(2008) 03 MP CK 0024

In the Madhya Pradesh High Court

Gendalal (since dead) through L.Rs. Sajjanbai etc. and Another — APPELLANT

Vs

Pannalal (since dead) through L.Rs. Lilabai etc. and Another — RESPONDENT

Date of Decision : 31-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Constitution of India, 1950 — Article 142
Evidence Act, 1872 — Section 92
Transfer of Property Act, 1882 — Section 58

Citation : (2008) ILR (MP) 3207 : (2008) 3 MPHT 521

Hon'ble Judges : A.K. Gohil, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A.K. Gohil, J.—This second appeal filed u/s 100 of CPC was admitted on the following substantial question of law:

(1) Whether the transaction embodied in Exh. D-1 is a sale or a mortgage?

(2) Whether the finding of the Court below on the questions relating to the proof of practice of fraud on the plaintiffs by the defendants and the execution of Exh. P-1 by them, wrong and perverse?

2. Brief facts of the case are that the respondent/plaintiff filed a suit for redemption of mortgage, possession and for declaration that the sale deed dated 31-3-1960 be declared as void. The suit of the plaintiff in brief was that the said land situated at Village Kapasthal bearing Survey Nos. 327, 406, 764, 799, 809,812 admeasuring 6.605 hect. was the land of Joint Hindu Family and their father Chunnilal was the owner of the land. In the year 1957 Chunnilal died and mother was also not alive. At that time, both the plaintiffs were minor and one Rama Balai was performing the agricultural operations on their behalf. Plaintiffs were residing alongwith their grandfather Laxmi Prasad. It was their case that the respondents were co-caste fellows. They took them into confidence and got a

mortgage deed executed for a consideration of Rs. 1000/-. Mortgage deed was got registered. At that time plaintiffs were very small children. Subsequently, they came to know that instead of getting the mortgage deed executed, the defendants got the sale deed executed from the plaintiffs fraudulently under the pretext of mortgage and thereafter when some objections were taken, respondents executed one agreement dated 15-2-1961 declaring therein that the land has been mortgaged and whenever plaintiffs will pay Rs. 1000/- they will leave the possession. Thereafter plaintiffs on several occasions tried to pay the amount and demanded possession, but it was denied. Subsequently, a notice was issued and thereafter the suit was filed.

3. In the written statement, the defence of the defendants was that on 31-3-1960 absolute sale deed was executed after payment of full consideration. The sale deed was executed voluntarily and plaintiffs were not minor. The land was never mortgaged and nor any agreement was written by them. Agreement dated 15-2-1961 is a forged document. Suit is barred by time and since the record of rights have not been challenged, therefore, the suit is also barred on the principle of res judicata. Issues were framed, evidence of parties was recorded and ultimately Trial Court decreed the suit in favour of respondent/ plaintiff holding therein that the sale deed dated 31-6-1960 was got executed fraudulently. It was also held that at the time of execution of sale deed, the plaintiffs were minor. Attempt was made to show them as major. The sale deed is void and liable to be set aside and the agreement dated 15-2-1961 was validly executed, which made the transaction as mortgage and towards security of payment of money and the transaction is not of sale, but is of mortgage and declared the sale deed as illegal and void and decreed the suit for redemption of mortgage and possession.

4. Against the aforesaid judgment and decree dated 29th November, 1983 passed by the Trial Court, the appellant/defendant filed First Appeal which was also heard and decided vide judgment dated 22nd April, 1994 and the Lower Appellate Court also affirmed the judgment and decree granted by the Trial Court, against which the appellants have filed this Second Appeal, which was admitted on the aforesaid substantial questions of law.

5. Shri J.M. Chhapekar, learned Counsel for the appellant argued and submitted that u/s 58(c) of the Transfer of Property Act, unless the condition of repurchase is embodied in the same document the transaction is not mortgage and placed reliance on the decision in the case of Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, . Shri Chhapekar also placed reliance on a decision in the case of Mushir Mohammed Khan (Dead) By LRS. Vs. Smt. Sajeda Bano and Others, , in which the Supreme Court has held that where parties executed more than one documents, true nature of the transaction has to be ascertained having regard to all the documents, true nature of the transaction has to be ascertained having regard to all the documents. In this case it was also held that though the suit for redemption was liable to be dismissed, however having regard to the recent

tendency of entering into such transaction to deprive the debtor of his right of redemption and the fact that the sale price did not represent true market value of the property, in order to do complete justice between the parties, defendant directed to pay Rs. 2 lakhs within 3 months failing which suit for redemption would stand dismissed with costs and the order was passed under Article 142 of the Constitution of India. He further placed reliance in the case of Bishwanath Prasad Singh Vs. Rajendra Prasad and Another, , in which Supreme Court held that mortgage by conditional sale must be evidenced by one document, though a sale with a condition for retransfer/reconveyance may be evidence by more than one document and therefore the transaction was held to be a sale deed and not a mortgage deed. Shri Chhapekar further submitted that the finding recorded by the Court below are totally perverse. The transaction was a complete sale and no condition of retransfer is mentioned in the sale deed and the finding of the Court about the agreement dated 15-2-1961 (Exh. P-1), which is an agreement, treating the aforesaid sale as mortgage is contrary to law and liable to be set aside. Exh. D-1 sale deed is a complete sale deed and both the Courts below have wrongly considered the law and facts. It was also submitted that in both the sale deeds on record Exhs. D-1 and D-2, the age of Pannalal is mentioned as 30 and age of Jivanlal is between 19 to 20 years, mother Kesharbai was alive at the time of sale and they were not minors. There are material contradictions in the statement of plaintiffs and their witnesses. The suit was filed after 21 years and there is no evidence on record about the fraud and the intention of the parties was that it was the transaction of sale.

6. Per contra, Shri B.L. Pavecha, learned Counsel for the respondents submitted that no substantial question of law is involved in this appeal. Both the Courts have consistently held that the sale deed Exh. D-1 was sham and bogus as it was intended to create a security for a loan transaction and was not intended to operate as a sale deed. Therefore, both the Courts have not committed any illegality in recording the finding. It was submitted that the transfer is not hit by proviso to Section 58(c) of the Transfer of Property Act, 1882 or by the decisions relied upon by the appellants in the case of Chunchun Jha (supra) and Vishwanath Prasad (supra). He placed reliance on a decision in the case of Smt. Gangabai Gilda Vs. Smt. Chhabubai Gandhi, , in which it was held that Sub-section (1) of Section 92 of the Evidence Act is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatsoever. For that purpose, oral evidence is admissible to show that the document executed was never intended to operate as a sale, but that some other agreement altogether, nor recorded in the document, was entered into between the parties and the decision in the case of AIR 1936 70 (Privy Council) , was also considered by the Apex Court. Further reliance was placed on a decision in the case of Indira Kaur and Ors Vs. Sheo Lal Kapoor, , in which it

was held that sale deed and contemporaneous agreement to resale property for same sum executed between parties. The transaction in question was mortgage. The Supreme Court also considered the increasing tendency of entering into such transaction in order to deprive the debtor of his right of redemption within the prescribed period of limitation and it was held that the transaction in question was one of mortgage in essence and substance though it was clothed in the garb of a transaction of ostensible sale. He placed reliance on the decision in the case of Gulab Chand (dead) by Lrs. v. Babulal (dead) by Lrs. 1998 (1) JLJ 1, in which Hon''ble Apex Court has held that three documents, i.e., sale deed, rent note and agreement to repurchase executed on same day, transaction is mortgage. Separate transaction may form a single transaction. No hard and fast rule can be laid down. It was further held that relationship of landlord and tenant not established, only transaction of mortgage created between the parties. It was further held that suit for eviction is not maintainable and the Court should judge the real intention and purpose in the facts of each case in the context of the intention of the parties and language in which it is couched.

In the case of Ramlal and Another Vs. Phagua and Others, , the Supreme Court has held that in addition to sale deed, agreement also entered into between parties simultaneously for execution of re-conveyance deed in favour of vendor. Admissions to that effect given by buyer. Mere mutation of name of buyer on alleged failure of repayment of amount, would not confer any right, title or interest in her favour in absence of real transaction of property and subsequent purchasers would also get no right, title or interest in property.

In the case of Mandas v. Manbai 1972 JLJ 632, Division Bench of this Court has held that if there was a stipulation between the parties that the contract would not be enforced or that it would not be acted upon being ab initio, oral evidence in support of such a plea may be given. It was further held that oral evidence is admissible to show that an agreement was only a sham or nominal transaction and was not intended to be acted upon. If the plea is that the sale was merely fictitious, such plea is not barred by the proviso to Section 58(c) of the Transfer of Property Act and when sale deed is fictitious, no right accrues under such sale deed.

The decision in the case of Draupadi Bai (Smt.) v. Nathu Singh 2004 (1) JLJ 427, was also cited to show that Single Bench has also held that when sale deed executed as security for loan, deed of reconveyance also executed by purchaser, seller also remained in possession and paid the loan with interest the intention of the parties was that the sale deed was not to be acted upon. Another decision in the case of Smt. Munnibai and Others Vs. Barelal Lodhi and Others, , was cited in which the Single Bench of the High Court of M.P. held that oral evidence is admissible to establish that the sale deed was sham transaction and was got executed to ensure repayment of loan.

7. Having heard the learned Counsel for the parties, I have given my anxious consideration to the reasoning assigned by both the Courts below. The finding of

both the Courts that the plaintiffs were minor at the time of execution of sale deed dated 31-3-1960 is the finding of fact and such a finding cannot be disturbed in Second Appeal without formulating the substantial question of law. Admittedly, in this case sale deed was executed on 31-3-1960 and around after 11 months on 15-2-1961 an agreement (Exh. P-1) was also executed by the appellants, in which it was declared that the aforesaid land was obtained on rent and a sum of Rs. 1,000/- was paid as security of loan and they will also pay the profit of 2 Ghadi Bigha and will retain the possession till the amount shall not be paid in lump sum and on receiving Rs. 1,000/-, will leave the possession and they will also execute the mortgage deed at Sardarpur. Both the Courts below have concurrently held that this document was executed by appellants/ defendants, which is also finding of fact and there is no material to hold that it is a perverse finding. From the language of both documents it is clear that the sale deed Exh. D-1 was a sham document and subsequently it was declared in so many words that it was intended to create security for loan transaction and was not intended to operate as a sale deed. When both the Courts below have concurrently held that the agreement (Exh P-1) was validly executed, then as held by the Supreme Court in case of Smt. Indira Kaur (supra), the transaction in question was one of mortgage in essence and substance though it was clothed in garb of a transaction of ostensible sale. Again in the case of Gulab Chand (supra), Supreme Court has held that three documents, i.e., sale deed, rent note and agreement to repurchase executed on same day, transaction is mortgage.

8. Thus, in view of the aforesaid discussion and considering the factual aspects as well as legal position on record that concurrent finding recorded by both the Courts below, it is held that the document Exh. D-1 sale deed is document of sham transaction of ostensible sale and transaction in question was one of the mortgage in essence and substance. It is further held that from the document Exh. P-1 it is clear that the sale deed was never intended to be acted upon and reading together both the documents, true nature of transaction has to be ascertained. Considering the price and the age of the respondents/plaintiffs, it cannot be held that proper price was paid as per the market value of the property and on consideration of the two documents read together would constitute mortgage, as Exh. P-l was executed by the defendants and there was no evidence on record that it was based on any fraud. Thus, the aforesaid substantial questions of law are answered accordingly. It is held that amount of Rs. 1000/- which was paid, was of loan amount and the amount was given as security for that amount. Thus, no case is made out to interfere in the judgment of both the Courts below.

9. Accordingly, this appeal fails and hereby dismissed. Parties are directed to bear their own costs.

