
(2009) 07 CHH CK 0006
In the Chhattisgarh High Court

Prakash Chand Bajaj

APPELLANT

Vs

Bundabai, Ramji, Birendra Pratap and Narendra Pratap

RESPONDENT

Date of Decision : 28-07-2009

Acts Referred:

Limitation Act, 1963 — Section 3
Transfer of Property Act, 1882 — Section 58

Citation : (2009) 3 CGLJ 224

Hon'ble Judges : T.P. Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

T.P. Sharma, J.—This is second appeal challenging the judgment & decree dated 22-4-95 & 27-4-95, respectively, passed by the 4th Additional District Judge, Raipur in Civil Appeal No. 2247/95, affirming the judgment & decree dated 15-1-93 passed by the 12th Civil Judge Class-II, Raipur in Civil Suit No. 73A/92, whereby learned Civil Judge Class-II has declared the document dated 8-2-74 cancelled and directed for re- conveyance of possession of the suit land to the respondent.

2. Judgment & decree are challenged on the ground that the suit filed by the respondent was hopelessly time barred and both the Courts below have not considered the question of limitation.

3. Brief facts giving rise to filing of this second appeal are that one deed in the form of sale deed was executed relating to the disputed property by the defendant in favour of the plaintiff dated 8-2-74 (Ex.D-1) and out of the property mentioned in Ex.D-1 one sale deed was executed by the defendant in favour of the plaintiff vide sale deed dated 28-6-78 (Ex.P-1). The present respondent has filed suit for declaration and cancellation of sale deed dated 8-2-74 on payment of the amount of mortgage of Rs. 1,000/-, and for recovery of possession in which it has been pleaded that the present respondent/plaintiff has mortgaged his property to the appellant/defendant and a document in the form of sale deed

was executed to secure the loan transaction, and in lieu of interest, possession of the property was transferred to the appellant. After part payment of the mortgage amount re- conveyance deed Ex.P-1 relating to remaining property was executed by the appellant in favour of the respondent, but even after receiving notice the present appellant has not executed the re-conveyance deed and has declined to receive remaining part of mortgage amount and has also declined to return the possession of remaining part of the land originally mortgaged. The suit was filed on 9-7-80 when the plaintiff/appellant has failed to reply the notice and not acted upon in accordance with notice, inter alia much after three years of the execution of sale deed.

4. In the written statement, the present appellant has specifically denied the alleged transaction as mortgage in the form of nominal sale and transfer of possession in lieu of interest. The present appellant has also denied the allegation that after receiving part payment of mortgage amount he has executed re-conveyance deed and specifically alleged that the suit for declaration and cancellation of sale deed is barred by limitation.

5. After appreciating the evidence adduced on behalf of the parties, learned Civil Judge has decreed the suit and by affirming the judgment & decree passed by learned Civil Judge, learned lower appellate Court has dismissed the appeal.

6. Following substantial question of law has been formulated for decision of this appeal:

Has the lower appellate Court erred in law in holding that the suit filed by the plaintiff was within limitation?

7. I have heard learned Counsel for the parties and perused the impugned judgment & decree as also the record of Courts below.

8. Learned Senior Advocate appearing on behalf of the appellant vehemently argued that the suit was simply for cancellation of sale deed and for recovery of possession, therefore, the suit in present form shall be governed by Article 59 of the Limitation Act, 1963 (for short 'the Act, 1963') and not by Article 65 of the Act, 1963. Learned Senior Advocate further argued that even the suit of this nature shall be filed within three years in accordance with the general provisions of limitation provided under Article 113 of the Act, 1963 and any suit filed after the period of three years shall be barred and shall be dismissed in terms of Section 3 of the Act, 1963. Learned Senior Advocate also argued that learned Civil Judge was under obligation to dismiss the suit on the ground of limitation and the lower appellate Court ought to have allowed the appeal and dismissed the suit only on the ground of limitation, but the Court below has not considered the substantive question of law relating to limitation and decreed the suit, and also dismissed the appeal filed on behalf of the appellant.

9. On the other hand, learned Counsel for the respondents submits that the question of limitation shall be determined on the basis of allegations made in the

plaint and not on the basis of allegations made in the written statement, if the plaintiff fails to prove his case that the document was not of mortgage but was sale of the suit land, the Court was empowered to dismiss the suit. Learned counsel further argued that the respondent/ plaintiff has pleaded in the plaint that the document was in the form of sale deed, but it was not sale and was mortgage, and in lieu of interest the possession was delivered which is punishable under the law. Learned Counsel also argued that virtually, the mortgage was usufructuary mortgage in accordance with clause (d) of Section 58 of the Transfer of Property Act, 1882 (for short 'the Act, 1882') and to recover possession based on mortgage limitation shall begin from the date of denial/ when the possession becomes adverse to the plaintiff and such suit shall govern by Article 65 of the Act, 1963.

10. On perusal of the plaint it is clear that the suit was for declaration & cancellation of sale deed, virtually, the mortgage deed is in the form of sale deed for recovery of possession after paying the mortgage amount in which it has been specifically pleaded that possession parted to the appellant is in lieu of future interest. Section 58 of the Act, 1882 defines mortgage. Clause (d) of Section 58 of the Act, 1882 defines usufructuary mortgage which reads as follows:

(d) Usufructuary mortgage.-Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest, or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee an usufructuary mortgagee.

11. Under clause (d) of Section 58 of the Act, 1882, mortgage by transferring possession in lieu of interest is permissible.

12. Limitation of the suit shall be reckoned on the basis of plaint allegation. Plaint allegation clearly shows that it was suit for redemption of mortgage property, recovery of possession and for declaration of the instrument, not for only cancellation of instrument. In case of cancellation or setting aside an instrument, limitation is three years in accordance with Article 59 of the Act, but in case of recovery of possession which is main relief in this case, on the basis of mortgaged property and for redemption or recovery of possession of immovable property the limitation provided in Article 61 of the Act, 1963 is 30 years, but if the suit is for redemption of mortgage and recovery of possession on the basis of adverse possession, such suit shall be governed by Article 65 of the Act, 1963, which reads as follows:

Article 65.-For possession of immovable property or any interest therein based on title.

Explanation-For the purpose of this Article-

(a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when estate of the remainderman, reversioner or devisee, as the case may be, falls into possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

13. In the present case, suit was for redemption of mortgage and recovery of possession of the property mortgaged under clause (d) of Section 58 of the Act, 1882. When the defendant failed to return possession and execute re-conveyance deed, the suit was for redemption of mortgage deed and recovery of possession, and limitation for such suit was 12 years in accordance with Article 65 of the Act, 1963.

14. The lower appellate Court has rightly decided the question of limitation in favour of the respondent and the Court below has not committed any illegality. For the aforesaid reasons, the substantial question of law is decided as negative and on the basis of aforesaid finding, the present appellant is liable to be dismissed and it is hereby dismissed.

15. The appellant shall bear his own cost of suit and appeal, and also bear the cost of opposite party. Advocate fees as per schedule.

16. Decree be drawn up accordingly.