(2019) 01 CHH CK 0067

In the Chhattisgarh High Court

Case No : Second Appeal No. 350 Of 2003

Jaswant Singh (Dead) Through LRs And Ors — APPELLANT

Vs

Tijiya Bai (Dead) Through LR And Ors — RESPONDENT

Date of Decision : 15-01-2019

Acts Referred:
Transfer Of Property Act, 1882 — Section 58(c)

Citation : (2019) 01 CHH CK 0067

Hon'ble Judges : Sanjay K. Agrawal, J

Bench : Single Bench

Advocate : Manoj Paranjpe, Anurag Singh, Rakesh Pandey, Vivek Tripathi, Vimlesh Bajpai,Malay Kumar Bhaduri, Sareena Khan

Final Decision : Dismissed

Judgement

1. The instant second appeal preferred by the legal representatives of defendant No.1 has been admitted for hearing by formulating the following substantial questions of law for determination: -

"(1) Whether the trial Court was justified in decreeing the suit in favour of plaintiffs by holding that sale deed dated 31.12.1969 (Ex.D-1) was a mortgage deed and not a outright sale by ignoring the fact that no such condition was incorporated in the sale deed as provided in Section 58 (c) of the Transfer of Property Act, 1882 by recording perverse finding?

(2) Whether the First appellate Court has committed illegality in affirming the judgment and decree so passed by the trial Court by recording perverse finding?"

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. The original plaintiffs namely, Tijiya and Rahi Bai instituted a civil suit on 3-7-1973 seeking declaration to the effect that the sale deed Ex.D-1 executed by them in favour of Mela Singh - original defendant No.1 for consideration of Rs.

2,500/- was in fact mortgage and not the real sale deed, as he was the money lender and he was also running a grocery shop and he had given Rs. 600/- loan to the plaintiffs and there was balance of Rs. 600/- of grocery shop and in lieu of the loan amount, alleged sale deed Ex.D-1 was executed. It was further pleaded that there was oral agreement to re-conveyance of the suit property between the parties and the loan amount was repaid with interest in presence of witnesses on or about 15-4-1973. It was also pleaded that the suit land remained in the possession of defendant No.1 for two years and thereafter, possession was handed over to the plaintiffs. The plaintiffs sought relief that defendant No.1 has no right over the suit property and further sought the relief of cancellation of sale deed.

3. Original defendant No.1 Mela Singh filed his written statement denying the plaint averments pleading specifically that the suit land was not mortgaged, as the same was sold by defendant No.1 for consideration of Rs. 2,500/- on 31-12-1969 in presence of witnesses. It is an out-and-out sale. It was further pleaded that the suit land is in his possession and his name has also been mutated in revenue records and there was no oral agreement to re-convey the suit property after payment of loan amount and therefore the suit deserves to be dismissed.

4. The trial Court framed as many as nine issues and decided the same in favour of the plaintiffs and against defendant No.1 holding that the sale deed was mortgage deed and it was not an outright sale, there was oral agreement for re-conveyance of the suit property. It has further been held that a valuable land of area 2.67 acres was purchased for a meager amount of Rs. 2,500/- and therefore the sale deed is void and granted decree in favour of the plaintiffs.

5. In appeal preferred by defendant No.1, the first appellate Court agreed with the finding of the trial Court and dismissed the appeal affirming the decree of the trial Court resulting into filing of this second appeal in which two substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

6. Mr. Manoj Paranjpe, learned counsel for the appellants/defendants, would submit that both the Courts below are absolutely unjustified in holding Ex.D-1 as mortgage deed in absence of any condition embodied in the sale deed Ex.D-1 that it is a mortgage deed with a condition of re-purchase in view of the proviso to Section 58(c) of the Transfer of Property Act, 1882. Therefore, judgments & decrees of the two Courts below are liable to be set aside.

7. Mr. Rakesh Pandey, learned counsel appearing for the plaintiffs / respondents No.1 and 2(a) to 2(g), would submit that both the Courts below are absolutely justified in holding the sale deed Ex.D-1 to be the mortgage deed, as there was oral agreement between the parties that Ex.D-1 is only a mortgage deed with a condition of re-payment on payment of loan amount which has been repaid and possession is already with the plaintiffs. Therefore, the second appeal deserves

to be dismissed.

8. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the records with utmost circumspection.

9. Section 58(c) of the Transfer of Property Act, 1882 defines "mortgage by conditional sale", and reads as under: -

"58. (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 a mortgage by conditional sale, and the mortgagee, a mortgagee by conditional sale:

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."

10. The effect of this proviso is that no document of sale can be treated as mortgage unless the document effecting the sale itself contains a recital to that effect. The whole object is to exclude or shut out the oral evidence to be adduced in the case when such a condition is contained in a separate document. Thus, if the document effecting a sale does not contain a stipulation regarding the conversion of the sale into a mortgage and such a stipulation is contained in a separate document, in such a case, it is not at all open in law to enquire into the nature of the transaction and to take extrinsic evidence for holding that the document which purports to be an absolute sale is in reality, a mortgage.

11. Original plaintiffs Tijiya and Rahi Bai both had executed a document Ex.D-1 in favour of original defendant No.1 Mela Singh. The recital attached to the sale deed states as under: -

बय ननामना ककिमतती २५०० रूपयना ननाम बबेचनबे-वनालना ममुस्मनात कतजतीयना उमर50 सनाल ववौ ममुस्मनात रनाहती उमर30 सनाल पतीसरनान खनवनामु सतननामती पबेशना खबेतती सनाककिन नवनागढ़-तह० बबेमबेतरना जजलनारूगमु ।द ननाम खरतीद दनार- ममैलनाजसहवल्द सन्तरनाम पसजनाबती पबेशना खबेतती सनाककिन नवनागढ़-तह०बबेमबेतरना, जजलना- दरूगमु । तफसतील जनाय दनाद- बय समुदनाभभूकम मवौजना नवनागढ़ तह० बबेमबेतरना जजलना दरूगमु मवौजना नम्बर ३०७ प०ह०नस०१६ मवौजना नवनागढ़ - - - नवनागढ़ ब्लनाकि पसचनायत हमै । ननाम मवौजना हक्कि नम्बर रकिबना हबेक्टनारबे लगनान नवनागढ़ भभूकमस्वनामती १०५७ ०-४० ०-१६२ ३-३५ नयना पमैसना १०६७ १-१७ ०-४७४ १०७१ १-११ ०-४५० मतीजनान, ३ २-६८ १,०७६ ३-३५ नयना पमैसना मनावजना कववरण- किकीमत किना रूपयना नगदती २५०० रूपयना आपस ममभर पनायना हहस यह ककि किजरअदना किरनबे किबे जलयबेभसनाबमैलनाखरतीदनबेभ किबे जलयबे अपन किबे ऊपर जलखबे भभूकम जजस पर हम ललोग किनावतीज हमै जलो ककिसती किबे पनास बय बकिशतीस रहनना नहहीं किकी गई हमै उसकिलो खरतीद दनार किबे पनास नगदती मनावजनामर पनाकिर बबेचकिर दखल किब्जना खरतीद दनार किलो दबे दती खरतीद दनार बय समुदना भभूकम पर किनावतीज हलोकिर किनाश्त किरबे लगनान पटनावबे सरकिनारती ररकिकॉरपर ननाम

पर दजरकिरनावबे अबभयनाम मबेरबे वनार सनान सनाथ खरतीद दनार सबे ककिसती ककिसम किबे दनावना यना उजर किरबे तलो मनावजना किना रकिम फसल किकी नमुकिसनानती जमतीन किकी तरक्किकी आकद खरतीद दनार किलोभयनाम मबेरबे वनार सनान किलो दबेनती हलोगती जलहनाजना बय ननामना खशतीमु सबे जलखना कदयबे ककि सनद रहबे वक्त पर किनाम आवबे तनारतीख ३१/१२/६९ टना० कशवनसदन प्रसनाद कतवनारती बबेमबेतरना कन० कतजतीयना कन० रनाहती गवनाहन 1. गमुरू बक्श हजसकिरतनार जसहस नवनागढ़ 2. दप्रकिमुदनास वल्द दलदनास,मु कममपमुरती

12. The question is, whether the above-stated transaction contained in Ex.D-1, which is in the nature of sale, is a mortgage by conditional sale or it is an outright sale? Both the Courts have concurrently held that it is a mortgage and not an outright sale and decreed the suit of the plaintiffs / respondents No.1 and 2(a) to 2(g) herein.

13. The question so posed for consideration is no longer res integra and stood adjudicated authoritatively by Their Lordships of the Supreme Court which may be referred herein usefully and profitably as well. The Supreme Court in the matter of Chunchun Jha v. Ebadat Ali and another AIR 1954 SC 345 considered the matter by posing a question in paragraph 5 as under: -

"(5) The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analysing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts. But certain broad principles remain."

14. The question so passed for consideration was answered by Their Lordships in paragraphs 9 and 13 as under: -

"(9) The document with which we are concerned (Ex. A) is in the following terms and our first duty is to construe the language used and see whether it is ambiguous. (We have paragraphed the document for convenience of construction and have omitted unnecessary words.)

(1) "Rs. 634 principal with interest under a registered rehan bond " (simple mortgage) "dated the 6th May 1927 is justly due .... by us the executants. Now we further require Rs. 65-6-0 more to meet costs of the suit under section 40." (Bihar Tenancy Act.)

(2) "and at present there is no other way in view rather it seems impossible and difficult to arrange for the money without selling the property let out in rehan " (simple mortgage) "under the above mentioned bond".

(3) "Therefore, we the executants declare .... that we .... sold and vended the properties detailed below on condition (given below) for a fair and just price of

Rs. 700......."

(4) "That we set off Rs. 634-10-0 against the consideration money " (torn) "payable under the aforesaid bond in favour of the said vendee and received Rs. 65-6-0 in cash from the said vendee. In this way the entire consideration money was realised from the said vendee."

(5) "and we put the said vendee in possession and occupation of the vended property detailed below and made him an absolute proprietor in our places."

(6) "If we, the executants, shall repay the consideration money to the said vendee within two years .... the property vended under this deed of conditional sale attached shall come in exclusive possession and occupation of us, the executants."

(7) "If we do not pay the same, the said vendee shall remain in possession and occupation thereof, generation after generation, and he shall appropriate the produce thereof."

(8) "We, the executants, neither have nor shall have any objection whatsoever in respect of the vended property and the consideration money. Perchance if we do so it shall be deemed null and void in Court."

(9) "and we declare also that the vended property is flawless in every way and that if in future any kind of defect whatsoever be found on account of which the said vendee be dispossessed of a portion or the entire property vended under this deed of conditional sale and will have to pay the loss or damage, in that event we, the executants,

(a) shall be liable to be prosecuted under the possession against the said vendee or his

(b) we shall pay the entire consideration money together with loss and damage and interest at the rate of Rs. 2 per mensem per hundred rupees from the date of the execution of this deed till the date of realisation from our person and other properties

(c) and we shall not claim the produce of the vended property for the period of vendee's possession against the said vendee or his heirs and representatives."

(10) "Therefore we, the executants .... have executed this deed of conditional sale so that it may be of use in future."

(13) We next turn to the conditions. The ones relevant to the present purpose are contained in Clauses (6) and (7). Both are ambiguous, but we have already said that on a fair construction clause (6) means that if the money is paid within the two years then the possession will revert to the executants with the result that the title which is already in them will continue to reside there. The necessary consequence of that is that the ostensible sale becomes void. Similarly, clause (7), though clumsily worded, can only mean that if the money is not paid, then

the sale shall become absolute. Those are not the actual words used but, in our opinion, that is a fair construction of their meaning when the document is read as a whole. If that is what they mean, as we hold they do, then the matter falls squarely within the ambit of Section 58(c)."

15. The decision rendered in Chunchun Jha (supra) has been followed by Their Lordships of the Supreme Court in the matter of Srinivasaiah v. H.R. Channabasappa (since dead) by his Legal Representatives and others (2017) 12 SCC 821.

16. Reverting to the facts of the present case in light of the proviso to Section 58(c) of the Transfer of Property Act, 1882 and in light of the principles rendered by Their Lordships of the Supreme Court in Chunchun Jha (supra) followed in Srinivasaiah (supra), examining Ex.D-1, it is quite vivid that the document in question purports to be an absolute sale, as it does not contain any stipulation for treating the sale as mortgage. The agreement of re-conveyance is neither embodied in a separate document, it is said to be agreed orally and it is not recorded in the document as such, in absence of embodiment of such a clause in Ex.D-1, the transaction cannot be regarded as mortgage, as no oral evidence is admissible to contradict Ex.D-1 which is an outright sale transferring title by the plaintiffs in favour of defendant No.1. Therefore, the transaction in question, in absence of embodiment as contained in the proviso to Section 58(c) of the Transfer of Property Act, 1882, cannot be regarded as mortgage and it is held to be an outright sale. Both the Courts below are absolutely unjustified in holding the sale deed dated 31-12-1969 (Ex.D-1) as mortgage in absence of incorporation in the said document Ex.D-1 that it is a mortgage as provided in the said proviso. As such, the finding recorded by the two Courts below in this regard is contrary to facts and law available on record.

17. Consequently, judgments & decrees passed by both the Courts below are hereby set aside and the suit would stand dismissed. The substantial questions of law are answered accordingly and the second appeal is allowed to the extent indicated herein-above leaving the parties to bear their own cost(s).

18. Decree be drawn-up accordingly.

