(2007) 04 PAT CK 0116

In the Patna High Court

Case No : Appeal from Appellate Decree Nos. 202 of 1990 and 250 of 1991

Mishree Lal Sah and Most. Badamo Devi APPELLANT

Vs

Jagarnath Sah (Dead) represented by LRS and Others RESPONDENT

Date of Decision : 20-04-2007

Acts Referred:

Citation : (2007) 04 PAT CK 0116

Final Decision : Dismissed

Judgement

Syed Md. Mahfooz Alam, J.—Second Appeal No. 202 of 1990 and Second Appeal No. 250 of 1991 were heard analogous as common question of law was involved in both the second appeals and, as such, the same are being disposed of by this common judgment. The judgment is being delivered in Second Appeal No. 202 of 1990.

2. Second Appeal No. 202 of 1990 has been preferred against the judgment dated 20.3.90 passed by the 4th additional District Judge, Saran at Chapra in Title Appeal No. 53/86 whereby he has been pleased to dismiss the appeal filed by the defendant-appellant Mishri Lal Sah against the judgment dated 30th April, 1986 passed by Sri K.M. Srivastava, Sub-Judge IInd, Chapra, in Title Suit No. 66 of 1983 whereby he had decreed the suit of the plaintiff-respondent.

3. Second Appeal No. 250 of 1991 has been preferred against the judgment dated 7th February, 1991, passed by Sri Birendra Kumar Sinha No. II, 3rd Additional District Judge, Saran, Chapra, in Title Appeal No. 88 of 1986 whereby he has been pleased to dismiss the appeal filed by the defendant-appellant Smt. Badamo Devi against the judgment dated 16.8.86 passed in Title Suit No. 67/83/30/86 by Sri S.K. Pathak, 4th Additional Sub-Judge, Chapra, whereby he had decreed the suit of the plaintiff-respondent. In both the suits respondent Jagarnath Sah was the plaintiff.

4. In Title Suit No. 66 of 1983 by which Second Appeal No. 202 of 1990 arises, the case of the plaintiff-respondent, Jagarnath Sah, was that he was in need of

money for renovation of house, for purchasing ox and also to meet other expenses of the family but due to coming into force at Money Lenders Act, no body was ready to lend money to him, as such, the plaintiff approached the defendant, Mishri Lal Sah, to give loan of rupees seven thousand to him for which he offered to execute a deed of Bai-ba-shart with stipulation that if the plaintiff would pay back the entire loan amount by 25.5.83, the defendant defendant would execute a deed of reconveyance and would deliver back possession to him. The defendant agreed to the above conditions and, accordingly, on 30.10.78, a deed of Bai-ba-shart was executed for rupees seven thousand equivalent to the mortgage value of the property although the real price of the property was rupees fifteen thousand. After execution of the deed, the defendant was put in possession of the property mentioned in the deed. In the said deed, it was incorporated that the defendant after receiving the sum of rupees seven thousand from the plaintiff by 25.5.83 would execute a deed of reconveyance in favour of reconveyence in favour of the plaintiff and will also put the plaintiff in possession thereof. Further case is that on 20.2.83 the plaintiff after having managed the money approached the defendant and tendered rupees seven thousand and requested him to execute the deed of reconveyance and put the plaintiff in possession of property but the defendant on some pretext or other delayed the matter. Thereafter, on 28.2.83, the plaintiff sent notice through his lawyer Sri Baijnath Prasad to the defendant which was received by the defendant on 2.3.83, who acknowledged the receipt of the notice and put his signature but in spite of that he neither received the money nor executed the deed of reconveyance. In the meantime, the plaintiff invested the money in some other business and then in order to manage the money for payment to the defendant within the stipulated period, the plaintiff executed several conditional sale deeds in favour of Ambika Prasad and others and then again he requested the defendant to receive money and execute the deed of reconveyance but the defendant did not execute the deed of reconveyance and, so, the plaintiff filed suit.

5. As per the written statement of the defendant-appellant, his case, in brief, is that the suit as framed is not maintainable. The plaintiff has got no cause of action for the suit. It is incorrect to say that there was any agreement between the parties that the consideration amount of the deed would be equivalent to mortage value, rather, the fact is that Rs. 7,000/- was the proper market price of the suit property. Further case is that on 30.10.78, the plaintiff executed the sale deed in respect of the suit property for valuable consideration of Rs. 7,000/- with condition that if the amount was returned back to the defendant-appellant by 25.5.83 then the defendant-appellant would execute the deed or reconveyance in favour of the plaintiff. It has been stated that the said sale was out and out a sale and not a mortgage and that is why after execution of the sale deed the plaintiff put the defendant-appellant in possession of the suit property. The defendant has also denied that the plaintiff had ever tendered the consideration money amounting to rupees seven thousand to him. He has also denied that the

plaintiff had ever sent any legal notice to him nor any such notice was served upon him. The defendant-appellant has also denied this fact that either on 20.2.83 or on 22.5.83 the plaintiff had rendered rupees seven thousand to him and had requested him to execute the deed of reconveyance. It has been stated that the plaintiff had no money in his possession to tender the same to the defendant and, as such, after expiry of the period fixed in the deed, the plaintiff is not entitled to get any relief with regard to the execution of deed of reconveyance.

6. In Title Suit No. 67 of 1983 / 30 of 1986 by which Second Appeal No. 250 of 1991 arises, the case of the plaintiff-respondent, Jagarnath Sah, was that he was in need of money for the purpose of repairing the house and purchase of bullocks and also to meet some other domestic expenses and to pay the loan to the creditors and so, he approached the defendant-appellant Badamo Devi to lend him rupees seven thousand as loan for which he offered to execute a deed of conditional sale at mortgage price of rupees seven thousand. The defendant-appellant accepted the proposal and then on 30.10.78 a deed of conditional sale was executed by the plaintiff in favour of the defendant-appellant with a clear stipulation that if by 25.5.83 the plaintiff paid back the entire mortgage money the defendant would execute a dead of reconveyance in favour of the plaintiff and would hand over the possession of the property mentioned in the deed. It is further stated that at the relevant time the market value of the property was not less than rupees fifteen thousand but the mortgage price was fixed at rupees seven thousand. Further case is that in the month of February, 1983, the plaintiff arranged the mortgage amount and on 20.2.83 he went to the house of the defendant and tendered the money to the defendant-appellant and requested her to execute the deed of reconveyance after accepting the mortgage money but the defendant did not pay any heed to the request. Thereafter, the plaintiff sent lawyer''s, notice dated 22.2.83 to the defendant through his lawyer Sri Baijnath Prasad by registered post. Through the said notice the plaintiff requested the defendant-appellant to accept the consideration amount and to execute the deed of reconveyance within fifteen days from the date of receipt of the notice. The said notice was received by the defendant-appellant on 2.3.83, who in token of receipt put her L.T.I. which was acknowledged by the son Bhagwan Prasad but in spite of the receipt of notice the defendant-appellant neither received the money amounting to rupees seven thousand nor executed the deed of reconveyance. In the meantime, the plaintiff utilised the money in other works and then on 20.5.83 the plaintiff executed another conditional sale in favour of one Ambika Prasad in order to arrange rupees seven thousand for tendering the same to the defendant-appellant and thereafter on 22.5.83 the plaintiff again went to the house of the defendant-appellant and requested her to execute the deed of reconveyance after accepting rupees seven thousand but the defendant-appellant deferred it on some plea or other and then the plaintiff filed this suit on 24.5.83 just the day before the expiry of the period fixed for execution of the deed of reconveyance.

7. The defenant-appellant in her written statement has accepted that the plaintiff had approached her to purchase the suit property and the defendant-appellant had agreed to purchase the property for consideration of rupees seven thousand and it was stipulated that if the consideration amount was repaid by 25.5.83 then in that case the defendant would execute the deed of reconveyance in favour of the plaintiff and, accordingly, the deed of conditional sale was executed on 30.10.73. The defendant has asserted that it was wrong to say that the deed was mortgage by conditional sale. He has also denied this fact that at the relevant time the price also the suit property was more than rupees fifteen thousand and has claimed that the real price of the property was rupees seven thousand. The defendant-appellant has also denied this fact that on 20.2.83 and 22.5.83 the plaintiff had tendered rupees seven thousand to her. She has also denied that any legal notice was ever served upon her and has categorically stated that since consideration money was not tendered to her within the stipulated period, as such, the sale has become final and the plaintiff is not entitled to get any relief.

8. From the perusal of the judgments of the trial court passed in Title Suit No. 66 of 1983 and Title Suit No. 67 of 1983, it appears that in both the suits almost similar issues were framed for consideration and the main issue was that Whether the impugned deeds dated 30.10.78 were conditional sale or mortgage by conditional sale and whether the plaintiff was entitled to get the deed of reconveyance executed by the defendant on payment of rupees seven thousand?

9. It appears from the perusal of the judgments of the trial court as well as of the appellant court passed in both the suits that both the courts have held that the impugned deeds were not out and out sale, rather, the same were mortgage by conditional sale and, thus, before this Court only one substantial question of law was framed in both the second appeals with regard to the nature of the documents i.e. whether the document, in question, is out and out a sale deed or the same is mortgage by conditional sale? The substantial question of law formulated in Second Appeal No. 202 of 1990 is in following manner:

Whether the deed dated 30.10.78 (Exhibit-A) was a deed of mortgage by way of conditional sale or the deed of sale with a condition of repurchase.

Where as the substantial question of law as formulated in Second Appeal No. 250 of 1991 is in following manner:

Whether Exhibit-A is a deed of mortgage by conditional sale as held by the court below or out and out a sale?

10. Thus, in both the second appeals, substantial question of law is same and similar and that is why both the appeals are being disposed of on the common question of law.

11. It has been argued by the learned Advocate of the respondents that both the appeals have been preferred against the concurrent findings of the courts below and the concurrent findings of the courts are that the documents, in question,

i.e. Exhibit-1 in both the suits are mortgage by conditional sale with stipulation that if by 25.5.83 the mortgage money was repaid to the defendant-appellant then in that case the defendant-appellant would execute the deed of reconveyance in favour of the plaintiff-respondent. He argued that there is again concurrent finding of the courts below that the plaintiff had ready money with him and had tendered the mortgage money i.e. rupees seven thousand to the defendant-appellant before the expiry of the period fixed in the document and had also served legal notice upon the defendant-appellant of both the suits and, as such, the plaintiff was entitled to get the deed of reconveyance executed in his favour. Learned Advocate further submitted that since this Court is sitting in Second Appeal, as such, this Court is not entitled to interfere with the concurrent findings of the courts below on facts. I fully agree with the argument of learned Advocate of the respondent and I am of the view that unless it is found that the findings of the courts below with regard to certain facts are perverse this Court is not empowered u/s 100 of the CPC to interfere with the findings of the courts below on facts. I have gone through the judgments of the trial court as well as of the appellate court given in both the suits and I am of the view that the findings of the courts below on facts are based on correct appreciation of oral as well as documentary evidence available on record and in no case can be called as perverse finding. I am, therefore, of the view that this Court while sitting in Second Appeal is not entitled to interfere with the findings of the courts below on facts and, hence, I will keep myself confined only to the substantial question of law as framed above.

12. In order to come to the conclusion that a particular document is a mortgage, by conditional sale or a sale with a condition of repurchase, first of all I would like to go through the definition of terms sale, conditional sale and mortgage by conditional sale. u/s 54 of the Transfer of Property Act (hereinafter to be referred as T.P. Act''), "Sale" has been defined in the following manner:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale with condition or conditional sale has been defined in the following manner:

In a sale coupled with an agreement to re-convey, there is no relation of debtor and creditor, nor is the price charged upon the property is conveyed, but the sale is subject to an obligation to re-transfer the property within the period specified.

Mortgage by conditional sale has been defined u/s 58-C of the T.P. Act in the following manner:

Where the mortgagor ostensibly sells the mortgaged property--

On a 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 a 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 mortagagee 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.

13. From the definition of sale with condition to re-purchase i.e. conditional sale and from the definition of mortgage by condition sale, it is apparent that in both the transactions there is element of sale and that is why even the mortgage by conditional sale has been defined as sale with stipulation that in default of payment of consideration amount the sale shall become absolute or on such payment the sale shall become void or the buyer shall transfer the property to the seller. The definition does not say that in default of payment of consideration money the mortgage will transform into an absolute sale. Therefore, the distinction between sale with condition to repurchase i.e. conditional sale or mortgage by conditional sale is not very clear. However, the courts have tried to make distinction between conditional sale and mortgage by conditional sale. According to Mulla, Following test should be applied to determine whether a particular document is a conditional sale or is a mortgage by conditional sale:

(i) the existence of a debt;

(ii) the period of repayment, a short period being indicative of a sale, and a long period of a mortgage; but the fact that time was made the essence of the contract to repurchase is not decisive;

(iii) the continuance of the grantor in possession indicates a mortgage;

(iv) a stipulation for the payment of interest on repayment indicates a mortgage;

(v) a price below the true value indicates a mortgage; a fair market value is strong evidence that the transaction is a sale;

(vi) the fact that no application for transfer of name was made till long after the sale, indicates a mortgage;

(vii) the right of redemption and foreclosure are co-extensive. The absence of such a right of mortgagee could only mean that it is a conditional sale.

14. In spite of the fact that there are some clear distinctions between conditional sale and mortgage by conditional sale, the courts are of the option that the question whether a given transaction is a mortgage by conditional sale or a sale outright with condition of repurchase is a vexed question and must be decided on its own facts and in most of the cases the intention of the parties determines the nature of the documents and one should be guided by the terms of the documents. In support of my view, I place reliance upon the decision reported in

Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, . The relevant lines from the said decision are quoted below:

Having regard to the nice distinction between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. It is also settled law that nomenclature of the document is hardly conclusive, and much importance can not be attached to the nomenclature alone since it is the real intention which requires to be gathered.

15. Almost same view has been taken in the decision reported in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, . The relevant lines of the said decision are quoted below:

The question whether a given transaction is a mortgage by conditional sale or a sale out-right with a condition of repurchase is a vexed one and must be decided on its own facts. In such cases the intention of the parties is the determining factor.

16. From the decisions referred to above, it is clear that the courts are of the view that in order to come to the conclusion whether a particular document is a sale with condition of repurchase or a mortgage by conditional sale, one should go to the contents of the document itself and from that he should gather what was the actual intention of the parties. However, some guidelines have been given by our High Court and the Apex court in several decisions in order to make clear cut distinction between the conditional sale and mortgage by conditional sale. In Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, while making distinction in between conditional sale and mortgage by conditional sale, the Apex Court has made following observation:

Under the Proviso to Section 58(c), of T.P. Act, if the sale and agreement to repurchase are embodied in separate document, then the transaction can not be a mortagage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons, who, after the amendment choose not to use two documents, do not intent the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of Section 58-C are fulfilled, then the deed should be construed as a mortgage.

17. In the case of P.L. Bapuswami Vs. N. Pattay Gounder, , the Apex Court while

making distinction between the conditional sale and mortgage by conditional sale has observed like this:

We consider that in the present case there are several circumstances to indicate that Ex.B-1 was a transaction of mortgage by conditional sale and not a sale with a condition for retransfer. In the first place, there is the important circumstance that the condition for repurchase is embodied in the same document. In the Second place, there is the significant fact that the consideration for Ex. B-1 was Rs. 4,000/- while the real value of the property was Rs. 8,000/-... and since the consideration for Ex.B-1 was only Rs. 4,000/-, it was a strong circumstance suggesting that the transaction was mortgage and not an out-right sale. In the third place, there is the circumstance that the patta was not transferred to the Ist defendant after the execution of Ex. B-1 by Palani Moopan. It appears that defendant No. 1 did not apply for the transfer of patta and the patta admittedly continued in the name of Palani Moopan even after the execution of Ex.B-1.... Lastly, there is the important circumstance that the consideration for reconveyance was Rs. 4,000/-, the same amount as the consideration for Ex. B-1. Having regard to the language of the document, Ex. B-1 and examining it in the light of these circumstances we are of the opinion that the transaction under Ex. B-1 was mortgage by conditional sale....

18. On the basis of the guidelines given in the above referred decisions, I would like to scrutinise whether Exhibit-A of both the suit are the documents of conditional sale or the same are the documents of mortgage by conditional sale. The contents of both the documents are almost similar. From the nomenclature both the documents have been described as document of conditional sale and the consideration has been shown as Rs. 7,000/-. In both the documents, there is condition that if the consideration amount repaid by 25.5.83 (the document was executed on 30.10.78) by the executant then in that case the purchaser would retransfer the lands to the vendor. This condition of repurchase or re-transfer is embodied in one and the same document and no separate document was executed by the purchaser in this regard. This is admittedly one of the characteristic of mortgage by conditionals sale. Again, it appears that same valuation of land for re-transfer was fixed although the period between execution and re-transfer was approximately five years. This fact also establishes that the nature of the document is mortgage by conditional sale and not sale with condition to repurchase. The third circumstances which makes the documents as mortgage by conditional sale is that although it has been mentioned that by execution of the document the purchaser had obtained all the rights which was vested in the seller but there is no mention in the document that the purchaser will have right to transfer the property to any body or that he would mutate his name in the Sherista of the State of Bihar although there is stipulation that he would pay the rent to the State of Bihar. The last but the most important circumstance which makes the document as mortagage by conditional sale is that as per the terms and conditions of the deed if the purchaser refuses to accept the consideration money within the period of limitation then in that case

the seller will have the right to deposit the consideration amount in court and will be entitled to take back possession of the property mentioned in the deed. It goes to establish that the title of the land mentioned in the deed was presumed to remain with the seller till the expiry of the period of limitation i.e. 25.5.83, that is why there was no mention of this fact in the sale deed that in case of refusal to re-transfer the land by the purchases the seller will be entitled to get the sale deed executed by the purchaser through the process of the court, father, it was simply mentioned that the seller will be entitled to get back the possession of the property. Thus, the contents of the deed (Exhibit-A) establishes beyond doubt that Exhibit-A of both the suits are the document of mortgage by conditional sale and not out and out a sale. This fact also stands supported from other attending circumstances i.e. (i) according to the finding of the courts below the actual valuation of the property mentioned in the deeds is more than rupees fifteen thousand, whereas, the consideration money as mentioned in the deed is only rupees seven thousand in both the deeds; (ii) the plaintiff being mortgagor and conscious of the fact that he is bound to repay the consideration money i.e. mortgage price to the purchaser by 25.5.83, he executed several documents of conditional sale to arrange the required money just before the expiry of the period of limitation; (iii) the plaintiff being conscious of the fact that period of limitation will expire on 25.5.83, he filed the suit before the expiry of the period of limitation: and before filing of the suit served legal notice upon the defendant; (v) although the purchaser-defendant were put in possession of the property but there is nothing on record that they tried to mutate their names with respect to the property described in the deed or that they even paid Malguzari to the state of Bihar. All the above mentioned circumstances establish beyond doubt that Exhibit-A of both the suits are the documents of mortgage by conditional sale.

19. It has been argued by the learned Advocate of the appellants that as per the terms and conditions embodied in the sale deed (Exhibit-A) of both the suits the purchasers i.e. appellants were not only put in possession of the property sold but they were given free hand to use the property as they liked and also to pay rent (Malguzari) of the said property which goes to establish that the purchasers had unfettered right of enjoyment of property sold which is characteristic of sale and not mortgage by conditional sale. He submitted that his case is similar to the case reported in Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, . For better appreciation, the relevant paragraph of the decision relied upon by the learned Advocate of the appellants is quoted below:

The property is sold conditionally by said document for a period of five years and possession is handed over. At the same time, the document proceeds to state. "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right". The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. The last important class is after the period of five years the transferee will have a right to get the municipal records mutated in his name and pay tax. Thereafter, the transferee will have an absolute right to mortgage, sell, or gift the suit property. Neither executant nor any one else court dispute the title. All the above clauses are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase. Thus, the finding by the High Court that the said document was not a mortgage by conditional sale; on the contrary a sale with an option to repurchase, can not be interfered with.

20. I am of the view that the ratio decided in the above mentioned case can not be applicable in this case as the recitals of Exhibit-A of both the suits are entirely different with the recitals of the document quoted in the judgment for the purpose of arriving at the conclusion whether the document was sale with option to repurchase or it was a mortgage by conditional sale. Here in this case, there is no recital in Exhibit-A of both the suits that the heirs and legal representatives also shall be entitled to use, enjoy and lease out the property mentioned in the deeds. There is also no mention in the deeds that even the purchaser will have any right to transfer the property to other persons or that they would get their names mutated in the Serishta of State of Bihar. In this view of the matter, I am of the opinion that since the recitals of the documents mentioned in the decision are entirely different with the recitals of Exhibit-A of both the suits, as such, the ratio decided in Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, will not apply in this case. Accordingly, I hold that the documents, in question, i.e. Exhibit-A of both the suits are documents of mortgage by conditional sale and not the documents of conditional sale and, accordingly, the substantial question of law is answered.

21. In the result, I do not find any merit in both the Second Appeals and, accordingly, both the appeals are hereby dismissed and the findings of the courts below in both the suits are hereby upheld. Appellants are directed to comply the order of the trial court within two months from the date of this judgment, failing which, the plaintiff-respondent will have the right to get the decree executed through the process of the court.

