

CASE NO.:
Appeal (civil) 3631 of 2006

PETITIONER:
Tulsi & Ors

RESPONDENT:
Chandrika Prasad. & Ors

DATE OF JUDGMENT: 24/08/2006

BENCH:
S.B. Sinha & Dalveer Bhandari

JUDGMENT:
J U D G M E N T
[Arising out of SLP (Civil) No. 19581 of 2004]

S.B. SINHA, J :

Leave granted.

Whether the deed dated 30.12.1968 constitutes a sale with condition of purchase or mortgage by way of conditional sale is the question which falls for consideration in this appeal which arises out of a judgment and order dated 27.7.2004 passed by the High Court of Jharkhand in F.A. No. 23 of 1991 (R) .

The basic fact of the matter is not in dispute. The property in question is a house property. It belonged to one Jawala Prasad Sah, defendant No. 3 in the suit. On 30.12.1968, he transferred the northern part of the house property to one Balmukund Chaudhary by way of mortgage for a consideration of Rs. 4,300/- repayable by 30.1.1971. He sold the entire property to the plaintiffs for a valuable consideration of Rs. 14,000/-. It included the right to redeem the mortgage. The transaction in question was also carried out on the same date, i.e.. 30.12.1968.

The husband of the Appellant No. 1 herein Banshidhar Singhania was a tenant in the said premises.

The Respondents filed a suit for a decree for redemption of the said mortgage as also a decree for mesne profit for the period 3.1.1972 till the recovery of possession of the mortgaged property. In the alternative, a prayer for a decree of specific performance was made.

It is not in dispute that prior to filing of the suit by several notices, the plaintiffs expressed their intention to redeem the mortgage. A personal tender of the entire mortgage amount was made which was refused. An application under Section 83 of the Transfer of Property Act was filed wherein an order for deposit of the mortgage amount was passed. In the said proceedings an objection was filed raising a contention that the instrument in question is a deed of sale.

The learned Trial Judge held that the document in question was a deed of mortgage with conditional sale and not a deed of sale with a condition of purchase and consequently a decree was passed. The First Appellate Court affirmed the said decree. The Second Appeal filed by the Appellant herein, as noticed hereinbefore, was dismissed.

The instrument in question is peculiar in nature. The nature of the

deed was described as Kewala Baibulwafa. The expression 'Kewala' denotes sale. We would a little later notice that use of the expression 'Baibulwafa' is not correct. Paragraph 5 of the deed described the property under sale. The reason for execution of the document is said to be pressing need of money on the part of the plaintiff for augmenting business capital and for domestic expenses as also for repaying debt to the moneylenders. The amount of consideration was stipulated as adequate therefor. However, it was stipulated that the purchaser, till the expiry of the specified time therein and till the sale became absolute and perfect, would maintain the property in its present condition. She, however, was permitted to exercise her option to carry on the reconstruction. The parties agreed on request having been made by the plaintiff \026 Appellant No. 1 that she be allowed time and opportunity to repay the entire consideration money in cash whereupon a deed of reconveyance would be executed in her favour. It was agreed that if the executant repays the entire amount by 30.12.1971, the executee will execute a deed of reconveyance in respect of the property in her favour and handover possession thereof. However, if the executant fails to repay payment of the entire consideration on that date, then in that case the sale would become absolute whereupon the executant or his heirs and successors will have no objection; and if the executant or his heirs and successors raise objection in respect of the stipulation therein, the same shall be ineffective and useless and the sale shall become absolute. It was furthermore stipulated:

"Therefore, after having fully considered about his profit and loss as also out of his free will and volition (the executant) writes (executes) this deed of Kewala Baibulwafa with condition of repayment of consideration money for future use. Dated the 29th December, 1969 at Daltonganj."

The following circumstances weighed with the learned trial court as well as the High Court in arriving at the finding that the transaction in question was a mortgage by way of a conditional sale:

- (i) The husband of the Appellant No. 1 was a tenant in respect of the property and he continued to occupy the same in the same capacity.
- (ii) The Appellants bore the costs of stamp duty which is not the normal practice in a case of absolute sale.
- (iii) The transaction essentially was a Baibulwafa, viz., mortgage by conditional sale.
- (iv) The land was required to be kept in the existing condition.
- (v) The transferor had an option to repay the entire consideration in one instalment whereupon a deed of reconveyance was to be executed by the transferor in her favour. For the said purpose a specific date was fixed, viz., 30.12.1971 and on obtaining such amount the transferee was to restore possession of the land to the plaintiff and only in the event of default on her part to repay the same; the sale was to become absolute and perfect.
- (vi) In the margin of the deed, the transferor categorically stated that he had executed a deed of Baibulwafa in respect of two parts of the shop.
- (vii) The amount has been received by the transferor in presence of the husband of the transferee.

We may, at the outset, notice that almost a similar question came up for consideration before a Division Bench of this Court in Bishwanath Prasad Singh v. Rajendra Prasad and Another [(2006) 4 SCC 432], wherein it was held:

"A deed as is well known must be construed having regard to the language used therein. We

have noticed hereinbefore 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."

However, in that case keeping in view the recitals made in the deed and other circumstances surrounding thereto the Trial Court as also the First Appellate Court came to finding that the Respondents therein executed a deed of absolute sale in favour of the Appellant, who in turn executed an agreement for reconveyance in favour of the Respondent. The term 'Baibulwafa' was held to be a deed of conditional sale with a contract of purchase and not a mortgage with conditional sale. The said findings were over-turned by the High Court.

This Court opined:

"The terminology 'vaibulwafa' used in the agreement does not carry any meaning. It could be either 'bai-ul-wafa' or 'bai-bil-wafa'.

It will bear repetition to state that with a view to ascertain the nature of a transaction the document has to be read as a whole. A sentence used or a term used may not be determinative of the real nature of transaction.

Baib-ul-wafa, it was held by the trial court connotes only an agreement for sale. In terms of Section 91 of the Evidence Act, if the terms of any disposition of property is reduced to writing, no evidence is admissible in proof of the terms of such disposition of property except the document itself."

Referring to Section 58(c) of the Transfer of Property Act, it was also held that the transaction in question was not partial but an absolute one.

Before we consider the stipulations contained in the deed dated 30.12.1968, it may be noticed that in terms of Section 58(c) of the Transfer of Property Act, a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there 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 sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller.

A distinction exists between a mortgage by way of conditional sale and a sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby.

The proviso appended to Section 58(c) of the Transfer of Property

Act was added by Act No. 20 of 1929 for resolution of the conflict in decisions on the question whether 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 transaction in this case has been evidenced by one document. Section 58(c) of the Transfer of Property Act will, therefore, apply.

In the instant case, the scribe of the document was examined. His categorical statement was that he had been asked by the parties to scribe a deed of mortgage and not a deed of sale. The Respondent No. 1, as noticed hereinbefore, in the document itself categorically stated that he was executing a deed of mortgage. Indisputably, the amount of stamp duty was also paid by him. In a case of deed of sale ordinarily the transferee pays the stamp duty. Why such a deviation from the normal practice was made has not been explained by the Appellant.

We have noticed hereinbefore that the nature of the deed described that the document is ambiguous as both the terms, viz., Kewala and Baibulwafa, were mentioned. The transaction, however, categorically states that the Appellant No. 1 was to maintain the property in its present condition. Of course, permission for reconstruction of the structure was granted. But, if the contention of the parties was to transfer the property absolutely, no such stipulation was required to be made at all. In a case of absolute transfer, the vendee has an absolute right to deal with his property in any manner he likes. It was clearly stipulated in the deed that in the event, the executant repayed the entire consideration by 30.12.1971, the purchaser would reconvey the property and furthermore deliver possession thereof. The sale was to become absolute only when the transferee failed to pay the said amount within the stipulated period. The courts below have also taken into consideration the contemporaneous conduct of the parties in treating the transaction to be one of mortgage and not of sale. We are, therefore, of the opinion that the parties intended to enter into a transaction of mortgage and not sale.

Section 91 of the Evidence Act mainly forbids proving of the contents of a writing otherwise than by writing itself and merely lays down the 'best evidence rule'. It, however, does not prohibit the parties to adduce evidence, in a case, the deed is capable of being construed differently to show how they understood the same.

We may notice that in Smt. Indira Kaur & Ors. v. Sheo Lal Kapoor [(1988) 2 SCC 488], this Court upon taking into consideration the stipulations made in the deed to the effect that a period of 10 years was fixed for conveying the property and the vendee was prohibited from selling and parting with his right, title and interest for the said period and no order of mutation was passed in his favour, construed the same to be a transaction of mortgage.

In the instant case also the transferees did not get their name mutated. The tenant in the property was no other than the husband of Appellant No. 1. He continued to be a tenant. The possession purported to have been delivered in favour of the defendant was merely a symbolic one.

Mr. S.B. Upadhyay, learned counsel appearing on behalf of the Appellants strongly relied upon Tamboli Ramanlal Motilal (Dead) By LRS. v. Ghanchi Chimanlal Keshavlal (Dead) By LRS. and Another [1993 Supp (1) SCC 295].

In Tamboli Ramanlal Motilal (supra), having regard to the stipulations made in the document the court was unable to conclude that there was a debt and the relationship between the parties was that of the debtor and the creditor. The stipulation "The property is sold

conditionally for a period of five years and possession is handed over. \005Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right" was considered to be one of the factors for coming to the conclusion that the transaction evidenced thereby was an absolute sale under a right of ownership. The transferee also had a right to get his name mutated in the municipal record and pay taxes. The transferee therein had an absolute right to mortgage, sell, or gift the suit property. The executant could not dispute the title of the transferee. Such is not the position here.

Before the courts below, the Appellant No. 1 did not examine herself. The Respondents categorically averred in the plaint that the mortgage amount was tendered to her as also to her husband. Having regard to the peculiar facts and circumstances of this case, we are of the opinion that she should have examined herself to deny such tender.

In *Sardar Gurbakhsh Singh v. Gurdial Singh and Another* [AIR 1927 PC 230], the Privy Council emphasized the need of examination of the parties as witnesses. [See also *Martand Pandharinath v. Radhabai*, AIR 1931 Bom 97 and *Sri Sudhir Ranjan Paul v. Sri Chhatter Singh Baid & Anr.*, Cal LT 1999(3) HC 261]

For the aforementioned reasons, we are of the opinion that there is no infirmity in the judgment of the courts below. The appeal is, therefore, dismissed. In the facts and circumstances of this case, there shall be no order as to costs.