plaintiff does not pay within the time stipulated even had not by then arisen. The original document i.e. Ext.2 has been so produced and proved by the

Plaintiff, which he says to have been returned to him by the Defendant. The date of execution of the document being on 17.06.1974, as against the period allowed for repayment by two years, the mortgage money has been repaid on 25.03.1975.

12. Chapter-IV of the T.P. Act provides the heading “of Mortgage of Immovable Property and Charges”. Section-58 of the said Act defines ‘Mortgage’, ‘Mortgager’, ‘Mortgagee’, ‘Mortgage money’ and ‘Mortgage deed’. Clause-(c) of said section is relevant for our case since it deals with Mortgage by Conditional Sale. It reads as under:-

“Section-58 (c) Mortgage by condition 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 mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.”

13. Section-60 of the Act provides the right of mortgagor to redeem. It says that in the event, the mortgage-money is paid by the mortgagor, the mortgagee is under obligation to (a) deliver the mortgage deed and all documents relating to the mortgaged property which are in possession or power of the mortgagee (b) where the mortgagee is in

possession of the mortgaged property and at the cost of mortgagor, either to retransfer the mortgaged property to him or to such third person as he may direct; or to execute and (where the mortgage has been effected by registered instrument to have registered acknowledgement in writing that any right in redemption of his interest transferred to the mortgagee has been extinguished; with the rider that the right so conferred by the provision of section-60 of the Act has not been extinguished by the act of the parties or by decree of a Court.

14. In our given case, there has been an endorsement with regard to the receipt of entire mortgage-money and return of original document in evidencing the payment of the mortgage money from the side of the mortgagor to the mortgagee. But as there is no separate deed/ document to that effect, the First Appellate Court has said that the recital of the mortgage deed when states that on payment of mortgage money, the defendant shall execute the deed of re-conveyance as required under section-60 (a) of the T.P. Act, the mortgagee was required to execute such deed of re-conveyance, and therefore non-execution of re-conveyance document creates doubt over the alleged redemption of the mortgage. This has already been answered as not the legal need. Secondly, it has been said that the endorsement Ext.2/a is a case of receipt of money which extinguishes the mortgage, it would not fall within the ambit of section-17(2)(ix) of the Indian Registration Act,

1908 (for short I.R. Act) as not required to be registered and the same thus having not been registered, the purported redemption is invalid.

15. The mortgage in the given case squarely comes under the ambit of section-58(c) of the T.P. Act. The provision of section-17(2)(xi) of the Indian Registration Act refers to the documents which do not require registration. It runs as follows:-

“any endorsement on a mortgage deed acknowledging the payment of whole or any part of mortgage money and any other receipt for payment of money due under a mortgage when receipt does not purport to extinguish the mortgage.”

On the face of the above, the view taken by the First Appellate Court that the endorsement Ext.2/a which purports to extinguish the mortgage being not registered, the redemption is invalid is not sustainable. The endorsement in this case when concerns with the acknowledgement of the payment of the mortgage money by the Plaintiff to the Defendant in citing that as the reason/circumstance for return of the original deed of mortgage, it is not understood for a moment as to how the First Appellate Court has gone to express the view that it was required to be registered. The same in my opinion runs contrary to the provisions of section-60 of the T.P. Act and is untenable. So, the answer to the substantial question of law stands returned in favour of upsetting said finding of the First Appellate Court standing against the Plaintiff. In view of the above, the mortgage having stood

discharged, the Defendant being under legal obligation to deliver the possession of the mortgaged property to the Plaintiff has thus, no more the right to possess the same. In that view of the matter, the Plaintiff being the right, title and interest holder of the suit land is entitled to a decree of recovery of possession of the suit property from the Defendant.

For all these aforesaid, the substantial question of law is answered in favour of the restoration of the judgment and decree passed by the Trial Court in decreeing the suit of the Plaintiff granting the reliefs as aforestated.

16. In the result, the Appeal stands allowed. The judgment and decree passed by the first Appellate Court are hereby set aside and those passed in Title Suit No.195 of 1998 are hereby restored.

The Defendant is hereby directed to leave the vacant possession of the suit property on or before 31st August, 2022 failing which the plaintiff would be at liberty to execute the decree for obtaining the possession of the suit property.

**(D. Dash),
Judge.**

Narayan