

(2011) 03 JH CK 0005
Jharkhand High Court
Case No: S.A. No. 274 of 2009

Ram Chandra Yadav and Another

APPELLANT

Vs

Shahid Alam and Others

RESPONDENT

Date of Decision: March 10, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 11
- Evidence Act, 1872 - Section 91, 92
- Transfer of Property Act, 1882 - Section 58

Citation: AIR 2011 Jhar 97 : (2011) 2 JCR 360 : (2011) 8 RCR(Civil) 2070

Hon'ble Judges: Poonam Srivastav, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Poonam Srivastav, J.

Instant Second Appeal is listed for admission under Order 41 Rule 11 Code of CPC. The Respondents-Defendants are represented and the lower Court record is also available. In the circumstance, respective counsels appearing on behalf of the Appellants and the Respondents are ready to argue the Second Appeal finally. Thus, the appeal proceeds for final hearing.

2. The substantial question of law which arises in the instant Second Appeal was formulated on 20.1.2011. Though learned Counsel has framed a number of substantial questions of law, but the appeal is being heard only on the following substantial question of law:

Whether the three transactions are mortgage by way of a conditional sale or a sale with a condition to repurchase?

3. Title Suit No. 16 of 1997 was preferred by Shahid Alam against the Defendants-Appellants claiming the reliefs for declaration of his title over the suit

land detailed in schedule-1 of the plaint and to put the Plaintiff in possession over the suit property after ejecting the Defendants and a decree for realization of Rs. 6800/-on account of losses suffered by the Plaintiff due to Defendants' unlawful retention of the suit property assessed at the rate of Rs. 200/-per month with effect from July 1994 to May 1997. Also for realization of pendente lite and future damage till delivery of possession at the rate of Rs. 200/-per month and also for a decree for permanent injunction restraining the Defendants from executing any deed of transfer or encumbrance on the suit property.

4. The case of the Plaintiff, in brief, is that he had purchased suit property through three sale deeds vide Sale deed Nos. 5187, 5188 and 5189 dated 14.6.1989 from the original Defendant Bhikhari Mahto @ Bhikhari Yadav. An another deed of agreement was registered on the same day i.e. on 14.6.1989 by the Plaintiff in favour of the Defendants stipulating that the Plaintiff had liberty to use and occupy the suit properties, but will not entitle them to receive rent or get the rent receipts issued in his own name. They would not encumber the suit properties by transfer or mortgage to any Bank etc. and the repayment of consideration money of the suit properties detailed in the three sale deeds mentioned aforesaid to the tune of Rs. 43,500/-within the period commencing from 14.6.1989 up to 13.6.1994. In the event of repayment the Plaintiff shall re-convey the suit properties in favour of the Defendants, failing which the sale deeds shall be converted into perfect and absolute.

5. The suit properties consist of pucca house and was in possession of two tenants, who were running their Radio and cycle shops. The Plaintiff had got those two shops vacated from the respective tenants and was in possession of the same from where the Plaintiff is carrying his own business after making necessary repairs, addition and alteration.

6. The pleadings mention that the Defendants failed to take any step to perform their part of contract as per registered deed of agreement dated 14.6.1989, whereby they were required to make the entire payment in compliance with the deed of agreement prior to 14.6.1994 and, therefore, the Plaintiff's claim that he was absolute owner of the suit property and his title was valid from the date of execution of the registered sale deeds by the Defendants in favour of the Plaintiff. The name of the Plaintiff was also mutated in respect of the suit properties.

7. The Defendants filed written statement challenging the maintainability of the suit in the present form and claimed that the suit was on frivolous and misconceived ground, barred by limitation, Specific Reliefs Act and principle of estoppel and acquiescence. It is admitted that the suit property was originally acquired by Dukhi Mahto through sale deed and was succeeded by Bhikhari Mahto. The Defendants claimed that they were not exclusive owner of the suit property and, therefore, they have no right to transfer the same alone and thus three sale deeds do not confer any valid title upon the Plaintiff. The Defendants, however, conceded that the

Plaintiff is in occupation of one room known as cycle shop and since Plaintiff failed to adjust the amount due to the tune of Rs. 16,500/-therefore, they did not acquire right and title over the suit property.

8. The suit was dismissed by the Subordinate Judge-II, Koderma coming to a conclusion that the deeds of transfer entered into between the Plaintiff and the Defendants was a mortgage with a conditional sale and not a deed of sale with condition to repurchase.

9. The Plaintiff preferred an appeal in the Court of the Additional District Judge (F.T.C.), Koderma vide Title Appeal No. 01 of 2006. The appellate Court framed only question to be decided was "whether the three sale deeds (Exts. 4 series) followed by the deed of an agreement (Ext.2) are a sale with condition of repurchase or mortgage by way of conditional sale?

10. Counsel appearing on behalf of the Defendants-Appellants has supported the judgment of the trial Court and submits that the sale deed and the agreement of re-conveyance were successfully executed on the same date. The series of events as admitted by both the parties and the terms of agreement clearly spell out the findings of the trial Court. There was no absolute sale, in the event there was any intention to transfer the suit properties by the three sale deeds, there would not have been any agreement for re-conveyance on the same date, thus, the Plaintiff and the Defendants both had agreed that the sale consideration would be handed over by the Defendants to the Plaintiff and in turn Plaintiff would execute the deed of re-transfer and, thus, evidently the only conclusion is that the transaction was not at all absolute sale, but it was a mortgage and, thus, the suit has rightly been dismissed.

11. Yet another circumstance has been pointed out that the transferrer had exclusive right since the property in question was purchased by his father Dukhi Mahto. Despite executing the sale deed the transferor continued in possession and, therefore it clearly suggests that the sale deeds were executed in a very casual manner. It was also pointed out that the Plaintiff had instituted a Title Suit No. 12 of 1994 and when the Defendants were ready to pay the entire consideration amount, the suit was withdrawn. This is yet another circumstance which leads to a conclusion that the transaction in question is a mortgage by way of conditional sale and the Plaintiff can have no claim over the suit property on the basis of sale deeds (Exts. 4 series).

12. Counsel appearing on behalf of contesting Plaintiff-Respondent has disputed the aforesaid argument at the very out set. He has pointed out and highlighted proviso to Section 58(c) of Transfer of Property Act, 1982, which reads as under:

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. The Lower appellate Court did not agree with the findings of the trial Court and was of the view that the transfer by the Defendants in favour of the Plaintiff was not a mortgage by conditional sale, since the three sale deeds and the agreement of sale was not embodied in a single documents. Besides, other circumstances were also taken into consideration before setting aside the findings of the trial Court and specific reasonings were attributed.

14. The Defendants have preferred this instant second appeal on the substantial question of law mentioned in the earlier part of the judgment. The admitted position in the instant appeal is that three sale deeds were executed on the same date followed by a deed of agreement in favour of the original Defendant Bhikhari Mahto by the Plaintiff. The agreement dated 14.6.1989 is in relation to the three sale deed Nos. 5187, 5188 and 5189. The said sale deeds had granted liberty to use and occupancy of the suit property, but had restricted the liberty to get rent of the suit properties and issue rent receipts in his own name for a stipulated period i.e. from 14.6.1989 upto 13.6.1994. The transferee-Plaintiff was also restrained from encumbering the suit property but only for the aforesaid stipulated period as mentioned in (Ext.2). It was also stipulated that the consideration money within the agreed time i.e. from 14.6.1989 to 13.6.1994 was liable to be repaid, else the sale would be absolute. It is, thus, evident that the documents itself, which was interpreted by the Appellant Court below was in the nature of a loan and the position of the vendor and vendee was that of debtor and creditor. It was a right of re-conveyance given by the Plaintiff himself, who was the purchaser, but the only embargo was the time frame, which admittedly the Defendants failed to adhere. Withdrawal of the previous suit No. 12 of 1994 cannot have such a far reaching effect to arrive at a conclusion that it was a mortgage and not an absolute sale. The certified copy of the plaint of Title Suit No. 12 of 1994 was filed by Defendant himself and on a bare perusal of the same the appellate Court was able to decipher the intention of Bhikhari Mahot. Perusal of the judgment of the appellate Court evidently establishes that the findings recorded are all based on good appraisal of evidence. Besides, the conclusion is based on sound reasonings and by specifically repudiating the findings of the trial Court. The trial Court has completely failed to take into note to proviso of Section 58(c) of the Transfer of Property Act and has come to a conclusion in favour of the Defendants in a cryptic manner, which the appellate court has taken note of and has given a detailed findings and reasonings for setting aside the judgment of the trial Court.

15. Counsel has placed reliance on a decision of *Tulsi and Ors. v. Chandrika Prasad and Ors.*, reported in 2006 JLR (SC) 178. While delivery judgment in this case reliance was placed on an apex Court decision of [Bishwanath Prasad Singh Vs. Rajendra Prasad and Another](#), . The Apex Court was of the view that the condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale must be an ostensible sale, it must contain a condition that on default of payment of mortgage money on certain date, the sale shall become absolute or on

condition that on such payment being made the buyer shall transfer the property. This is not the situation in the instant case.

16. In the case of Bishwanath Prasad Singh (supra), Supreme Court had laid down the principle in paragraph 44 of its judgment, which is reproduced herein below:

Going by Section 58(c) of Transfer of Property Act, it is clear that for an ostensible sale deed to be construed as mortgage by conditional sale, the condition that on repayment of the consideration by the seller the buyer shall transfer the property to the seller is embodied in the document which effects or purports to effect the same. It has so been clarified by this Court also in Pandit Chunchun Jha v. Sheikh Ebadat Ali and Anr. (1995(1) SCR 174) by stating, " If the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not." Therefore, it is clear that what was involved in this case was the sale followed by a contemporaneous agreement for re-conveyance of the property. Such an agreement to re-convey is an option contract and the right has to be exercised within the period of limitation provided therefore. It has also been held that in such an agreement for re-conveyance, time is of the essence of the contract. The Plaintiffs not having sued within time for re-conveyance, it would not be open to them to seek a declaration that the transaction of sale entered into by them construed in the light of the separate agreement for re-conveyance executed by the purchaser, should be declared to be a mortgage. Such a suit would also be hit by Section 91 of the Evidence Act, subject to the exceptions contained in Section 92 of the Act.

17. In view of the findings recorded earlier and after going through the two judgments of the Courts below, I do not agree with the findings of the trial Court. The circumstances that lead to an irrevocable conclusion that the transaction can by no means constitute a mortgage by conditional sale. The condition of re-conveyance was necessarily liable to be incorporated in one and the same documents, in view of proviso to Section 58(c) of the Act and since this aspect is evidently absent it cannot be concluded to be a mortgage by conditional sale. Admittedly there are three sale deeds and the fourth deed, which is in form of an agreement for re-payment of the loan money does not fulfill the condition incorporated in Section 58(c) proviso. The Lower appellate Court has arrived at a just conclusion by decreeing the suit of the Plaintiff. The Plaintiff gave an opportunity to the original Defendant to repay the entire consideration money and only then the Plaintiff would have been obliged to re-convey the suit property and that too the money was to be paid between the period commencing from 14.6.1989 to 13.6.1994. It was not done and therefore, the question raised in the instant appeal that the transfer made in the instant case was a mortgage by conditional sale is answered in negative, but it was a sale with a condition to re-purchase and that became absolute on 13.6.1994. This is one of those cases where the intention of the parties is very clear and it is contract where

the time is essence and, therefore, on 13.6.1994 the sale has become absolute. I am in agreement with the findings arrived at by the lower appellate Court.

18. The Second Appeal lacks merit and is, accordingly, dismissed. No order as to the costs.