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Ct-08

SAT 60 of 2014

Amena Khatun
Vs.
Kartick Chandra Kundu & Ors.

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The appeal is defective. However, no attempt has been made to remove the defects. The appeal is of the year 2014.

The appeal appeared in the warning list on 29th November, 2022 with a clear indication that the same shall be transferred to the regular list on 5th December, 2022, since then the matter is appearing in the list. Therefore, the appellant has due notice.

The appellate decree dated 20th September, 2013 affirming the judgment and decree passed by the trial court on 17th May, 2011 in a suit for declaration that the registered deeds of sale as security and Ekranama dated 07.5.1968 are in substance a loan with other consequential reliefs are the subject matter of challenge in this second appeal.

The suit was dismissed on contest.

We have carefully read the judgment of the trial court as well as the first appellate court.

The trial court has taken into consideration the evidence of P.W 1 in which during cross-examination she has stated that she could not recollect when she approached Bishnu Pada Kundu to settle her accounts. This is extremely essential to show that the plaintiff considered the said transaction to be a loan in substance and not a sale. The onus is on the plaintiff to prove that the transaction is not a sale but a loan in substance.

The learned Trial Judge has relied upon the recitals of the impugned deed marked as Exhibit-F and arrived at a conclusion that the recitals in the impugned deed are clear and unambiguous suggesting outright sale and on fair construction of the deed read as a whole, the learned Trial Judge arrived at a finding that it is, in fact, a sale and not a loan. The learned Trial Judge has also taken note of the fact that in the sale deed there was a condition for repurchase. However, the plaintiff failed to exercise her right to repurchase within the time stated in the Ekrarnama and the time being the essence of the contract in contracts for re-conveyance of immovable property as held by Hon'ble Apex Court in a plethora of judgments including ***Raj Kishore (Dead) By L.Rs. v. Prem Singh & Ors.,*** reported in **AIR 2011 SC 382** (paragraph 21 & 22):**2011(1) ICC 47,** relied upon to by the defendants, the plaintiff cannot now claim of the suit property.

In ***Raj Kishore (Dead) By L.Rs.*** *(supra)* similar issue came up for consideration. Before the Supreme Court the appellant contended that transfer was only by way of security for repayment of loan. The plaintiff however, failed to prove that he tendered amount of loan to the purchaser within the date stipulated. In such context it was held:

"21……The general principle of law that equity grants relief against penalty in a money bond and also against the penal sums made payable on breach of bonds has an exception to it. The exception was recognized by the Federal Court in Shanmugam Pillai case (supra) where by a majority the Court held that if under an agreement an option to a vendor is reserved for repurchasing the property sold by him, the option is

in the nature of a concession or a privilege and may be exercised in fulfillment of the conditions on the fulfillment of which it is made exercisable. If the original vendor fails to act punctually according to the terms of the contract, the right to repurchase will be lost and cannot be specifically enforced. Refusal to enforce the terms for failure to abide by the conditions does not amount to enforcement of a penalty and the Court has no power to afford relief against the forfeiture arising as a result of breach of such a condition. The Court followed the principle set out in Davis v. Thomas (1830) 39 ER 195. The above principle was recognized to be correct in K. Simrathmull case (supra). This Court also quoted with approval the following passage from Halsbury's Laws of England Vol.14, III Edn., page 622, paragraph 1151:

> *"Where under a contract, conveyance, or will a beneficial right is to arise upon the performance by the beneficiary of some act in a stated manner, or at a stated time, the act must be performed accordingly in order to obtain the enjoyment of the right, and in the absence of fraud, accident or surprise, equity will not relieve against a breach of the terms."*

22. In the present case there is no allegation of fraud, accident or surprise to call for intervention of equity so as to save the Plaintiffs right of re-conveyance of the property against forfeiture."

The first appellate court in affirming the decision of the trial court has observed that the valuation mentioned in the deed of sale is a fair valuation and there is no evidence suggesting existence of relationship of creditor and debtor.

The trial court and the first appellate court have also taken into consideration that the sale deed filed by the plaintiff and the defendants showing different consideration money as regards of the suit mouza would show that the consideration money of Rs.1,000/- mentioned in the impugned deed cannot be said to be a price below the market value, having regard to the fact that two years earlier i.e. in the year 1966 the plaintiff purchased a suit property at Rs.600/-. The first appellate court has also relied upon the decision of the Calcutta High Court in ***Swarnalata Tat v. Chandi Charan Dey & Ors.,*** reported in ***AIR 1984 Cal 130*** where it was observed that *"it cannot laid down as a general principle that whenever there is a sale of property at the value lower than its worth it will lead to an irresistible inference that the transaction is in substance a loan. A price below the true value by itself cannot indicate a mortgage nor a fair market value can be the conclusive evidence that the transaction is a sale. Where there is no evidence of the relationship of creditor and debtor and there is no prior transaction by ad between the parties to the conveyance, even if the consideration of sale does not represent the market price, the transaction in substance. There may be very many factors which may compel a person to sell a property at a price which may not reflect the market value. The cumulative effect of all the relevant facts will determine the real character of the transaction and not one or two factors considered in isolation."*

Both the courts have applied correct test in ascertaining the real character of the transaction and addressed to all the relevant factors that are required to be considered in deciding the dispute between the parties.

The aforesaid finding of facts and the conclusions arrived at on the basis of oral and documentary evidence cannot be said to be perverse or suffer from any non-application of mind.

On such consideration, we are of the view that this second appeal does not involve any substantial question of law.

The appeal accordingly fails.

The second appeal is, therefore, summarily dismissed under Order XLI Rule 11 of the Code of Civil Procedure at the admission stage.

There will be no order as to costs.

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