

(2013) 09 PAT CK 0042
In the Patna High Court
Case No : Second Appeal No. 306 of 2008

Md. Allauddin

APPELLANT

Vs

Md. Vaseeruddin

RESPONDENT

Date of Decision : 12-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35(2)
Evidence Act, 1872 — Section 17
Transfer of Property Act, 1882 — Section 58(c), 67, 83

Citation : (2013) 09 PAT CK 0042

Hon'ble Judges : Mungeshwar Sahoo, J

Bench : Single Bench

Advocate : Abbas Haider and Mr. Ranjay Kr. Singh, for the Appellant; Raghib Ahsan and Mr. Nafisuzzoha, for the Respondent

Final Decision : Dismissed

Judgement

Mungeshwar Sahoo, J.—The plaintiff has filed this Second Appeal against the judgment and decree dated 11.08.2008 passed by the Additional District Judge-cum-Fast Track Court No. 5, Madhepura in Title Appeal No. 21 of 2005/04 of 2006 whereby the lower appellate court dismissed the appeal and thereby confirmed the trial court judgment and decree dated 02.07.2005 passed by the learned Additional Munsif, Madhepura in Title Suit No. 74 of 1994. The plaintiff-appellant filed the aforesaid suit for declaration that the sale deed dated 26.09.1988 executed by the defendant be declared as absolute sale and further for declaration of title on the suit property measuring 1 bigha 18 dhurs.

2. The plaintiff claimed the aforesaid relief alleging that in fact there was a negotiation for sale of the suit property between the plaintiff and the defendant and the consideration was fixed for Rs. 9,500.00. After receiving the consideration amount the defendant executed registered sale deed on 26.09.1988 in favour of the plaintiff and gave possession of the property to the plaintiff. Subsequently the defendant tried to dispossess the plaintiff from the

suit property and looted the crops, therefore, the plaintiff filed a complaint case and the plaintiff heard that instead of executing sale deed, a conditional sale deed has been executed by the defendant. He thereafter got the certified copy of the deed and came to know that in collusion with the witnesses and deed writer a subsequent paragraph was added in the agreement. The plaintiff alternatively claimed that a decree for foreclosure may be passed.

3. The defendant appeared and filed contesting written statement. According to the defendant, the negotiation was for sudbharna i.e. a mortgage deed. Accordingly, a conditional sale deed was executed for security of the loan amount of Rs. 9,500.00. The condition was that if the amount is returned before 31.03.1994, the endorsement shall be made in the back of the document and the same shall be returned to the defendant. The plaintiff came in possession on the basis of the conditional sale deed. When the defendant went to return back the consideration amount but the plaintiff refused. Therefore, after service of notice the defendant filed miscellaneous case u/s 83 of the Transfer of Property Act before the Munsif, Madhepura being Miscellaneous Case No. 17 of 1994 and amount has been deposited in the said miscellaneous case.

4. The trial court as well as the appellate court both concurrently found that the deed in question i.e. Ext. 3 is a mortgage by conditional sale and accordingly the plaintiffs suit was dismissed.

5. At the time of admission on 09.08.2010 the following two substantial questions of law were formulated:--

(i) Whether the trial court as well as the appellate court were correct in holding that Ext. 3 is the deed of mortgage by conditional sale?

(ii) Whether in view of the conflicting recitals in the concerned deed the recital in the first part thereof should have been accepted for relevant consideration with regard to the nature of the deed in view of the ratio laid down in Ramkishore Lal Vs. Kamal Narain, ?

6. The learned counsel Mr. Abbas Haider appearing on behalf of the appellant submitted that while interpreting the terms of Ext. 3 the courts below have not considered the circumstances and the intentions of the parties and wrongly held that Ext. 3 is a mortgage by conditional sale. According to the learned counsel, in the deed there are two distinct paragraphs. In the first paragraph, it has been mentioned that the defendant is selling the property to the plaintiff for Rs. 9,500.00 and possession was handed over to the plaintiff. This is absolute sale, therefore, title passed to the plaintiff. Subsequently without the knowledge of the plaintiff the second paragraph was mentioned in Ext. 3 to the effect that if the full consideration amount is returned back within 31.03.1994, the endorsement shall be made in the back of the deed and the deed will be returned to the defendant. According to the learned counsel, this has been subsequently inserted fraudulently by the defendant. Moreover, according to the learned counsel the subsequent insertion of this paragraph-2 is in direct conflict with paragraph-1.

Therefore, in view of the decision reported in Ramkishore Lal Vs. Kamal Narain, the first part of the document i.e. the first paragraph which speaks about the absolute sale will prevail. However, while recording the finding that Ext. 3 is a conditional sale, the courts below have relied on the documents of criminal cases which are not admissible in civil matter. Further, the courts below have not at all considered the surrounding circumstances because all the witnesses examined on behalf of the plaintiff have unequivocally stated that there was a negotiation of absolute sale and the witnesses of the plaintiff have also stated that the defendant had sold the property and after sale, the plaintiff is coming in possession of the property. According to the learned counsel, none of the conditions mentioned in Section 58(c) of the Transfer of Property Act is mentioned in Ext. 3, therefore, Section 58(c) of the Transfer of Property Act is not applicable. In support of his above contentions, the learned counsel relied upon Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others,) and Shanti Kumar Panda Vs. Shakuntala Devi, On these grounds, the learned counsel submitted that both the substantial questions of law formulated be answered in favour of the appellant and the plaintiffs suit be decreed declaring title of the plaintiff.

7. On the other hand, the learned senior counsel Mr. Raghib Ahsan appearing on behalf of the respondent submitted that the substantial questions of law formulated at the time of admission do not involve in this present Second Appeal for a fresh decision because these questions have already been answered in several decisions by the Hon''ble Supreme Court. The learned counsel further submitted that the decision relied upon by the appellant i.e. the case of Ramkishore Lal and another (supra) is not applicable in the present case. The learned counsel further submitted that there is no conflict in the two paragraphs of the deed (Ext. 3). The learned counsel in support of his contentions relied upon P.L. Bapuswami Vs. N. Pattay Gounder, . On these grounds, the learned counsel submitted that the appellant's appeal be dismissed with cost.

8. In view of the submissions of the learned counsel for the parties and in view of the substantial questions of law formulated, the only dispute between the parties is whether Ext. 3 is a mortgage by conditional sale as alleged by the defendant or whether it is out and out sale deed as alleged by the plaintiff. The main case of the plaintiff is that subsequently the second paragraph has been added in collusion with the scribe and the witnesses. So far this case is concerned, none of the courts below have found the case of the plaintiff to be true. In such circumstances, taking the document as it now stands the question is to be answered.

9. From perusal of Ext. 3, the deed in question, it appears that in the first paragraph it is mentioned that the defendant is selling the property for Rs. 9,500.00. In second paragraph, the condition has been mentioned to the effect that if within 31.03.1994 the consideration amount is returned by the defendant, the endorsement shall be made to that effect in the document and if it is not

returned within the said period, the plaintiff will get his name mutated and the plaintiff will become absolute owner thereof.

10. Section 58(c) of the Transfer of Property Act reads as follows:--

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 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.)

11. In view of this provision as provided in proviso, if the condition to the effect that on default of payment of the mortgage-money on certain date sale shall become absolute is embodied in the document itself then it will be considered to be a mortgage by conditional sale. Now there is no universal law that whenever if the condition is mentioned in the deed, it will be considered as mortgage by conditional sale. The court has to examine the surrounding circumstances also and the conditions mentioned in the deed. The Hon'ble Supreme Court in the case of Bhaskar Waman Joshi (supra) has held that the question whether by the incorporation of a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. So far this settled principle is concerned, there is no doubt.

13 in the case of P.L. Bapuswami Vs. N. Pattay Gounder, , the Hon'ble Supreme Court has examined the provision as contained in Section 58(c) of the Transfer of Property Act. It appears that in that case also same recitals were made in the deed and considering the circumstances the Hon'ble Supreme Court held that the deed in question is a mortgage by conditional sale. In the present case according to the plaintiff, the first paragraph says about the absolute sale whereas the condition for return of consideration amount was fixed by the later portion of the deed. Now let us consider the circumstances of the present case:--

(i) In the deed itself, it is mentioned that if the amount is not returned by 31.03.1994 then the plaintiff will get his name mutated and will become absolute owner of the property.

(ii) Admittedly within the said period, a miscellaneous case was filed u/s 83 of

the Transfer of Property Act by the defendant and in that case money was deposited by the order of the court.

(iii) In the document in later portion it has been mentioned that if the amount is returned within 31.03.1994, an endorsement shall be made to that effect in the back of the deed.

(iv) The deed was executed in September, 1988 and the amount that was to be returned within 31.03.1994 is the same consideration amount. If the sale deed is absolute sale deed then the condition that if the consideration is returned within the stipulated period, there should have been mentioned that the property will be re-conveyed to the defendant but it is mentioned that if money is returned, there will be an endorsement to that effect.

(v) The plaintiff, in Ext. E i.e. the complaint case filed by him, admitted that he had obtained a mortgage regarding the suit property.

Before the Supreme Court in the relied case the conditions are same.

13. The learned counsel for the appellant submitted that this Ext.E (complaint case) filed by the plaintiff could not have been relied upon by the courts below. The learned counsel has relied upon Shanti Kumar Panda Vs. Shakuntala Devi, . The Hon''ble Supreme Court has held that a decision by a Criminal Court does not bind the Civil Court while a decision by the Civil Court binds the Criminal Court. Here, it may be mentioned that the courts below have not relied upon any decision of the Criminal Court. The document (Ext. E) is admittedly a complaint case filed by the plaintiff himself. It is settled principles of law that admission is the best evidence unless it is explained by the party admitting the fact. According to Section 17 of the Indian Evidence Act, an admission is a statement oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned. Here, the admission made by the plaintiff was produced by the defendant. According to the courts below, the plaintiff categorically admitted that he has obtained the land in mortgage i.e. he is coming in possession of the property as a mortgagee.

14. In the case of Ahmedsaheb (D) by L.Rs. and Others Vs. Sayed Ismail, the Hon''ble Supreme Court has held that admission made either in pleadings or orally is the best evidence and needs no further corroboration. Recently the Hon''ble Supreme Court in the case of Vathsala Manickavasagam and Others Vs. N. Ganesan and Another, has held at paragraph 24 that as far as the principle to be applied in Section 17 is concerned, the Section as it reads is an admission, which constitutes a substantial piece of evidence, which can be relied upon for proving the veracity of the facts, incorporated therein. When once, the admission as noted in a statement either oral or documentary is found, then the whole onus would shift to the party who made such an admission and it will become an imperative duty on such party to explain it. In the present case instead of explaining under what circumstances the admissions were made in Ext. E, the

plaintiff admitted to have filed the complaint case but the submission is made with regard to reliability of Ext. E.

15. So far the submission of learned counsel that second part of the document will be superseded by the first part when there will be any inconsistency is concerned, from perusal of the judgment of the Hon"ble Supreme Court referred to above Ramkishore Lal Vs. Kamal Narain,), it appears that this decision of the Hon"ble Supreme Court do not relate to the interpretation of Section 58(c) of the Transfer of Property Act. The principle for general interpretation of the document has been mentioned. The interpretation of general document will be different and the interpretation of document as envisaged u/s 58(c) of the Transfer of property Act will be different. Therefore, the decision cannot be made applicable to a deed which is executed in terms of Section 58(c) of the Transfer of Property Act. In my opinion, therefore, the decision of the Hon"ble Supreme Court in the case of Ramkishore Lal and another (supra) is not applicable in the present case. I, therefore, find that the deed in question i.e. Ext. 3 is a mortgage by conditional sale and not absolute sale.

16. The learned counsel for the appellant submitted that the appellant has alternatively claimed that the decree for foreclosure be passed in favour of the plaintiff but both the courts below have not considered this aspect of the matter. So far this submission is concerned, Section 67 of the Transfer of Property Act provides that the mortgagee has, at any time after the mortgage-money has become due to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited, a right to obtain from the Court that the mortgagor shall be absolutely debarred from his right to redeem the property. In such circumstances the relief claimed for by the plaintiff will be given only after expiry of period of limitation.

17. Article 61 of the Limitation Act provides that the period to redeem or recover possession of immovable property mortgaged is 30 years from the date when the right to redeem or to recover possession accrues. In the present case, the right to redeem or to recover possession accrued to the defendant on 31.03.1994 i.e. the period fixed by agreement between the parties to return the consideration amount. Now, therefore, the period is still subsisting. Moreover, as stated above money has been deposited u/s 83 of the Transfer of Property Act and according to Section 67 prior to the mortgage-money has been paid or deposited, the suit should have been filed for foreclosure. In my opinion, therefore, the alternative relief claimed by the plaintiff also cannot be granted.

18. It appears that the plaintiff is the brother of the defendant. The suit was filed in the year 1994 and in spite of the decree by the courts below the appellant is using the usufruct of the suit property on the above frivolous grounds. In the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), , the Hon"ble Supreme Court has held that the judicial notice can be taken of the fact that many unscrupulous parties take advantage of the fact that either the costs are not awarded or nominal costs are awarded against the unsuccessful

party. Unfortunately, it has become a practice to direct parties to bear their own costs. In a large number of cases, such an order is passed despite Section 35(2) Code of Civil Procedure. Such a practice also encourages the filing of frivolous suits. It also leads to the taking up of frivolous defences. Further, wherever costs are awarded, ordinarily the same are not realistic and are nominal. When Section 35(2) provides for costs to follow the event, it is implicit that the costs have to be those which are reasonably incurred by a successful party except in those cases where the court in its discretion may direct otherwise by recording reasons therefor. In view of the above decision of the Hon"ble Supreme Court and in view of the peculiar facts and circumstances of the case, it appears that when the defendant filed the miscellaneous case and deposited the amount u/s 83 of the Transfer of Property Act, the present plaintiff filed this frivolous suit with a view to deprive the defendant from the property. In view of my above discussions, the substantial questions of law formulated are answered against the plaintiff-appellant and in favour of the defendant-respondent. Accordingly, this Second Appeal is dismissed with costs of Rs. 10,000.00 (rupees ten thousand) to be paid by the plaintiff-appellant to the defendant-respondent within two months from today, failing which the defendant-respondent is at liberty to realize the same through the process of the Court.