

**IN THE HIGH COURT AT CALCUTTA**  
(CIVIL APPELLATE JURISDICTION)

PRESENT:

**THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY**

**S.A. 185 of 2019**

***NIRUPAMA KUNTI***  
**VS.**  
***MAYA RANI SAMNATA***

|                      |                                                                                                                                                                                   |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Appellant    | : Mr. Animesh Paul, Adv.<br>Ms. Haardikaa Rajdav, Adv.                                                                                                                            |
| For the Respondent   | : Mr. Joyjit Roychowdhury, Adv.<br>Mr. Subhendu Bhattacharjee, Adv.<br>Mr. Sk. Abu Jafor, Adv.<br>Mr. Mashikul Shaikh, Adv.<br>Ms. Dipanita Laha, Adv.<br>Ms. Rupanita Laha, Adv. |
| Hearing concluded on | : 18 <sup>th</sup> July, 2023                                                                                                                                                     |
| Judgement on         | : 1 <sup>st</sup> August, 2023                                                                                                                                                    |

**Siddhartha Roy Chowdhury, J.:**

1. Challenge in this appeal is to the judgement and decree passed by learned Additional District and Sessions Judge, 3<sup>rd</sup> Court, Howrah in Title Appeal No. 100 of 2016, reversing thereby the judgement and decree passed by learned Trial Court on 30<sup>th</sup> April, 2011 in Title Suit No. 19 of 2008.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, depicting herself as the owner of the property the plaintiff filed a suit for eviction of defendant contending, *inter alia*, that Maya Rani Samanta, the defendant herein, purchased the property in

suit from Md. Masum Mallick in the year 1984. While possessing the property by mutating her name and by constructing one RTO shed covering the suit property where she used to run work shop, Maya Rani Samanta on 24<sup>th</sup> May, 2001 sold and transferred the said property to the plaintiff by executing a deed which was registered on 25<sup>th</sup> May, 2001. The defendant however, approached the plaintiff to allow her to continue with the possession as she had to run the work shop and accordingly the plaintiff granted leave and licence to the defendant till 30<sup>th</sup> Chaitra, 1409 B.S. Licence was extended further till 30<sup>th</sup> Pous, 1414 B.S. Thereafter, the plaintiff refused to extend the licence further and filed the suit for eviction of the defendant after the defendant failed to act in terms of the notice terminating the licence.

4. The defendant contested the suit by filing written statement denying all material allegations.
5. It is the specific case of the defendant that she is owner of the suit property and not a licensee. She was in need of money and for that purpose she requested the plaintiff to lend a sum of Rs. 67,000/-; the plaintiff agreed to accommodate the defendant subject to the execution of an agreement, which is why the defendant on good faith executed the document on 25<sup>th</sup> May, 2001, and it was duly registered. When the plaintiff subsequently started claiming ownership over the property, local people intervened and the plaintiff agreed to re-conveyance the property in suit upon payment of Rs. 1,10,000/-. On 14<sup>th</sup> September, 2001, the agreement was executed. The defendant paid a sum of Rs. 60,000/- thereafter a sum of Rs. 30,000/- and subsequently she paid the remaining sum of Rs. 20,000/- but no receipt was granted by the

plaintiff. The defendant made a counter claim seeking declaration that the transaction was not out and out sale, it was loan in substance; the defendant sought for direction upon the defendant to the counter claim (plaintiff of the suit) to execute the deed of re-conveyance. The plaintiff to the suit filed a written statement to that counter claim.

6. Learned Trial Court upon considering the pleadings of the parties framed issues. Considering the evidence alleged by the parties both oral and documentary, learned Trial Court was pleased to grant the decree in favour of the plaintiff for eviction and recovery of *Khas* possession. The counter claim stood dismissed. The defendant was directed to quit and vacate the suit property and to deliver peaceful possession of the same to the plaintiff.
7. Aggrieved by the said judgement and decree the defendant Maya Rani Samanta preferred an appeal before the learned District Judge, Howrah which was transferred to the Court of learned Additional District and Sessions Judge, 3<sup>rd</sup> Court, Howrah. Learned lower Appellate Court was pleased to allow the appeal and was pleased to send the case record on remand to the learned Trial Court for proper framing of issues in respect of counter claim filed by the defendant and to dispose of the suit if necessary after granting liberty to the parties to adduce evidence.
8. Aggrieved by the said judgement of learned First Appellate Court the second appeal has been preferred by the plaintiff.
9. Assailing the impugned order Mr. Animesh Paul, learned Counsel for the plaintiff (appellant) submits that learned First Appellate Court failed to appreciate the evidence on record and passed the impugned judgement upon absolute misreading of evidence. It is contended that

learned First Appellate Court had no reason to direct the learned Trial Court to re-write the judgement after giving opportunity to the parties to adduce evidence particularly when adequate evidence was there on record. Learned First Appellate Court failed to appreciate the fact that the defendant did not challenge the order dismissing the counter claim. When the defendant accepted the verdict of learned Trial Court on the counter claim, the learned First Appellate Court had no plausible reason to set aside the judgement impugned. It is contended by learned Counsel for the plaintiff that the document Exhibit-1 is absolutely eloquent about the right title interest of the plaintiff in respect of the suit property which she acquired by purchase from the defendant at a consideration of Rs. 67,000/-. There is no whisper in the deed to demonstrate that it was by conditional sale. The deed was executed on 24<sup>th</sup> May, 2001, the plaintiff thereafter, mutated her name as it would appear from Exhibit-3, the record of right. The issue has been reached its finality and cannot be re-opened.

10. Learned Counsel for the respondent Mr. Jayjit Roychowdhury submits that the rules or procedures are handmaid of justice. The object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily deny the opportunity of participating in the process of justice dispensation.
11. In support of his contention learned Counsel relied upon the judgement of Hon'ble Supreme Court in the case of **RANI KUSUM (SMT) VVS. KANCHAN DEVI (SMT) & ORS.** reported in **(2005) 6 SCC 705** wherein it is held :-

*“All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.”*

12. It is further submitted that in absence of any separate judgement, when the defendant took out an appeal challenging the judgement and decree of the learned Trial Court the same may be considered to be an appeal challenging the finding of learned Trial Court while disposing of the counter claim as well. No separate judgement was pronounced. Therefore, the issue has not been set at rest to invoke the provision of Section 11 of the Code of Civil Procedure.
13. It is further submitted by Mr. Roychowdhury, learned Counsel for the defendant (respondent) that single appeal should be held to be maintainable against the decree by the learned Trial Court where learned Trial Court decided the counter claim of the defendant. In support of his contention Mr. Roychowdhury placed his reliance upon the judgement of Hon’ble High Court of Rajasthan in **Smt. Iqbal & Ors. vs. Ramesh & Ors.** reported in **2018 Supreme (Raj) 870**.
14. It is contended further, the document containing the signature of plaintiff, Exhibit-A demonstrates the fact that the plaintiff got the deed executed by the defendant and the defendant did not carry her mind,

while putting her signature. She was driven by the need of money as loan.

15. Undoubtedly the plaintiff, Nirupama Kunti admitted her signature on a stamp paper which is marked as Exhibit-A and content has not been proved. Mere signature, Exhibit-A on a stamp paper, *inter alia*, acknowledging payment of Rs. 90,000/- out of Rs. 1,10,000/- on 14<sup>th</sup> September, 2003, by no stretch of imagination can be said to be a document indicating that Maya Rani Samanta, the defendant actually did not transfer the property by sale. The recital of the deed unerringly indicates that the property was transferred by the vendor Maya Rani Samanta to Nirupama Kunti. The signature Exhibit-A cannot give any meaning to the words used in the deed in question Exhibit-1.
16. The document Exhibit-1 is the manifestation of transfer of title in favour of the plaintiff purchaser. The question whether given transaction is a mortgage by conditional sale or a sale outright is to be gathered from the language used in the document itself. The real question would be the legal effect of the words used in the documents and not the intention of the parties. In this regard, we can profitably use the decision of Hon'ble Supreme Court pronounced in the case of **PANDIT CHUNCHUN JHA VS. SHEIKH EBADAT ALI & ANR.** reported in **AIR 1954 SC 345** wherein it is held :-

*“6. The first is that the intention of the parties is the determining factor: see Balkishen Das V. Legge (1). 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.”*

17. Section 58 (c) of the Transfer of Property Act enunciates :-

*“Section 58(c) in The Transfer of Property Act, 1882*

*(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 mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: 1[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.]”*

18. The language of Section 58 (c) of the Transfer of Property Act is loud and clear that no transaction shall be deemed to be a mortgage unless the condition is laid down in the document which effects or purports to affect the sale. Here the defendant is relying upon the acknowledgement of payment of money which was not a document contemporaneous to the document Exhibit-1. The defendant had the onus to prove the document that contains Exhibit-A but the said document has not been proved according to law. The plaintiff, however, by oral and documentary evidence has proved her title in respect of property in suit.

19. Admittedly the defendant is in possession of the property and she has transferred her right title interest over the same by executing the

deed Exhibit-1. Therefore, she cannot claim to have been possessing the property as owner, on the contrary the claim of the plaintiff that she allowed the defendant to remain in possession of the property for a certain period sounds probable. The licence since has been revoked, the defendant cannot assert her right to continue with her possession. The judgement impugned is bad in law, if not perverse and should not be allowed to remain in force.

20. That apart, by not preferring any appeal against the observation of learned Trial Court on the counter claim, the defendant by necessary implication has accepted the same and it cannot be reopened in the second appeal being barred by the principle of res-judicata. In this regard, we can rely upon the judgement of Hon'ble Apex Court pronounced in the case of **RAJNI RANI & ANR. VS. KHAIRATILAL & ORS.** reported in **(2015) 2 SCC 682** wherein it is held :-

*“12. From the aforesaid enunciation of law, it is manifest that when there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, as has been narrated earlier, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 of C.P.C. The claim of the defendants has been negatived. In Jag Mohan Chawla and Another v. Dera Radha Swami Satsang<sup>4</sup> dealing with the concept of counter-claim, the Court has opined thus: (SCC p. 703, para5)*

*“5... is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding*

*and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.”*

*13. Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. ....”*

21. In **HARBANS SINGH & ORS. VS. SANT HARI SINGH & ORS.**

reported in **(2009) 2 SCC 526**, the Hon’ble Apex Court held :-

*“16.The principle of res judicata in the aforementioned fact situation, in our opinion, has rightly been applied by the High Court.*

*17. Section 11 of the Code of Civil Procedure reads thus:*

*"Section 11 - Res judicata.-- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*

18. *In Premier Tyres Limited vs. Kerala State Road Transport Corporation* (SCC pp. 148-49, paras 4-5)

*"4...The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non-filing of appeal against a judgment or decree is that it becomes final. This finality can be taken away only in accordance with law. Same consequences follow when a judgment or decree in a connected suit is not appealed from."*

22. Section 11 of the Civil Procedure Code says :-

*"Section 11 - Res judicata.-- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."*

The expression unless compelled by cause and specific language of the statute is the key expression which cannot be ignored.

23. In *Smt. Iqbal (supra)* it is held :-

*"In view of the above express provision contained in Order XX Rue 19 (2) CPC, there is no substance in the submissions made by learned counsel for the respondent, therefore, the objection raised in this regard is rejected. Single appeal is held as maintainable against the decree passed by the trial court, wherein, the suit has been dismissed and counter claim has been accepted."*

This judgement was pronounced keeping in mind the provision of Order 19 Sub-Rule 2 of the Code of Civil Procedure :-

*“Order 19 Rule 2. Power to order attendance of deponent for cross-examination.*

*(1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.*

*(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court or the Court otherwise directs.”*

24. Single appeal undoubtedly is maintainable against the decree passed by the learned Trial Court wherein the suit has been dismissed and the counter claim has been accepted.
25. Therefore, the defendant cannot overcome the legal impediment created by the statutory provision as envisaged under Section 11 of the Code of Civil Procedure to challenge the decree passed by learned Trial Court dismissing the counter claim in the second appeal.
26. Learned First Appellate Court while passing impugned judgement made mutually contradictory observations. According to learned First Appellate Court, learned Trial Court did not frame proper issues in respect of counter claim of the defendant nor elaborately discussed about the case made out in the counter claim by the defendant. The learned First Appellate Court failed to consider that by not preferring any appeal against the decision of learned Trial Court on counter claim the defendant virtually accepted the verdict and the same is reflected in the impugned judgement where learned Trial Court observed :- “In view of my above discussion and observation, my considered view is that the learned Trial Court correctly decreed the suit in favour of the plaintiff and I find no impropriety, irregularity, illegality in the judgement passed

by learned Trial Court and he heard both in law and fact in decreeing the suit in favour of the plaintiff and is also dismissed the counter claim of the defendant.”

Therefore, the suit, in my humble opinion could not have been dismissed and could not have been sent to remand by the learned First Appellate Court.

27. When the language of the deed Exhibit-1 unerringly says that the plaintiff acquired the ownership, the possession of the defendant becomes the possession of a licensee.
28. The appeal is accepted and allowed on contest. Decree passed by learned Trial Court stands restored. The defendant to quit, vacate and deliver possession of the property within 60 days from date to the plaintiff. Department to draw up decree.
29. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.
30. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

***(SIDDHARTHA ROY CHOWDHURY, J.)***

\* “28. The appeal merits no further consideration and is dismissed, however, without cost.”

Vide order passed on 08.08.2023 paragraph 28 has been removed.