

HIGH COURT OF CHHATTISGARH

BENCH : Narendra Kumar Vyas, J.

Date of Decision: 14-03-2024

FA No. No. 171 of 2017

HETRAM SAHU

Vs.

RAMLAL CHOUHAN AND OTHER

Legislation:

Code of Civil Procedure, 1908, Section 96

Transfer of Property Act, Section 58, Section 59

Registration Act, 1908, Section 17

Indian Penal Code, Section 145

Limitation Act, Article 19

Subject: Appeal regarding the validity of a mortgage deed involving a property dispute between Hetram Sahu and Ramlal Chouhan.

Headnotes:

Property Dispute – Mortgage Deed's Validity – Challenged in first appeal under Section 96 CPC – Hetram Sahu (Appellant/Defendant No.1) contesting trial court's decree declaring the mortgage deed as null and void, and ordering return of property possession – Allegations of fraud in execution of mortgage deed instead of rent deed. [Paras 1-2]

Evidence and Witness Testimony – Plaintiff's testimony and cross-examination evidence, alongside other witnesses (PW1 to PW10) – Plaintiff's lack of education and allegation of being deceived into signing mortgage deed – Defendant's admission of renting two shops and absence of registration for mortgage deed. [Paras 6-9]

Legal Analysis – Trial court's application of legal principles – Section 59 of the Transfer of Property Act requires registration of mortgage deeds over Rs. 100 – Section 17 of the Registration Act deems unregistered deeds for property over Rs. 100 invalid – Appellant's argument on using unregistered mortgage deed for collateral purposes rejected as no recovery suit or counter-claim was filed. [Paras 10, 20-24]

Decision – Dismissal of First Appeal – Mortgage deed dated 20-9-2006 held not a valid mortgage by conditional sale as per Section 58(c) of the Transfer of Property Act – Lack of registration and failure to fulfill conditions render mortgage deed invalid – Trial court's judgment in favor of the plaintiff upheld. [Paras 25-28]

Referred Cases:

- Jala Bani vs. State of J & K (AIR 1977 SC 2220)
- Prakash (dead) by LR vs. G. Aradhya and others (2023 LiveLaw 9SC) 685)
- Shakeel Ahmed vs. Syed Akhlaq Hussain (Civil Appeal No. 1558/2023 2023 INC 1016)

Representing Advocates:

Counsel for Hetram Sahu (Appellant/Defendant No.1): Not specified

H.B. Agrawal, Sr. Advocate assisted by Yogesh Chandra for Ramlal Chouhan (Respondent)

CAV ORDER

Narendra Kumar Vyas, J. - The appellant/defendant No.1 has filed the instant First Appeal under Section 96 of the Code of Civil Procedure, 1908 being aggrieved by the judgment and decree dated 20-3-2017 passed by the Additional District Judge, Katghora, District - Korba (C.G.) in Civil Suit No.01-A/2015 whereby the learned trial Court has decreed the suit filed by the plaintiff/respondent No.1 holding that the mortgage deed dated 20-9-2006 executed between the plaintiff and defendant No.1 is null and void and the defendant No.1/appellant was directed to handover possession of the suit property within two months from the date of the judgment and decree.

2. Brief facts as reflected from the record are that the plaintiff has filed a civil suit before the learned trial court mainly contending that he is a retired SECL employee and in the year 1963 he has constructed four shops on the land belonging to the SECL for which he spent expenditure of Rs.40,000/- and since then he is in possession of that property. Subsequently, the plaintiff let out two shops out of 4 shops to the appellant/defendant No.1 in the year 2005. Neither the appellant /defendant No.1 has paid the rent nor vacated the shops. Thereafter, the defendant No.1 has executed an agreement in the year 2006 and asked the plaintiff to put his signature on stamp papers as the plaintiff is an uneducated person and the defendant No. 1 knowing about the weakness of the plaintiff has obtained signature of the plaintiff fraudulently in the name of rent deed and executed mortgage deed instead of rent deed. This fact was brought to the notice of the plaintiff in the year 2012 when the

defendant initiated proceedings under Section 145 of the Cr.P.C., wherein the defendant No.1 has produced the mortgage deed, then only it was brought to the notice of the plaintiff that he has been cheated by the defendant No.1 which has necessitated the plaintiff to file present civil suit. It has been further contended that the plaintiff has neither sold the property nor executed the mortgage. It has also been contended that the Sub Divisional Officer has passed the order under Section 145 of Cr.P.C., without considering the fact, therefore, he has prayed for quashing of the order passed by the learned Sub-divisional Magistrate also in the suit. On the factual foundation, plaintiff has prayed for possession of the suit property and also prayed for quashing of the mortgage deed dated 20-9-2006 as well as the order passed by the Sub Divisional Magistrate, Katghora, Dist. Korba in case No 144 of 2012 and the order dated passed on 9-11-2012.

3. The defendant No.1 filed his written statement denying the allegations made in the plaint mainly contending that in the year 2005 the defendant has taken two shops on rent for which he has paid Rs.10,000/- as surety and rent was also given 1000/- per month. It has also been contended that the plaintiff has constructed his house at Raipur for which money is required, therefore, the plaintiff has taken Rs.1,20,000/- on 8-10-2006 after executing the mortgage deed before the notary wherein it has been mentioned that if Rs.1,20,000/- is not paid within one year then the defendant No.1 will be the owner of the suit property. As such, after execution of the mortgage deed it has not been required for him to pay the rent. It has also been contended that since the defendant No.1 purchased the property on his name, therefore, he has already obtained electricity connection and also got registration in the Municipal Corporation, Korba and running the shops and would submit that the Sub-Divisional Magistrate has also passed the order on 9-11-2012 in favour of the defendant No.1. It has also been contended that the trial court has no jurisdiction to set aside the order dated 9-11-2012 passed by the Sub Divisional Magistrate, Katghora. It has also been contended that since SECL was not party to the case, therefore, suit is not maintainable and it has also been contended that the suit is barred by limitation.

4. The respondent State has also filed written statement wherein it has been contended that the suit property is the Government land which has been obtained by the SECL only for mining purpose. It has also been contended that neither permission from SECL nor from the Government has been obtained. It has also been contended that the land has not been transferred

in the name of any of the parties, as such neither the plaintiff nor the defendant has any right of possession over the suit property and would pray for dismissal of the suit.

5. On the pleadings of the parties, the trial court has framed as many as seven issues. Issue No. 1, 3 and 6 are relevant which are extracted as under:-

क्र०	वाद प्रश्न	निष्कर्ष
1.	क्या गिरवीनामा लेख दिनांक 20/09/2006 अवैध होकर निरस्त किये जाने योग्य है ?	“ हां ”
3.	क्या विवादित दुकान से प्रतिवादी क्र० 01 को बेदखल कर वादी कब्जा पाने का अधिकारी है ?	“ हां ”
6.	क्या वाद परिसीमा विधि से बाधित है ?	“ नहीं ”

6. To substantiate his defence, plaintiff has examined himself as PW/1 Ramlal Chouhan, P.K. Das (PW/-2), Mahesh Pathak (PW/3), Vahida Khan PW/4, Ultra Nage (PW/5), Malti Nage (PW/6), Budwara Mahant (PW/7), Purnima Sahu (PW/9) and Kamta Prasad (PW/9) and Dharmendra Jagdhiye (PW/10). The plaintiff has also exhibited documents i.e., Isthaghasa submitted before the Police Station (Ex.P/1), order sheet of the Sub Divisional Magistrate, Katghora (Ex.P/2), Order of Sub Divisional Officer (Ex.P/3), receipt issued by the Municipal Corporation on 9-5-2012 and 13-12-2015 (Ex.P/5) and death certificate of Malk Ram (Ex.P/6). Plaintiff witness (PW1) in his examination-in-chief by way of an affidavit as provided under Order 18 Rule 4 CPC has reiterated the stand which he has already taken the stand in the plaint. This witness was extensively cross-examined by the defendant wherein he has stated in para 20 of his cross-examination that Hetram has executed agreement for rent, as such he has put his signature and denied in presence of notary of Babban Choudhary and other witness, he has taken Rs.1,20,000/- on the condition that if he is not able to pay the said amount within a period of one year, then two shops will be owned by the defendant.

7. PK Das (PW/2) in his examination-in-chief has stated that Ramlal is not an educated person, he cannot put his signature and he has never sold the property through mortgage to the defendant. This witness was extensively cross examined by the defendant wherein he has denied the terms of paying rent of Rs. 1,000/- to the plaintiff. He has also admitted that Ramlal after retirement has constructed his house at Raipur. He has also admitted that for construction of the house Ramlal is in need of money but he has denied that he has mortgaged the house and shop for Rs.1,20,000/-.

8. To substantiate his stand, defendant No.1 has examined himself as DW/ 1 and exhibited documents i.e. namely mortgage deed (Ex.D/1) and registration certificate under Shops and Establishments Act (Ex.D/2) and electricity distribution bill certificate (Ex.D/3). Hetram Sahu (DW/1) in his examination-in-chief by way of an affidavit as provided under Order 18 Rule 4 of CPC reiterated the same stand which he has taken in the written statement. This witness was cross-examined by the plaintiff wherein he has admitted that plaintiff Ramlal has four shops at Bankimogra. He has also admitted that due to good relationship he has shown his willingness to take two shops on rent from the plaintiff. He has also admitted that he has taken two shops on his possession and he has also stated that documentation was prepared in the year 2005 with regard to agreement with Ramlal Chowhan. He has also admitted that he has not taken any receipt from Ramlal Chowhan. He has also admitted that mortgage deed was not executed with Registrar. He has also admitted that the mortgage deed was prepared by the Advocate and he has not put his signature. He has also stated that neither he has put any signature on any stamp paper (Ex. D/1) nor he has been registered. He has also admitted that his two brothers are in Police Department. He has also admitted that the Sub Divisional Magistrate has directed the plaintiff to pay Rs.40,000/- but he has not deposited the same.

9. The defendant has also examined DW/2 Janak Ram who has been cross examined by the plaintiff wherein he has stated that the documentation with regard to shop was done in presence of Babban Chowdary and he is not aware of the date but he has stated that documentation was done between 10.30 to 1.00 am in the morning and he has stated that the documentation was done with regard to sale of the shop. He has also stated that it was neither for mortgage nor for rent agreement and he is also not aware what was written in the agreement. He has also admitted at the time of documentation Ramlal, Ramkumar and Tularam were present and no other person was present.

10. The learned trial after appreciating the evidence and material on record has decreed the suit vide judgment and decree dated 20-3-2017 declaring the mortgage deed dated 20-9-2006 as not operative. The learned trial court while deciding issue No. 1 and 2 has recorded its finding that the defendant No. 1 has not examined any witness to prove the mortgage and the defendant No. 1 has also failed to lead any evidence to prove that mortgage by conditional sale as per Section 59 of the Transfer of Property Act and if the

mortgage is more than Rs. 100/-and where the mortgage is mortgaged by conditional sale then it should be registered and two witnesses should have attested the same and where the mortgage money is less than Rs. 100/- then the property can be delivered by signed and attested registered deed only. It has also recorded its finding that if the sale property is more than Rs. 100/- then it should be registered document and he has also considered the provisions of Section 17-B of the Registration Act and has held that where value of the suit property is more than Rs.100/- then registration is compulsory and since the property is having more than Rs.100 and no registration has been done, therefore, the mortgage deed is illegal and it should be quashed. Learned trial court while deciding the issue No.2 has recorded its finding that when a civil suit is disposed of, the proceeding under Section 145 of Cr.P.C., will come to an end by relying upon the judgment of Hon'ble Supreme Court in **Jala Bani vs. State of J & K, reported in AIR 1977 SC 2220** and accordingly decreed the suit in favour of the plaintiff vide its judgment dated 20.03.2017. Being aggrieved with the judgment and decree, the defendant has preferred the first appeal.

11. Learned counsel for the defendant would submit that as per Section 58 of the Transfer of Property Act, it is quite vivid that transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, is a mortgage. He would further submit that present case is not a case of pledge, but the case of mortgage where the respondent took loan from the defendant and executed the conditional mortgage, deed for four shops in the name of defendant for the purpose of securing the payment of money advanced by way of loan. Since conditional mortgage deed is executed by the plaintiff which was unregistered, the learned trial court has committed illegality in not considering its legality. He would further submit that an unregistered mortgage deed can be admitted in the evidence for collateral purpose i.e. for recovery of money covered by an unregistered deed. To buttress his submissions, he has relied upon the judgment of Hon'ble High Court of Andhra Pradesh in case of **Umde Bhojram vs. Wadla Gangadhar, reported in 2004 SCC Online AP 50** wherein the Hon'ble the High Court of Andhra Pradesh has held in para 27 which reads as under:-

"27.As per the above decisions of various High Courts, including this court, an unregistered mortgage deed can be admitted in evidence for collateral purpose of recovery of money covered by an unregistered mortgage deed

without touching upon the right regarding the property when there is a personal covenant to repay the debt, which is severable from other parts of the document"

12. Hon'ble the High Court of Andhra Pradesh in case of **A. Archana vs. D. Uma Maheswara Reddy, reported in 2019 SCC Online AP 90** has held in para 10 of its judgment as under:- "10. The petitioner specifically stated in her affidavit filed in the trial Court in I.A. No. 201 of 2018 that she was enforcing the personal covenant in the unregistered mortgage deed in respect of 'C schedule property whereby the respondent had agreed to repay the amount whenever they demand. However, the learned trial Judge considered the above recital as the main purpose and object of the document in question and not being an instance of collateral purpose. The petitioner has brought to the notice of this Court the observations of erstwhile composite High Court of Andhra Pradesh at Hyderabad in **Umde Bhojram v. Wadla Gangadhar (1) 2004 (2) ALT 367**, in this context and it was the ruling cited by the petitioner before the trial Court. It is further contended for the petitioner that the observations in respect of an unregistered mortgage deed being admissible in evidence, in terms of proviso to Section 49 of the Registration Act, 1908, could be considered by permitting to exhibit the same as a part of evidence. After reviewing the law, basing on the rulings of various High Courts including the High Court at Hyderabad, with reference to the application of Section 17(1)(c) as well as Section 49 of Registration Act, it was observed in paragraph-27 as under: "As per the above decisions of various High courts, including this Court, an unregistered mortgage deed can be admitted in evidence for collateral purpose of recovery of money covered by an unregistered mortgage deed without touching upon the right regarding the property when there is a personal covenant to repay the debt, which is severable from other parts of the document."

13. He would further submit that the recovery of money is the principle thing for which the conditional mortgage deed was executed. As such, he would pray for allowing the appeal and setting aside the judgment and decree passed by the trial court.

14. On the other hand, Mr. H.B. Agrawal, learned Sr. Advocate assisted by Mr. Yogesh Chandra, counsel for the respondent No.1 would submit that unless and until the mortgage deed is registered he cannot claim right over the suit property. He would further submit that as per Article 19 of the Limitation Act the recovery can be done by filing a separate suit but to avoid

the same he has filed written statement taking the defence of mortgage which is not permissible. He would further submit that since no counter claim has been filed by the defendant, as such demand of recovery of amount of Rs.1,20,000/- cannot be made and would pray for dismissal of the appeal.

15. I have heard learned counsel for the parties and perused the record with utmost satisfaction

16. From the aforesaid submissions made by the parties, the points to be determined by this court are:

(i) Whether mortgage deed dated 20-9-2006 is a valid mortgage deed as per the provisions of Transfer of Property Act and can be said to be mortgaged by conditional sale as per Section 58(c) of the Transfer of Property Act?.

(ii) If the mortgage deed is not registered then what will be the effect of the mortgage deed?".

To determine these two vital points, it is expedient for this court to extract the relevant provisions of Sections 58 and 58(c) of the Transfer of Property Act which read as under:-

"58 (a) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

58 (c) 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".

17. Learned counsel for the petitioner would submit that the plaintiff is unable to prove that the mortgage deed has been written under coercion, threat or by taking coercive steps and he has also admitted his signature in the mortgage deed, still learned trial court has failed to appreciate the validity of mortgage deed and thus committed illegality which deserves to be set aside.

18. On the other hand, Learned Sr. Advocate appearing for the respondent No.1 would submit that the mortgage deed is not registered and it is a mortgage by conditional sale and the property mortgage is valued more than Rs. 100/-, as such its registration is necessary and the requirement of Section 59 should be required to be fulfilled which is not there, therefore, he would submit that the learned court below has not committed any illegality in passing the decree and prayed for dismissal of the appeal.

19. The controversy moves around the mortgage deed dated 20-9-2006. The relevant paragraph of the mortgage deed (Ex.D/1) is reproduced as under:-

“ गिरवी लेख

गिरवी रखने वाले का नाम व पता— श्री रामलाल उम्र 60 वर्ष पिता स्व. मालिक राम जाति चौहान पेशा रिटायर्ड
साकिन पारा तहसील कटघोरा जिला कोरबा छ.ग.।

प्रथम पक्षकार

गिरवी रखवाने वाले का नाम व पता— श्री हेतराम साहू उम्र 24 वर्ष पिता श्री तुलाराम जाति साहू पेशा व्यवसाय
साकिन वासी तहसील कटघोरा जिला कोरबा छ.ग.

द्वितीय पक्षकार

केफियत- चूंकि प्रथम पक्षकार रामपुर में मकान बना रहा है तथा उसमें उक्त मकान के निर्माण में काफी खर्च हो रहे है इस लिये उक्त की होने के कारण प्रथम पक्षकार अपनी बेजा कब्जा की मकान जिसमें वह 30 वर्ष से निवास करता चला आ रहा है को द्वितीय पक्षकार के पास 1,20000/- एक लाख बीस हजार रूपये में गिरवी रख दिया है तथा उसके परिणाम स्वरूप नगद 1,20000/- आज प्राप्त कर लिया है। प्रथम पक्षकार एक वर्ष के भीतर उक्त गिरवी की रकम को द्वितीय पक्षकार को वापस कर देगा। यदि प्रथम पक्षकार उक्त रकम सीमा अवधि के भीतर नहीं वापस करेगा तो उक्त मकान द्वितीय पक्षकार की स्वतः हो जायेगी और उक्त मकान पर प्रथम पक्षकार कोई हक व अधिकार नहीं होगा और प्रथम पक्षकार अपने उक्त मकान को खालीकर द्वितीय पक्षकार की हेतराम, रामलाल कमशः कब्जा दे देगा। इसमके प्रथम पक्षकार की कोई भविष्य में आपत्ति नहीं होगी।

अतः यह गिरवी विलेख आज दिनांक 08/10/06 को दो गवाहों के सामने लिखकर एवं पढ़कर सूनी समझकर सबूत के रूप में उसपर अपना हस्ताक्षर अपने स्व मन व चित से किया बिना नशा पानी खाये अपने प्रसन्न चित से कर दिया ताकि वक्त पर काम आवे एवं भविष्य में रहे। आज दिनांक 08/10/06 को में यह कागजात तैयार किया गया।

20. From bare perusal of the mortgage deed, it is quite vivid that there is no condition for re-transfer embodied in the Ex,D/1 ie., mortgage deed which affects or purports to sell, as such it cannot be said held to be regarded as mortgage. It is a mortgage by conditional sale. Even the defendant in his cross examination has clearly admitted in para 13 that he has shown his willingness to take two shops on rent and an agreement was executed in the year 2005 and document with regard to rent was available with the plaintiff Ramlal, but no notice to produce the said document was given by the defendant to the plaintiff to substantiate his stand that in the year 2005 an agreement for rent was executed. From bare perusal of the mortgage deed (Ex D/1), it is quite vivid that if the plaintiff is unable to pay the amount subsequently the right of the plaintiff will come to an end, as such it is mortgage by conditional sale. The issue with regard to mortgage has recently come up for consideration before the Hon'ble Supreme Court in Civil Appeal No 706 of 2015 decided on 18-8-2023 in case of **Prakash (dead) by LR vs. G. Aradhya and others, reported in 2023 LiveLaw 9SC) 685** wherein the Hon'ble Supreme Court has considered difference between "mortgage by conditional sale and "Sale with condition of re-transfer." and the Hon'ble the Supreme Court has held that a transaction cannot be deemed to be mortgage unless the condition for re-conveyance is contained in the document which purports to effect the same. The Hon'ble Supreme Court has held in paras 23 to 34 as under.

23. Before we appreciate the arguments raised at the Bar, we may refer to Section 58 of the 1882 Act wherein the terms: "mortgage", "mortgagor" and "mortgagee" etc. have been defined. Sub-section (c) which deals with "mortgage by conditional sale" relevant for the point in issue, are extracted below: "58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) **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."

24. A perusal of the aforesaid proviso to sub-section (c) of Section 58 of the 1882 Act⁴ provides that no transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale. It is the undisputed case in hand that it was not a single document, the conditions contained wherein have to be considered by this Court to opine that the transaction was not a sale, but a mortgage. Admittedly, there are two separate documents.

25. Similar argument, where two separate documents were executed, came up for consideration before this Court in **Bishwanath Prasad Singh's case** (supra). One was the Sale Deed and the second was the agreement for sale. Both were executed on the same date. It was opined therein that to appreciate a document its contents are to be read in entirety and the intention of the parties is to be gathered from the language used therein. Para 16 of the aforesaid judgment is referred to for ready reference:

"16. A deed as is well known must be construed having regard to the language used therein. We have noticed herein-before that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors."

25.1. Further, in the aforesaid judgment, this Court while interpreting the terms of the agreement executed along with the Sale Deed and opined that the same cannot be treated to be a mortgage as the expression used therein were 'vendor', 'vendee', 'sold' and 'consideration'. Fixed period was granted for execution of the Sale Deed.

25.2. The scope of Section 58(c) of the 1882 Act was considered in detail in paras 27 to 33 thereof which are extracted below:

"27. A bare perusal of the said provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of re-transfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal right to the purchaser (sic seller), and such a personal right would be lost, unless the same is exercised within the stipulated time.

28. In **Pandit Chunchun Jha v. Sk. Ebadat Ali [(1955) 1 SCR 174 : AIR 1954 SC 345]** this Court clearly held: (SCR p. 177)

"We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one case with another. Each must be decided on its own facts."

29. Yet again in **Mushir Mohd. Khan v. Sajeda Bano [(2000) 3 SCC 536]** this Court upon construing Section 58(c) of the Transfer of Property Act opined: (SCC pp. 541-42, para 9)

"9. The proviso to this clause was added by Act 20 of 1929 so as to set at rest the conflict of decisions on the question whether the conditions, specially the

condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed. The legislature enacted that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale."

30. Referring to **Chunchun Jha [(1955) 1 SCR 174: AIR 1954 SC 345]** it was held: (SCC p. 544, para 14)

"14. Applying the principles laid down above, the two documents read together would not constitute a 'mortgage' as the condition of repurchase is not contained in the same documents by which the property was sold. The proviso to clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a 'mortgage by conditional sale'."

31. In **Umabai v. Nilkanth Dhondiba Chavan [(2005) 6 SCC 243]** wherein one of us was a party, this Court held: (SCC p. 254, para 21)

"21. There exists a distinction between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. (See: **Pandit Chunchun Jha v. Sk. Ebadat Ali [(1955) 1 SCR 174 : AIR 1954 SC 345]** , **Bhaskar Waman Joshi v. Narayan Rambilas Agarwal [(1960) 2 SCR 117 : AIR 1960 SC 301]** , **K. Simrathmull v. S. Nanjalingiah Gowder [1962 Supp (3) SCR 476 : AIR 1963 SC 1182]** , **Mushir Mohd. Khan [(2000) 3 SCC 536]** and **Tamboli Ramanlal Motilal [Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal, 1993 Supp (1) SCC 295]** .)"

32. The High Court relied upon **Indira Kaur v. Sheo Lal Kapoor [(1988) 2 SCC 488 : AIR 1988 SC 1074]**. Therein the Court took into consideration the factors adumbrated therein, particularly, a long stipulated period of 10 years for conveying the property and the vendee was prohibited from selling and parting with his right, title and interest for 10 years. The vendor was allowed

to occupy the property as a tenant on payment of Rs 80 per month. No order of mutation was passed in his favour. It was held:

"6. ... In the present case having regard to the facts and circumstances highlighted in the course of the discussion pertaining to the question as to whether or not the transaction was a transaction of mortgage having regard to the real intention of the parties it would be difficult to hold that the agreement to sell executed by the defendant in favour of the plaintiff was by way of a 'concession'. It was a transaction entered into by the defendant who was a hardheaded businessman and the documents in question have been carefully framed in legal terminology taking into account the relevant provisions of law. The transaction also discloses the awareness of the defendant about Section 58(c) of the Transfer of Property Act as is evident from the fact that the reconveyance clause is not embodied in the sale deed itself. In the agreement to sell, no reference has been made to the transaction of sale though it has been executed contemporaneously. The defendant who has permitted the plaintiff to continue in possession on payment of rent equivalent to about 13% per cent interest and was evidently aware of all the dimensions of the matter would not have granted any concession or executed the agreement by way of a concession. The agreement was executed evidently because the plaintiff would not have executed the sale deed unless an agreement to sell by a contemporaneous document was also executed to enable the plaintiff to enforce specific performance within ten years. It was therefore a transaction entered into with open eyes by the defendant and there was no question of granting any concession."

33. In the instant case, as noticed herein-before, the transfer is complete and not partial, no stipulation has been made that the appellant cannot transfer the property. Not only that, the appellant was put in possession of the land, his name was also mutated."

25.3. A perusal of the aforesaid paras of the judgment shows that the proviso was added in Section 58(c) of the Act vide Act No.20 of 1929, so as to put at rest the conflicting decisions on the issue. A deeming fiction was added in the negative that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale.

25.4. The judgment of this Court in **Umabai v. Nilkanth Dhondiba Chavan, (2005) 6 SCC 243**, has also been referred to, which defines the distinction

between mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists and a right to redeem remains with the debtor; but a sale with condition of repurchase is not a lending and borrowing arrangement. Proviso to Section 58(c) of the 1882 Act was referred to in the aforesaid judgment to hold that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. The judgment of this Court in **Ramlal's case** (supra), relied upon by learned Senior counsel for the appellant, was specifically dealt with and distinguished in paras 34 and 35 thereof in **Bishwanath Prasad Case** (supra) and the same are extracted below:

"34. In **Ramlal v. Phagua** this Court having regard to the peculiar fact situation obtaining therein opined: (SCC p. 173, para 18)

"18. In our opinion, agreement to reconvey the property will not ipso facto lead to the conclusion that the sale is nominal and in view of the stand of Defendant 8, as also of the fact that the property worth Rs 700 has been purportedly sold for Rs 400, we are of the considered opinion that the sale deed dated 1-12-1965 did not convey any title to Defendant 8. It is well settled by a catena of decisions that the vendor cannot convey to the vendee better title than she herself has."

21. Even in the said mortgage deed by which the right of the suit property has been transferred is having value consideration is more than Rs. 100/-, as such its registration as per the provisions of Section 17 of the Registration of the Act is compulsory. Section 17 of the Registration Act, 1908 reads as under:-

"17. Documents of which registration is compulsory:-

(1) The following documents shall be registered. if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866 (XX of 1866) or the Registration Act, 1871 (VIII of 1871) or the Indian Registration Act, 1877 (III of 1877) or this Act came or comes into force, namely:-

(a) instruments of gift of immoveable property;

(b) other non-testamentary instruments which purport or operate, create, declare, assign, limit or extinguish, whether in present or in future any right,

title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent; The Registration Act 1908

(e) non -testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property: Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this sub - section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rent reserved by which do not exceed fifty rupees.

(f) agreement relating to the Deposit of title deeds, where such deposit has been made by way of security for the repayment of a loan or an existing or future debts ; (g) sale certificate issued by any competent officer or authority under any recovery Act ;

(h) irrevocable Power of Attorney relating to transfer of immovable property in any way, executed on or after the commencement of the Registration (Maharashtra Amendment) Act, 2010.

(IA) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of property Act, 1882 shall be registered if they have been executed on or after the commencement of the Registration and other related laws (Amendment) Act, 2001 and is such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A. (2) Nothing in clauses (b) and (c) of sub - section (1) applies to -

: (i) any composition - deed; or

(ii) any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consists in whole or in part of immovable property; or

(iii) any debenture issued by any such Company, and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder of the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property, or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) any document "any document other than the documents specified in subsection (1A)" not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards, to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject matter of the suit or proceeding ; or

(vii) any grant of immovable property by the State Government ;or

(viii) any instrument of partition made by a Revenue - officer; or

(ix) any order granting a loan or Instrument of collateral security granted under the Land Improvement Act, 1871, (XXV of 1871) or the Land Improvement Loans Act, 1883 (XIX of 1883); or The Registration Act 1908 7

(x) any order granting a loan under the Agriculturists Loan Act, 1884 (XII of 1884) or under the Bombay Non -Agriculturists Loans Act 1928, or instrument for securing the repayment of a loan made under either of those Acts;

or (xa) any order made under the Charitable Endowments Act, 1890 (VI of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting such Treasurer of any property; or * The state amendment w.e.f. 1/4/2013.

(xi) any endorsement on a mortgage - deed acknowledging the payment of the whole or any part of the mortgage -money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer. [Explanation:- A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest - money or of the whole or any part of the purchase money.] (3) Authorities to adopt a son, executed after the first day of January 1872 and not conferred by a will shall be registered.

22. The issue of compulsory registration of property valued more than Rs.100/- has come up for consideration before the Hon'ble Supreme Court in case of Shakeel Ahmed vs. Syed Akhlaq Hussain in Civil Appeal No. 1558/2023 2023 INC 1016 decided on 01.11.2023 wherein the Hon'ble Supreme Court has held in para 10 and 11 which reads as under:-

"10. Having considered the submissions at the outset, it is to be emphasized that irrespective of what was decided in the case of **Suraj Lamps and Industries** (supra) the fact remains that no title could be transferred with respect to immovable properties on the basis of an unregistered Agreement to Sell or on the basis of an unregistered General Power of Attorney. The Registration Act, 1908 clearly provides that a document which requires compulsory registration under the Act, would not confer any right, much less a legally enforceable right to approach a Court of Law on its basis. Even if these documents i.e. the Agreement to Sell and the Power of Attorney were registered, still it could not be said that the respondent would have acquired title over the property in question. At best, on the basis of the registered agreement to sell, he could have claimed relief of specific performance in appropriate proceedings. In this regard, reference may be Civil Appeal No.1598 of 2023 Page 9 of 11 made to sections 17 and 49 of the Registration Act and section 54 of the Transfer of Property Act, 1882.

11. Law is well settled that no right, title or interest in immovable property can be conferred without a registered document. Even the judgment of this Court in the case of **Suraj Lamps & Industries** (supra) lays down the same

proposition. Reference may also be made to the following judgments of this Court:

(i). Ameer Minhaj Vs. Deirdre Elizabeth (Wright) Issar and Others

(ii) . Balram Singh Vs. Kelo Devi

(iii). M/S Paul Rubber Industries Private Limited Vs. Amit Chand Mitra & Anr."

23. The submission made by the learned counsel for the defendant No.1 is that the unregistered mortgage deed can be used in evidence for collateral proceedings i.e. for recovery of money. This legal position is not in dispute but the defendant No. 1 has neither filed any counter claim nor filed any recovery suit to recover the alleged payment made to the plaintiff, as such also the submission made by the counsel for the defendant No. 1 will not give any assistance, accordingly it is rejected. The record of the case would further demonstrate that the defendant No. 1 has never given any notice to produce document for production of alleged rent agreement as stated by him in the examination-in-chief which also establishes falsehood of story of the defendant that a rent agreement was executed between the plaintiff and the defendant.

24. In the light of the aforesaid legal position of law and considering the factual matrix, it is quite vivid that the mortgage deed dated 20-9-2006 was not a deed of mortgage but it was mortgage by conditional sale which is not fulfilling the requisite condition as provided in Section 58(c) of the Transfer of Property Act, and also considering the fact that by way of alleged mortgage by conditional sale (Ex.D/1), the mortgage property is more than Rs. 100/-, therefore, its registration is must which has not been done in the present case, therefore, it cannot be said that mortgage by conditional sale, the defendant accrued title over the suit property.

25. Considering this aspect of the matter, I am of the opinion that the learned trial court has not committed any illegality or irregularity in decreeing the suit in favour of the plaintiff which warrants interference by this court. Accordingly, the instant first appeal being devoid of merit is liable to be dismissed and is hereby dismissed.

26. Interim order passed by this court on 12-4-2017 is vacated.

27. Accordingly, a decree be drawn up.

28. Pending interlocutory applications, if any, stand disposed of.

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