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(2013) 07 PAT CK 0003

In the Patna High Court

Case No : Second Appeal No. 166 of 2010

Satan Singh @ Satya Narain Singh and Others APPELLANT

Vs

Gulabehand Sharma and Others RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 100(3), 100(5)
Transfer of Property Act, 1882 — Section 58(c), 60

Citation : (2014) 1 PLJR 58

Hon'ble Judges : Jyoti Saran, J

Bench : Single Bench

Advocate : Binod Kumar Singh, for the Appellant; Sanjay Kumar Verma, for the Respondent

Judgement

Jyoti Saran, J.—The appellant has filed this appeal being aggrieved and dissatisfied with the judgment and decree dated 10.2.2010/24.2.2010 passed by learned Additional District and Sessions Judge, F.T.C.-I, Gopalganj in Title Appeal Nos. 83 of 1979/193 of 2009, whereby the appellate court below has partly modified the judgment and decree dated 24.2.1979/19.11.1979 passed by learned Additional Munsif, Gopalganj in Title Suit No. 55 of 1971 by dismissing the suit on contest as against the appellants-1(A), (B) & (C) while disposing of the suit on compromise as against the appellant nos. 2 and 3. I shall be referring to the status of the parties as it stood before the trial court.

2. The facts of the case briefly stated is that the suit was filed by the plaintiffs for redemption of the mortgage for the suit property bearing khata no. 34, survey no. 23 and khata no. 20, survey no. 39 having an area of 16 kathas 8 dhurs situated in Mauza-Barahara, P.S.-Bhorey, District-Gopalganj. It was the case of the plaintiffs that the landholders by a registered sale deed dated 1.6.1914 had transferred the suit property in favour of Girija Shukla and Aditya Shukla and also handed over possession to them. It was further case of the plaintiffs that Girija Shukla vide registered sale deed dated 5.7.1920 sold the land in favour of

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Khedu Ahir who in turn sold the suit property in favour of Jado Lohar and Lakshan Lohar on 11.8.1926. It is the plaintiffs'' case that Jado Lohar, Raghunandan Lohar and Lakshan Lohar all were sons of Rajnandan Lohar out of whom Lakshan Lohar died issueless. Whereas plaintiff nos. 1 to 3 are sons of Jado Lohar, the plaintiff no. 4 is the son of Raghunandan Lohar. If is further the case of the plaintiff that Lachhan Lohar and Ganesh Lohar had executed a registered jarpeshagi "Baimeyadi Char sala" on 18.5.1954 after receiving Rs. 1,605/- in favour of one Gena Singh, the defendant and also handed over the possession of the suit property to him. It is the plaintiffs case that in terms of the deed a sum of Rs. 972/- of the mortgage money was to be given to one Babu Inderdeo Rai, in lieu of the loan taken by Lachhan Lohar on a hand note and in a similar manner a sum of Rs. 623/- was to be given to him in lieu of the loan taken by Ganesh Lohar on a hand note, while Rs. 10/- was to be paid to the mortgagor. It is further the case of the plaintiffs that it was agreed between the parties that the mortgagor would recover the possession of the mortgaged property after making the payment of the mortgaged amount within the period mentioned in the deed failing which the second party Gena Singh would be at liberty to get a sale deed executed through the process of the court after service of notice and also get his name mutated in the Government records. According to the plaintiffs it was further agreed that Gena Singh would also be entitled for enjoyment of the usufructs of the mortgaged property. It is further the case of the plaintiffs that when the defendant did not make payment of the mortgaged amount to Babu Indradeo Rai then the plaintiffs discharged the loan themselves in terms of the two hand notes. It was further the case of the plaintiffs that before filing the suit, they requested the defendant for redemption of the mortgage and to deliver possession of the mortgaged property to them but the request was refused by the defendant and hence the suit was filed giving rise to Title Suit No. 55 of 1971.

3. The trial court by judgment and decree dated 24.9.1979 dismissed the suit. Being aggrieved the plaintiffs filed a Title Appeal bearing Title Appeal Nos. 83 of 1979/193 of 2009 which has been decreed in favour of the plaintiff-appellants by the impugned judgment and decree in this appeal.

4. While Mr. Binod Kumar Singh has appeared for the defendant-respondent-appellant, the plaintiffs are represented by Mr. Sanjay Kumar Verma, Advocate. The original plaintiffs and the defendant died during the pendency of the suit/ appeal and have been substituted by their respective legal heirs in the court below.

5. The thrust of arguments of Mr. Singh appearing for the appellant is that although the deed in question dated 18.5.1954 is in the nature of a sale deed with a condition of repurchase but the appellate court below has committed a serious illegality in treating the same as a deed of mortgage with conditional sale ignoring the provision of Section 58(c) of the Transfer of Property Act (hereinafter referred to as the ''Act'') as well as the proviso attached to it. It is

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the submission of Mr. Singh that the construction of the deed by the appellate court itself is a serious infirmity warranting interference in this appeal. It is submitted that the appellate court has made out a third case which was not even pleaded by the plaintiff and even in absence of any such relief prayed by the plaintiff in his suit.

6. Mr. Sanjay Kumar Verma has appeared for the plaintiff-appellant-respondent. While contesting the contention raised by Mr. Singh, he submits that the appellant has failed to raise any such issue in his memo of appeal as being canvassed during the course of argument. Mr. Verma, with reference to the provisions of Section 100(3) of the CPC (hereinafter referred to as the ''Code'') has submitted that the appellant has to restrict his issues to those as framed in the memo of appeal. With reference to paragraph 14 of the judgment impugned, Mr. Verma submitted that in view of the admission of the appellant himself that the deed in question was a mortgage deed with conditional sale and that on default of payment in terms of the deed, the sale shall become absolute, the appellant now cannot deviate from this admission. It was submitted that once the deed is held to be a mortgage deed, be it of any nature, the mortgagor has a right to redeem before expiry of period of limitation prescribed under the Limitation Act. He has thus submitted that appellate court below having examined the nature and character of the deed, in absence of any legal infirmity therein, it would not require any interference by this Court.

7. Mr. Singh in his short reply has submitted that in absence of tender of money by the plaintiff towards redemption of the mortgage, he had no cause of action in view of the statutory provision underlying Section 60 of the Act. It was further submitted that the claim of tendering of the mortgage money by the plaintiff stands negated not only by the trial court but even the appellate court and thus in absence of any tender, the plaintiff neither had a cause of action nor could claim redemption. In response to the reliance placed by Mr. Verma on Section 100(3) of the Code, Mr. Singh referred to the provision of Section 100(5) of the Code to submit that if a substantial question of law does arise, it would not preclude the court from framing any such question even if the same has not been formulated by the appellant in the memo of appeal.

8. I have heard learned counsel for the parties and perused the materials on record. This appeal arises from a judgment of reversal and thus the issue posed before this Court would require a careful examination. As I have already stated the thrust of argument of Mr. Singh is directed towards the nature of the deed which according to him is in the nature of deed of absolute sale with a condition of repurchase and that the appellate court has misread the intent of the parties as reflected from the recitals to the deed and thus has committed a serious infirmity in holding the same to be a deed of mortgage with conditional sale.

9. It is now to be seen whether the finding of the appellate court is supportive by the recitals of the deed or hinges on perversity. It is by now well settled that while construing a deed not only the intention of the parties to the deed is to be

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seen but it is an equally relevant consideration, whether the intention of the parties is reflected from the recitals to the deed. Law is well settled on this score and reference is made to the judgment of the Supreme Court rendered in the case of Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, The nature of the deed is "Bai Meyadi Char Sala" which literally means a deed with no fixed period but with option to the parties, exercisable within four years. The titular description of the deed not clearly reflecting its character, the appellate court rightly ventured into the recitals of the deed to ascertain the intention of the parties, for determining whether the deed was a mortgage deed with conditional sale or a sale deed with a condition of repurchase. The appellate court upon examination of the recitals of the document has mentioned that in terms of the deed, the second party i.e. the defendant-appellant before this Court during the period of mortgage would remain in possession of the suit property, enjoy the usufructs and also pay the rent of the same and upon payment of the mortgage amount of Rs. 1,605/- by the first party, the first party i.e. the plaintiff would be entitled to enter possession over the suit property as also for return of the mortgage document. The appellate court has also noted the right of the second party to get a sale deed executed through the process of the court after service of notice to the first party, on the failure of the first party to discharge their obligation within the period fixed in the deed. The appellate court also took notice of the stipulation vesting the right in the second party to sue the first party for interest in the event of their dispossession from the suit property during the period of mortgage. The deed further vested right in the second party to get his name entered in the Government records after execution of a sale deed through the process of the court after serving notice on the first party. Although the relevant covenants of the deed have been reproduced by the appellate court while recording his finding that the deed in question was in the nature of a mortgage deed with conditional sale and though Mr. Singh tried to counter this conclusion on the anvil of the conditions present in the provision underlying Section 58(c) of the Act and the proviso attached thereto but he failed to establish any relationship of a buyer and seller being reflected from the deed in question, between the parties. On the contrary the relevant recitals leave no room for confusion that the relationship between the two parties was that of a creditor and a debtor with a condition that the creditor upon failure of the debtor to discharge the debts, would be entitled to get a sale deed executed through the process of the Court after service of notice to the debtor. Had it been a case of outright sale with a condition of repurchase, the option would not have been given to the creditor to get a sale deed executed through the process of the Court rather this option would have been reserved by the debtor but it is not so nor it is reflected from the recitals as reproduced by the appellate court in the judgment impugned.

10. A somewhat similar issue was the subject matter of the judgment rendered in the case of Chunchun Jha (supra) where the recitals to the deed were somewhat ambiguous and has been reproduced by the Supreme Court in

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paragraph-9 of the judgment. In fact Clause-3 thereof, contained an admission of sale. The deed also contained a stipulation that if the executant made payment of the money within two years the property would revert to them. The Supreme Court taking note of the circumstances, in paragraphs 10 and 11 of the judgment concluded that the intention of the executant was that the title would remain with them and though the deed lacked precision of a practised hand and there was ambiguity present but considering the covenants to the deed in totality, the Supreme Court in paragraph 20 of the judgment held the deed to be a mortgage deed with conditional sale. The Supreme Court has taken note of the limitations of the deed writers which sometimes result in ambiguity. The judgment of the Supreme Court rendered in the case of Chunchun Jha applies with all force to the present case.

11. Mr. Singh had next tried to question the conclusion of the appellate court on grounds that it did not satisfy the conditions attached to Section 58(c). It is difficult to appreciate the contentions so raised by Mr. Singh. The conditions set out in Section 58(c) are separated by the word or meaning thereby that on either of the conditions being satisfied in a mortgage deed, it would be a mortgage deed with conditional sale. In my opinion all the three conditions stipulated in Section 58(c) stood satisfied by the covenants present in the deed inasmuch as it vested right in the second party to get a sale deed executed through the process of the court upon failure of the first party to pay the mortgage money. It also contained stipulation that upon making payment of the mortgage money the second party shall return the mortgage deed and also transfer the possession of the property to the first party thus satisfying the other two conditions. Even the proviso in no manner comes to the aid of the appellant inasmuch as the condition is very much embodied in the deed regarding reversion of the property and the return of the deed to the first party, upon discharge of the obligation thus affecting the condition of sale, so envisaged thereunder. It is thus manifest that neither on the basis of the stipulations present in the deed nor on the strength of the provision of Section 58(c) of the Act, can the appellant question the conclusion drawn by the appellate court.

12. The other ground on which the appellant had tried to question the appellate decree is that once the claim of the plaintiff regarding tendering of the mortgage money has been rejected by the appellate court, the stipulations provided u/s 60 of the Act not being satisfied, there was no cause of action for the plaintiff to maintain the suit. It is not in contest that the right vested in the second party who is the appellant before this Court of perfecting his title over the suit property in the light of the stipulations set out in the deed dated 18.5.1954 by getting a sale deed executed through the process of the court after service of notice to the first party, was never exercised by the second party. Thus, the right of the first party to redeem the property continued and was inherent in them until the right was foreclosed by an appropriate suit which event never took place. The plaintiff thus had the legal right to file a suit for redemption within the prescribed period of 30 years from the date of execution of the deed in terms of the provisions of

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Article 61 of the Limitation Act. The suit for redemption was filed in the year 1971 i.e. within 30 years of the execution of the mortgage deed dated 18.5.1954. That brings this Court to the issue whether in view of the finding of the appellate court that the mortgage money had not been paid, the plaintiff had any cause of action to maintain the suit. This argument also has no legs to stand for more than one reason. Firstly, it was all along the case of the plaintiff that they had made payment of the mortgage money by making payment of the loan amount to Babu Indradeo Rai upon failure of the defendant to do so. It is the case of the plaintiff that having done so, when they approached the defendant for restoration of possession and the return of the document, they were refused the same and it is for this reason that they chose to institute the suit in question. Though this contention of the plaintiff stands negated by the appellate court but this circumstance alone would not take away the right of the plaintiff to maintain the suit in view of the judicial pronouncement of this Court reported in Asarfi Mahaseth Vs. Ram Swaroop Panjiar and Others,) which has also been taken note of by the appellate court to hold that a suit of such nature can also be brought without tendering or depositing the mortgage money. This would bring this Court to the last issue raised by Mr. Singh appearing for the appellant regarding a third case being made out by the appellate court which was not even pleaded by the plaintiff.

13. I wonder how this argument is available to the appellant when it is an admitted position that the suit in question was filed for redemption of the suit property and all that the appellate court by the impugned judgment and decree has done is to allow the suit requiring certain steps to be taken by the plaintiff for redemption of the suit property. For the reasons aforestated, it is held that no substantial question of law arises in the present appeal for consideration. This appeal is accordingly dismissed.

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