

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 132 of 2018

RANJANA MONDAL & ORS.
VS.
KISHORI MOHAN SAMANTA

For the Appellants	: Mr. Amal Krishna Saha, Adv. Mr. Souvik Sarkar, Adv.
For the Respondent	: Mr. D.K. Adhikari, Adv.
Hearing concluded on	: 5 th July, 2023
Judgement on	: 19 th July, 2023

Siddhartha Roy Chowdhury, J.:

1. This appeal impeaches the judgement and decree passed by learned First Appellate Court in Title Appeal No. 18 of 2011 affirming the judgement and decree passed by learned Trial Court.
2. Briefly stated, the predecessor-in-interest of the present appellant, Bishnu Pada Mondal files the suit for declaration that the mortgage created by the document described in 'Kha' schedule of the plaint in respect of the property comprised within plot no. 5655 and 5656 within Mouza Mouligram was redeemed and the plaintiff/appellant has the right title interest over the 'Ka' schedule property and for permanent injunction, stating, *inter alia*, that the original plaintiff Bishnu Pada Mondal approached the defendant to lend a sum of Rs. 500/- but the defendant/respondent Kishori Mohan Samanta refused to lend any

money without security. Helpless plaintiff was compelled to place the property described in 'Ka' schedule of the plaint on mortgage. The defendant/respondent got a deed of sale executed in his favour by plaintiff/appellant showing a sum of Rs. 1500/- as consideration money and the said instrument was registered on 22nd July, 1974. It is contended that at the relevant point of time the value of the said property was Rs. 2000/-. The plaintiff/appellant had to keep the property mortgaged only for Rs. 500/- however, the possession of the property was never parted with. According to plaintiff/appellant, the transaction that took place on 22nd July, 1974 was in substance a loan transaction and not a sale. The defendant however, refused to release the mortgaged property. The plaintiff/appellant filed a petition under Section 36 and 38 of the Bengal Money Lenders Act, 1940 before the competent Court of law. During pendency of the said proceeding the parties came to a settlement. It was agreed upon by and between the parties with the intervention of their well wishers that the plaintiff shall withdraw the said proceeding by 2nd August, 1975 and the defendant would execute a deed transferring the 'Ka' schedule property in favour of the plaintiff. If the defendant/respondent failed to act in terms of agreement it would be held that the plaintiff/appellant had the right title interest over the said property. The plaintiff/appellant in terms of such settlement paid the money but the defendant/respondent did not execute the instrument transferring the property in question in favour of the plaintiff/appellant. As the plaintiff had been possessing the suit property he did not insist for execution of the deed. By the act of the parties, the mortgage was redeemed. But on 18th Bhadra 1408, the

defendant/respondent threatened the plaintiff to dispossess him from the suit property. Hence the suit.

3. The defendant contested the suit by filing written statement denying all material allegations. According to defendant, the plaintiff sold and transferred the property in suit on 22nd July, 1974 by executing the deed registered on 23rd July, 1974. Since after purchase defendant has been possessing the said property. The plaintiff earlier filed a suit under the Bengal Money Lenders Act and the same was withdrawn. Thereafter, he initiated proceeding under Section 147, 323 and 379 of the I.P.C. being Pingla P.S. Case No. 75 dated 25th November, 1975 C.R. Case No. 82 of 1976. Ultimately he filed R.L. Case No. 768 of 1983 in order to get back the land under WBAL Act but all the proceedings were decided to the ultimate benefit of the defendant/respondent.
4. Considering the pleadings of the parties and evidence adduced by witnesses, learned Trial Court dismissed the suit. The decision of the learned Trial Court was challenged before the learned First Appellate Court in Title Appeal No. 18 of 2011. Learned First Appellate Court also refused to accept the appeal. Challenging the said judgement and decree of learned First Appellate Court, successors of original plaintiff/appellant preferred the second appeal which was admitted on the following points:-

1. Whether the learned First Appellate Court misdirected the appeal by not considering the additional issues framed by this High Court while allowing the prayer for amendment of the plaintiffs/appellants in the context of the evidence given

by the parties after the amendment was allowed by the revisional court?

2. Whether the finding of the First Appellate Court that the disputed transaction was an out and out sale, is based on the evidence on record?

5. Mr. Amal Krishna Saha, learned Counsel for the appellants argued that both the Courts below failed to appreciate the evidence on record. Drawing my attention to Exhibit-4 and 5 as well as Exhibit-10 Mr. Saha submits that on 27th July, 1975 the parties came to a settlement that the plaintiff/appellant Bishnu Pada Mondal, since deceased, would withdraw the suit, he had filed by 2nd August, 1975. He would repay a sum of Rs. 1500/- to the defendant/respondent Kishori Mohan Samanta and Kishori Mohan Samanta in turn would release the property by executing a deed immediately thereafter. According to Mr. Saha, this document Exhibit-2 is sufficient to demonstrate that the transaction between the parties was the loan transaction and not an out and out sale. The plaintiff/appellant did not part with possession of the suit property at any point of time. Possession of the property is with the appellants and in support of his submission attention of the Court is drawn to documents, Exhibit-7 series. It is further contended by Mr. Saha that though the instrument Exhibit-1, the certified copy of the deed no. 102345 of 1975 or Exhibit-A the original document does not contain any clause apropos to Section 58(c) of the Transfer of Property Act but at the time of the execution it was orally agreed by and between the parties that upon repayment of loan, the property would be retransferred in favour of the appellant/plaintiff. Drawing my attention

to Exhibit-H, H/1 Mr. Saha submits that the document would suggest that the property was sold under distress as the petitioner in the proceeding being Case no. 768 of 1983 was in need of money to repay the debt and there was oral agreement for re-conveyance. My attention is drawn Sub-Section 6 of Section 40 of the Bengal Money Lenders Act, 1940 which envisages that oral agreement or settlement contradicting, varying, adding to or subtracting from the terms of any document creating and witnessing a loan shall be admitted.

7. Therefore, it is contended by Mr. Saha that the deed of transfer Exhibit-1 or Exhibit-A though does not contain any recital regarding re-conveyance of the property but oral agreement entered into by and between the parties to that effect ought to have been taken into consideration by learned First Appellate Court.
8. Mr. D.K. Adhikari, learned Counsel representing the respondent refuting such contention of Mr. Saha submits that in order to prove that the transaction a loan transaction in substance the statutory provision as laid down under Section 58(c) of the Transfer of Property Act is required to be satisfied. There has to have either some averment in the recital or there has to have an agreement for re-conveyance executed by and between the parties simultaneously with the execution of deed of sale. In absence of any document to that effect or any averment in the recital of the deed, Exhibit-A, there is no reason to hold that the transaction was not a sale transaction, it was mortgaged by conditional sale. According to Mr. Adhikari, the document Exhibit-H, which is an application before the competent authority under WBRL Act is an admission that the plaintiff/appellant transferred the property by way of

sale though he failed to prove that it was a distress sale. It was never disclosed before the competent authority in the proceeding under WBRLA Act of 1973, that the transaction was not a sale transaction.

9. I have perused the provision as laid down under Sub-Section 6 of Section 40 which says :-

“40. Entry of an amount in a bond, etc., different to the amount actually lent to be an offence. –

1. xxxx

2. xxxx

3. xxxx

4. xxxx

5. xxxx

6. Notwithstanding anything contained in the Indian Evidence Act, 1872, evidence adduced by a borrower in a suit to which this Act applies or a suit brought by a borrower for relief under section 36 or in any criminal proceedings under section 41 or section 42, of any oral agreement or statement contradicting, varying, adding to or subtracting from the terms of any document creating or witnessing a loan, shall be admitted.”

10. Plain reading of the said statutory provision suggests that provision of Section 91 and 92 of the Evidence Act shall not be applicable in a case under the West Bengal Money Lenders Act, 1940 when the borrower in a suit under the said Act or in any other proceeding claiming relief under Section 56 or in any criminal proceeding under Section 41 and 42 of the said Act, can lead oral evidence contradicting, varying, adding to or subtracting from the terms of any document creating or witnessing a loan shall be admitted.

11. Hon’ble Apex Court in **ROOP KUMAR VS. MOHAN THEDANI** reported in **(2003) 6 SCC 595** held :-

“18. In [Section 92](#) the legislature has prevented oral evidence being adduced for the purpose of varying the contract as between the parties to the contract; but, no such limitations are imposed under [Section 91](#). Having regard to the jural position of [Sections 91](#) and [92](#) and the deliberation omission from [Section 91](#) of such words of limitation, it must be taken note of that even a third party if he wants to establish a particular contract between certain others, either when such contract has been reduced to in a document or where under the law such contract has to be in writing, can only prove such contract by the production of such writing.”

12. Hon’ble Supreme Court in **R. JANAKIRAMAN VS. STATE REPRESENTED BY INSPECTOR OF POLICE, CBI, SPE, MADRAS** reported in **(2006) 1 SCC 697** held :-

“24. We may cull out the principles relating to [Section 92](#) of the Evidence Act, thus:

i) [Section 92](#) is supplementary to [Section 91](#) and corollary to the rule contained in [Section 91](#).

ii) The rule contained in [Section 92](#) will apply only to the parties to the instrument or their successors-in-interest. Strangers to the contract Page 0013 (which would include the prosecution in a criminal proceeding) are not barred from establishing a contemporaneous oral agreement contradicting or varying the terms of the instrument. On the other hand, [Section 91](#) may apply to strangers also.

iii) The bar under [Section 92](#) would apply when a party to the instrument, relying on the instrument, seeks to prove that the terms of the transaction covered by the instrument are different from what is contained in the instrument. It will not apply where anyone, including a party to the instrument, seeks to establish that the

transaction itself is different from what it purports to be. To put it differently, the bar is to oral evidence to disprove the terms of a contract, and not to disprove the contract itself, or to prove that the document was not intended to be acted upon and that intention was totally different.

Applying the aforesaid principles, it is clear that the bar under [Section 92](#) will apply to a proceeding inter-parties to a document and not to a criminal proceeding, where the prosecution is trying to prove that a particular document or set of documents are fictitious documents created to offer an explanation for disproportionate wealth. Oral evidence can always be led to show that a transaction under a particular document or set of documents is sham or fictitious or nominal, not intended to be acted upon.”

13. The document Exhibit-A or Exhibit-1 is not ex-facie a document of loan. This provision shall be applicable in case of a document creating or witnessing any loan and not otherwise. Therefore, when the document appears to be a deed of sale, prima facie the provision of Section 92 of the Evidence Act shall operate as a bar and oral evidence cannot be entertained to contradict the content of the said instrument. That apart from the document Exhibit-2 it appears that according to appellant the parties, with the intervention of local people settled the dispute and it was agreed that Bishnu Pada Mondal, since deceased, would withdraw the proceeding under Section 36 of the Bengal Money Lenders Act by 2nd August, 1975 and Kishori Mohan Samanta would be paid the money by 29th Magh 1382 corresponding to sometime in the year, 1975 and Kishori Mohan Samanta would execute the deed therefore, while from the content of Exhibit-10, admitted as additional

evidence I find that Kishori Mohan Samanta was paid the money on 10th April, 1977. Learned Appellate Court while considering the documents Exhibit-3 and Exhibit-10 made some observation however, in the second appeal I do not want to dilate on that. But it can be said that the terms as laid down in the document, as contained in Exhibit-2 was not complied with by the plaintiff/appellant. Thereafter, in the year 1983 the proceeding to restore the property allegedly sold on distress was initiated after five years of the alleged compromise.

14. Before parting with the appeal I would like to underscore two other issues. Admittedly the plaintiff/appellant Bishnu Pada Mondal, since deceased, filed a case under Section 36 of the Bengal Money Lenders Act and it was withdrawn. The certified copy of Exhibit-D suggests that the petitioner was permitted to withdraw the case and liberty was given to withdraw the amount as well. No leave was taken by the plaintiff/appellant before the learned Trial Court who was in seisin of the said case to sue afresh. Therefore, the plaintiff/appellant cannot maintain the suit praying for the identical relief in a roundabout manner.

15. In this regard the judgement of Hon'ble Supreme Court pronounced in **SARGUJA TRANSPORT SERVICE VS. STATE TRANSPORT APPELLATE TRIBUNAL, M.P., GWALIOR & ORS.** reported in **AIR 1987 SC 88; (1987) 1 SCC 5** wherein it is held :-

"7. The Code as it now stands thus makes a distinction between 'abandonment' of a suit and 'withdrawal' from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission, referred to in sub-rule (3) of rule 1 of Order XXIII of

the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. Invito beneficium non datur. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason [the Code](#) insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in [section 11](#) of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or 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 rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue involved, yet [the Code](#) provides, as stated earlier, that a second suit will not lie in sub-rule (4) of rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred

to in sub-rule (3) in order to prevent the abuse of the process of the Court.”

16. That apart, the title of the plaintiff was denied by the defendant/respondent when he refused to execute deed re-conveyancing the property he acquired by purchase in the year 1977, if not 1975. Under Article 58 the period of limitation as prescribed under the Limitation Act, 1963 would be three years when the right to sue first accrues. Therefore, the suit which is not covered under Article 61 (a) or 63 (a), is barred by limitation. Though no issue was framed as to whether the suit is barred by limitation in view of Section 3 of the Limitation Act. While deciding the second appeal this Court has the jurisdiction to see whether the suit has been filed well within the prescribed time period.

17. Mr. Saha, learned Counsel for the appellants in order to buttress his argument that the transaction was a mortgage transaction not out and out sale relied upon the judgement of Hon'ble Supreme Court in the case of **VIDHYADHAR VS. MANIKRAO & ANR.** reported in **AIR 1999 SC 1441** wherein it is held :-

“38. The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record.

39. Applying these principles to the instant case, it will be seen that defendant No. 2 executed a sale deed in favour of the plaintiff, presented it for registration, admitted its execution before the Sub-Registrar before whom remaining part of the sale

consideration was paid and, thereafter, the document was registered. The additional circumstances are that when the plaintiff instituted a suit on the basis of his title based on the aforesaid sale deed, defendant No. 2, who was the vendor, admitted in his written statement, the whole case set out by the plaintiff and further admitted in the witness box that he had executed a sale deed in favour of the plaintiff and had also received full amount of consideration. These facts clearly establish that a complete and formidable sale deed was executed by defendant No. 2 in favour of the plaintiff and the title in the property passed to plaintiff. The findings recorded by the High Court on this question cannot, therefore, be upheld.”

This judgement, in my humble opinion is of no help to the appellants.

18. In **BANKU BEHARI CHANDRA VS. SM. KALYANI DEVI** reported in **70 CWN 139** it is held :-

“The transaction, however, which was intended to be a mortgage, was made or effected in the form of a sale with a separate agreement of re-purchase or re-conveyance. As a matter of fact, there were two documents, a conveyance or sale-deed and an agreement for re-conveyance and the learned trial Judge dismissed the suit on the preliminary ground that, having regard to the said two separate documents and in view, particularly, of the proviso to sec. 58(c) of the Transfer of Property Act, the transaction cannot, in law, be regarded as a mortgage and, accordingly, the present suit on that basis would fail.”

19. Under such circumstances, I am not inclined to accept the appeal.

Consequently, the appeal is dismissed however, without cost.

20. Let a copy of this judgement along with the LCR be sent down to the learned Trial Court for information and necessary compliance.

21. 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.)