(2018) 08 MP CK 0192

In the Madhya Pradesh High Court

Case No : First Appeal No.47, 48 Of 2002

Jagdish Chanda Sharma (Dead) Through L.Rs.Smt. Sukhwanti Sharma & Others — APPELLANT

Vs

Smt. Dropadi Bai (Dead) Through L.R.Ku.Usha Bai — RESPONDENT

Date of Decision : 24-08-2018

Acts Referred:
- Transfer of Property Act, 1882 — Section 58(c), 83
- Evidence Act, 1872 — Section 91, 92
- Code Of Civil Procedure, 1908 — Order 13 Rule 4
- Limitation Act, 1963 — Article 56, 58, 61

Citation : (2018) 08 MP CK 0192

Hon'ble Judges : Vivek Agarwal, J

Bench : Single Bench

Advocate : Santosh Agarwal, K.S. Tomar, Sanjay Tomar

Final Decision : Allowed

Judgement

Both these appeals have been filed by defendant being aggrieved by the judgment and decree dated 19.12.2001 passed in Civil Suits No.7A/1992 and

No.8A/1992 by the Court of Third Additional District Judge, Gwalior, whereby the suit filed by the plaintiff for declaration and permanent injunction

has been decreed.

2. For the sake of convenience, the facts of Civil Suit No.7A/1992 are taken because the two suits were filed in respect of half of the suit property,

which was conveyed by one sale deed and another half of the property having been conveyed by the second sale deed.

3. Brief facts of the case are and not disputed between the parties that there is Babu-Rao-Daund-Ka-Bada at Maharani Laxmi Bai Road, Lashkar,

having Municipal No.1559 and New No.768/1 situated at Ward No.1. Dropadi Bai-plaintiff no.1 is wife of Babu Rao Daund, who was an employee of

the Erstwhile Ruler of Gwalior Estate and who died in the year 1953, whereas plaintiffs no.2 and 3 are his daughters. It is also an admitted position

that the plaintiffs had taken various amounts as loan on different dates between 20.01.1959 and

23. 05.1966 after mortgaging their house from the persons who are family members of defendant Jagdish Prasad. It is also an admitted position that

the plaintiff had executed a sale deed for half portion of the property on 02.08.1969 and 4. 06.1971 another half was sold in favour of the defendant-

appellant.

4. Thereafter a suit was filed for declaration and injunction in the year 1992 to the effect that for the purpose of education etc. of the girls, some

amount was taken as loan and during pendency of repayment of such loan, Shri Babu Rao Daund died in the year 1953. Since there was no earning

member in the family of Babu Rao Daund and no means were left for up-keep of the family, therefore, loans were obtained on different dates by

mortgaging suit property in favour of the person, who had advanced loan. It is submitted that the documents in the form of mortgage deed was

executed firstly on 20.01.1959 and thereafter on 23.05.1966. It is also mentioned that the relationship of loanee and loaner were continuing between

the plaintiff and the defendant, but when further sum of Rs.9,000/- was demanded, then it was extended as a loan on the condition of execution of a

sale deed of half portion of the property in favour of the defendant, but there was an oral assurance that the said sale deed will be only a formal one

and it will never be given any effect. It is submitted that plaintiff no.1, who was an illiterate widow and plaintiffs no.2 and 3 were not having

knowledge about the transaction, executed a sale deed on 02.08.1969, and taking advantage of poor financial condition of the plaintiffs, another sale

deed was executed on 04.06.1971, which is the subject matter of Suit No.8A/1992. It is also submitted that the market value of half of the portion of

the property was Rs.2.00 Lacs as the total value of the property was Rs.4.00 Lacs and, therefore, execution of the sale deed for the loan amount,

amounted to exploitation. It is also submitted that the name of Dropadi Bai is recorded in the Municipal records and she is regularly paying property

tax before the Municipality and has paid the water taxes etc. in 1992 also, therefore, she is the owner, possessor and title holder of the suit property. It

is also mentioned in the suit that she was always in possession of the suit property, which is another proof of the transaction being a sham transaction

and not being actual sale transaction. It is also submitted that even she was recovering the rent from the tenants, which is further evidence in her

favour that the sale deed was formal and it was in fact a conditional sale with oral understanding of redemption of the property on payment of such

loan amount.

5. In favour of such pleadings, the plaintiff has filed copies of earlier mortgage deed as Ex.P/3C, Postal Receipt as Ex.P/5 and payment of taxes of

the local authorities as Ex.P/5C so also the certificates showing payment of taxes as Exs.P/6 and P/7. A notice (Ex.P/9), on which no date is

mentioned, has been enclosed addressed to the defendants-appellants on behalf of the plaintiffs that the plaintiffs have been requesting the defendants

to accept their principal amount of Rs.21,000/-with simple interest @ 1% per month and to execute the sale deed of the suit property in favour of the

plaintiffs by cancelling the sale deed dated 02.08.1969 and 04.06.1971.

6. Appellants-defendants, on the other hand, submitted that the suit was barred by limitation. Since the suit was filed for declaration and redemption,

therefore, Article 61 of the Limitation Act will not be applicable, but Article 56 or 58 of the Limitation Act will be applicable. It is also submitted that

the plea of adverse possession taken by the plaintiffs demonstrates that the defendant-appellant was the actual owner as plea of adverse possession is

admissible only against actual owner.

7. It is further submitted that the plaintiffs never complied with the conditions of Section 83 of the Transfer of Property Act by depositing the money

due on mortgage in the Court to show their bona fide and in any case the provisions of Section 58 (c) of the Transfer of Property Act are attracted

inasmuch as there is no stipulation in the sale deed in regard to mortgage being that by conditional sale. It is submitted by the appellant that proviso

below to Section 58 (c) of the Transfer of Property Act clearly provides 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. It is also submitted that Ex.D/1 rent deed was executed by the

appellant in favour of the plaintiffs looking to their poor financial condition and non-availability of any alternative accommodation, but that will not make

them the owner of the property to claim that the transaction was that of a conditional sale and they are entitled to redeem the property.

8. Learned counsel for the plaintiff-respondents submits that the limitation will commence from 01.04.1992 when notice Annexure P/15 was sent

seeking redemption. He also submits that Section 83 of the Transfer of Property Act has no application nor it is mandatory and further points out that

DW1 has admitted that there was a transaction of mortgage.

9. Learned counsel for the plaintiff-respondents has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Sait Tarajee

Khimchand & Others v. Yelamarti Satyam & Others as reported in AIR 1971 SC 1865, wherein the ratio is that as per Order 13 Rule 4 of CPC,

mere marking of a document as an exhibit does not dispense with its proof.

10. Similarly, reliance has been placed on the decisions of the Hon'ble Supreme Court in the cases of Smt. Indira Kaur & Others v. Shri Sheo Lal

Kapoor as reported in AIR 1988 SC 1074 and K. Simrathmull v. Nanjalingiah Gowder as reported in AIR 1963 SC 1182.

11. The issue, which is involved, is whether the sale deed in absence of any stipulation to the effect that it is a conditional sale or with option to

repurchase, then whether in the light of the previous mortgage, can the transaction of sale effected through registered sale deed be treated as that of

mortgage by conditional sale with option to repurchase or not?

12. The law laid down in the case of Sait Tarajee Khimchand (supra) is distinguishable in the facts and circumstances of the case inasmuch as

admittedly the plaintiffs had executed the sale deed and they have failed to prove that there was any condition or stipulation for reconveyance so that

such sale deed could have been treated as a deed of mortgage. Besides this, the plaintiff has not led any evidence in regard to insufficiency of the

consideration mentioned in the sale deed terming it to be much less than market value so to render such transaction to be a sham transaction. They

have also not given any explanation as to how limitation could have been computed from the date of notice. Therefore, in absence of any promptness

on the part of the plaintiffs seeking revocation of sale deeds executed on 02.08.1969 and 04.06.1971, raising plea of adverse possession turned out to

be self-defeating for the plaintiff an important aspect, which has been ignored by the learned Additional District Judge.

13. As far as the law laid down by the Hon'ble Supreme Court in the case of K. Simrathmull (supra), is concerned, the facts of that case are that the

plaintiff borrowed cerain amount from the defendant and in lieu thereof executed deed of conveyance of certain land with a house thereon in favour

of the defendant. On the same day, another deed of reconveyance was executed by the defendant. By this deed, the defendant agreed to reconvey

the house, but the exercise of the right of demanding reconveyance by the plaintiff was subject to two conditions (1) that the right must be exercised

within two years; and (2) the rent payable by the plaintiff should not be in arrears for more than six months at any time. The plaintiff broke the second

condition. The defendant refused to convey. In a suit for specific performance, the plaintiff prayed for exercise of Court's equitable jurisdiction and to

give relief against the forfeiture clause. In that backdrop relying on the decision in the case of Shanmugam Pillay v. Annalakhshmi Ammal as reported

in AIR 1950 FC 38 (V 37) held that the Court could not relieve the plaintiff against the forfeiture clause. Refusal to enforce the terms specially for

failure to abide by the conditions did 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. It has been held that 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. Thus, the ratio of this

case is not applicable in the facts and circumstances of the present case because the plaintiff has failed to point out that there were any clause

pertaining to reconveyance in the sale deed and if there was a clause, then what was the time limit to exercise right of redemption and what were the

other terms and conditions for such redemption. In absence of any such stipulation, it cannot be said that the ratio of the law laid down by the Hon'ble

Supreme Court in the case of K. Simrathmull (supra) is applicable to the facts and circumstances of the case.

14. In the case of Smt. Indira Kaur (supra), there was a contemporaneous agreement to resale the property to A executed by B for same

consideration and period of 10 years was stipulated for claiming resale. Possession of property was to remain with the original seller on payment of

rent to the buyer. But in the present case, there is no contemporaneous agreement to resale property mentioning any some or any duration for

execution of such agreement to resale the property. Therefore, the facts of Smt. Indira Kaur (supra) are also distinguishable. In fact, in the case of

Smt. Indira Kaur (supra), there were additional twin aspects, namely, a finding of plaintiff being not ready and willingness was given, which was set

aside and secondly she had given notice within the due date to attend the office of Sub-Registry for reconveyance of the property in the light of

contemporaneous agreement to resale, but the defendant had failed to appear and reconvey the property. In the present case, all the three elements,

namely, the presence of a contemporaneous agreement to resale or any stipulation in the sale deed itself in regard to reconveyance, any prescription

of any time limit for such reconveyance and ready and willingness of the plaintiff within such time limit are missing, therefore, facts of this case are

also distinguishable.

15. Learned counsel for the defendant-appellant has placed reliance on the judgment of the Hon'ble Supreme Court in the case of Mushir Mohammed

Khan (dead) by L.Rs. v. Smt. Sajeda Bano & Others as reported in AIR 2000 SC 1085, wherein in para 16 it has been held that combined reading of

three documents, i.e., agreement of reconveyance, sale deed and rent note do not constitute mortgage or mortgage by conditional sale in absence of

conditional sale inasmuch as condition to repurchase, was not contained in the sale deed itself, therefore, the documents cannot be treated as creating

a mortgage on account of the prohibition contained in the proviso to clause (c) of Section 58 of the Transfer of Property Act.

16. Similarly, reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of Tamboli Ramanlal Motilal (dead) by L.Rs. v.

Ghanchi Chimanlal Keshavlal (dead) by L.Rs.and another as reported in AIR 1992 SC 1236, wherein the ratio is that clauses of deed are to be read

so as to understand that whether they are consistent with express function of making the transaction a conditional sale with option to repurchase. If

the writings of the deed do not disclose any such intention, then the document will not be treated as that of a mortgage by conditional sale.

17. Similar is the ratio of law as has been laid down by this Court in the case of Jama son of Mithu v. Khalil son of Mohinuddin & Others as reported

in 2009 (3) MOLJ

18. As far as limitation is concerned, the learned trial Court erred in treating it to be governed by the provisions of Article 61 of the Limitation Act,

whereas it will be governed by Article 56 of the Limitation Act.

19. Hon'bleÂ SupremeÂ CourtÂ inÂ the Â caseÂ ofÂ Bishwanath Prasad Singh v. Rajendra Prasad & Another as reported in (2006) 4 SCC

432 has held that in such an agreement of re-conveyance, time is of the essence of the contract.

Respondent-plaintiff, who had sold the property in question with a condition to retransfer/reconvey, not having sued within time for reconveyance, it

would not be open to them to seek a declaration that in light of the reconveyance agreement, the transaction viewed as a whole should be declared to

be a mortgage. Such claim/suit would also be hit by Section 91 of the Evidence Act subject to Section 92 thereof.

20. It is also apparent that the trial Court has failed to take into consideration the provisions of Section 58 (c) of the Transfer of Property Act and also

the fact that plaintiffs no.2 and 3 were admittedly educated and had executed the sale deed after attaining majority, therefore, it cannot be said that

they were ignorant about the contents of the sale deed and taking advantage of illiteracy of plaintiff no.1, such sale deeds were got executed. In fact,

it is an admitted position that the plaintiffs were obtaining loans from time to time and it has also come on record that plaintiff no.2 had joined services

of the State after passing Higher Secondary before the date of execution of the sale deed and, therefore, it cannot be said that she was not in a

position to repay the debt and was forced to sell her property.

21. In view of such facts being available on record and also in the light of the law laid down in the case of Vijay Kumar Tamrakar v. Smt. Shanti

Singh as reported in 1993 (II) MPWN Short Note 155, once the signature on the sale deed are admitted and executant, i.e., plaintiffs no.2 and 3 are

educated persons, then it cannot be presumed that they had signed on some blank paper and without receiving consideration mentioned therein or

without understanding the contents of the documents.

22. In view of such facts, since there is no stipulation in the sale deed making it

to be a conditional sale with option of repurchase, the judgment and

decree passed by the trial Court suffers from illegality and is not in consonance with the legal provisions contained in the Transfer of Property Act.

Thus, the appeals succeed and are allowed. The impugned judgment and decree are set aside.

