CASE NO.:
Appeal (civil) 1276 of 2006

PETITIONER:
Bishwanath Prasad Singh

RESPONDENT:
Rajendra Prasad & Anr

DATE OF JUDGMENT: 24/02/2006

BENCH:
S.B. Sinha

JUDGMENT:
J U D G M E N T
(Arising out of SLP(C)No.26865/2004)

S.B. SINHA, J :

Leave granted.

This appeal is directed against the Judgment and Order dated 11th September, 1988 passed by a learned Single Judge of the Jharkhand High Court, Ranchi in Appeal from Appellate Decree No.176 of 1988 whereby and whereunder a second appeal preferred by the respondents herein from a Judgment and Decree dated 18.7.1988 passed by the 6th Additional District Judge, Palamau at Daltonganj in Title Appeal No.26 of 1987 setting aside the Judgment and Decree dated 27.6.1987 passed by Munsif, Daltonganj in Title Suit No.11 of 1986, was allowed.
The respondents herein filed a suit against the appellant, inter alia, for a declaration that the transaction dated 24.6.1977, although ostensibly expressed in the shape of a deed of sale, was in fact a transaction of usufructuary mortgage and for a further declaration that the said transaction stands redeemed under Section 12 of the Bihar Money Lenders Act, 1974.
The respondents herein further sought for a decree directing the appellant to deliver vacant possession of the suit land to them, failing which they might be put back in possession thereof through the process of Court. The respondents averred that they were occupancy raiyats of the suit land. The appellant herein allegedly gave an advance of Rs.3,000/- on their executing a deed of usufructuary mortgage in respect of the suit land. However, allegedly the appellant asked them to execute a deed of sale on the ground that he did not possess any money lending licence, whereupon indisputably such a deed was executed on 24.6.1977. The appellant in turn executed a registered deed of agreement in his favour whereby and whereunder the respondent agreed to execute a deed of reconveyance on his receipt of the said sum of Rs.3,000/-.

The appellant herein in his written statement, on the other hand, contended that in fact a deed of sale was executed on 24.6.1977 by the respondents in his favour. It is, however, accepted that the appellant executed a deed of an agreement for sale on the same day. It is furthermore not in dispute that the respondents herein filed an application in the Court of Munsif, Daltonganj being Miscellaneous Case No.14 of 1978 purporting to be under Section 83 of the Transfer of Property Act seeking its permission to deposit an amount of Rs.3,000/- By an Order dated 22.3.1979, despite an objection taken in this behalf by the appellant herein that the transaction in question was not a mortgage, the respondents were permitted to deposit the said amount.

It is also not in dispute that the property in question was mutated in the name of the appellant in the Revenue Records of Rights.

The Trial Court, in view of the pleadings of the parties, framed the following issues :

"(i) Is the suit, as framed maintainable?

(ii) Have the plaintiffs got cause of action for the suit?

(iii) Is the sale deed dated 24.6.1977 real transaction of usufructuary mortgage deed in view of the agreement of the same day executed by the defendant and, if so, are the plaintiffs entitled to a decree as prayed for?

(iv) To what relief or reliefs, if any, the plaintiffs are entitled?"

The said suit was dismissed holding that the deed of sale dated 24.6.1977 coupled with the said agreement of reconveyance of the same date did not constitute a mortgage. It was further held that the remedy available to the respondents was only to file a suit for specific performance of the contract and as such a relief had not been availed of by them within a period of three years, no relief could be granted in their favour. The appeal preferred by the respondents herein thereagainst was also dismissed.

The respondents thereafter filed a second appeal before the High Court which was allowed by the impugned judgment.

The purported substantial question of law framed by the High Court is as under :

"Whether in view of the admission made by respondent no.2 in Ext.2 to the effect that the parties understood the document to be a deed of Baibulbafa, learned court committed error of law in construing Ext.A without taking into consideration the admissions made by the parties to the aforementioned effect, in view of the decision reported in AIR 1988 SC 1074."

The High Court in its judgment came to the conclusion that the recital of both the documents spelt out that the real intention of the parties was that the transaction was to be one of mortgage holding that the said deed of mortgage was executed by the respondents in favour of the appellant for the purpose of securing a loan of Rs.3,000/-. It was also held that the agreement for sale dated 24.6.1977 did not have the efficacy to control the import of the recitals made in the said conveyance dated 24.6.1977.

Mr. P.S. Mishra, learned Senior Counsel appearing on behalf of the appellant raised a short question in support of this appeal. It was contended that having regard to the provisions of Section 58(C) of the Transfer of Property Act, the High Court committed a manifest error in holding the transaction to be one of mortgage as the said plea could not have been raised having regard to the provisions of Sections 91 and 92 of the Indian Evidence Act. It was further contended that the order dated 22.3.1979 passed by the Civil Court in Miscellaneous Case No.14 of 1978 filed under Section 83 of the Transfer of Property Act, did not operate as res judicata as thereby no issue between the parties was heard and finally decided. It was further submitted that in view of the recitals in the said deed dated 24.6.1977, the High Court committed an error in holding that by reason thereof the right title and interest of the respondents did not pass on to the appellant herein. It was argued that the High Court also committed a manifest error in interfering with the concurrent findings of the Trial Court as also the First Appellate Court.

Mr. Vijay Hansaria, learned Senior Counsel appearing on behalf of

the respondents, on the other hand, supported the judgment of the High Court. It was submitted that the order dated 22.3.1979 would operate as res judicata in view of the fact that the issue as to whether the said transaction evidenced by the deed dated 24.6.1977 constituted a mortgage or a sale, had been determined thereby.

It is not in dispute that the deed in question was titled as a 'deed of sale'. The respondents were described as 'vendor' and the appellant as a 'vendee'. The nature of the deed was mentioned as 'Sale Deed (Kewala)'. The amount paid by the appellant to the respondents was treated to be the consideration money. In the recitals made therein the purpose of executing the deed of sale was stated to be as for repaying the debts taken by the respondents from several money lenders and it was recited that they did not have any source of income to repay the debts and no means of liquidating the debts except to sell out the said land. It was categorically stated:

"Therefore, vendors on their own wishes and in good mental capacity sold the property/land mentioned in column 5 aforesaid for a consideration of Rs.3000/- to the aforesaid vendee Sh. Vishwanath Prasad Singh and accordingly transferred all rights pertaining to this land to Sh. Vishwanath Singh. From today neither Vendors nor their successors or legal heirs have no right or title over this land."

On the same date, as noticed hereinbefore, an agreement for sale (Ekrarnama) was executed where again the parties were described as 'Vendor' and 'Vendee'. In the said agreement for sale, the parties referred to the deed of sale executed on the said date by the respondents. However, it was stated therein that the said deed of sale was executed on the Baibulbafa condition. It was also stated that the 'vendees' agreed that the 'vendor' or his successors or heirs whenever would pay the consideration amount of Rs.3,000/- within 23 months from that date, i.e., upto the month of June, 1978, then he would execute the deed of sale pertaining to the said property.

The learned Trial Court as also the learned First Appellate Court arrived at a concurrent finding that the said transaction did not constitute a mortgage but thereby the respondents executed a deed of sale in favour of the appellant and the appellant in turn executed an agreement for reconveyance in their favour. 'Baibulwafa' was held to be a deed of conditional sale with a contract of repurchase and not a mortgage with conditional sale. On the aforesaid findings it was categorically held that a suit for declaration that the said transactions in effect and substance constitute a mortgage, was not maintainable.

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 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.

We are not oblivious of the fact that the term 'Bai-bil-wafa' or 'Bye-bil-wuffa/wafa' is an Arabic term which may mean a mortgage or a condition sale but the said term is not synonymous to 'Bai-ul-wafa'. In P. Ramanatha Aiyar's Advanced Law Lexicon, 3rd edition at page 442, it is stated:

"Bai-ul-wafa. There is no unanimity of opinion among the jurisconsults of Islam on the point whether a transaction of Bail-ul-wafa is a valid

sale, a fasid sale or a mortgage. Hence, it was held that "the Court is consequently, free to choose any of the opinions (of jurists) which might be conformable to the equities of the case and may carry out the real intention of the parties." It was further held that "in this type of transaction, the contract between the parties is to the effect that the transferee sells to the transferee the property in question for either within a fixed period or at any undefined time, the sale would to the transferor".

We have noticed hereinbefore that the nature of deed was stated to be agreement (Ekrarnama), the nature of the document was not stated to be 'Bai-ul-wafa', the relevant clause whereof reads as under:

"Because the vendor today of this date has sold the property of this deed to the vendee through registered agreement on the Vaibulwafa condition and during this period the vendor and vendee has already agreed that this case will remain as Vaibulwafa and as per the said Sarait, vendor of this deed agrees that the vendee of this deed or his successors or heirs whenever will pay the consideration amount of this deed amount to Rs. 3000/- (three thousand) within 23 months from today i.e. upto the month of June, 1978 after harvesting of the crops i.e. Paddy or Ravi, then I the vendor or my legal heirs or my successors after receiving the said consideration amount of Rs. 3000/- will execute the sale deed pertaining to the property mentioned in column 5 of this deed in favour of the vendee or his legal heirs or successor."

It is of some significance to note that therein the expressions "vendor", "vendee", "sold" and "consideration" have been used. These expressions together with the fact that the sale deed was executed to be within a period of 23 months, i.e., upto June, 1978, evidently the expression 'Vaibulwafa' as a condition was loosely used.

Furthermore, the agreement was also executed for a fixed period. The other terms and conditions of the said agreement (Ekrarnama) also clearly go to show that the parties understood the same to be a deed of reconveyance and not mortgage or a conditional sale.

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.

Baibulwafa, 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.

In Ishwar Dass Jain (D) through Lrs. v. Sohan Lal (D) by Lrs. [(2000) 1 SCC 434] this Court in a case where a transaction in question was said to be a sham transaction opined that oral evidence was not admissible when a party relied upon the said document.

In Roop Kumar v. Mohan Thedani [(2003) 6 SCC 595] the Court laid down the parameters of best evidence rule in the following terms:

"Section 91 relates to evidence of terms of contract, grants and other disposition of properties reduced to form of document. This section merely forbids proving the contents of a writing otherwise than by writing itself; it is covered by the ordinary rule of law of evidence, applicable not merely to solemn writings of the sort named but to others known sometimes as the "best-evidence rule". It is in reality declaring a doctrine of the substantive law, namely, in the case of a written contract, that all proceedings and contemporaneous oral expressions of the thing are merged in the writing or displaced by it. (See Thayer's Preliminary Law on Evidence, p. 397 and p. 398; Phipson's Evidence, 7th Edn., p. 546; Wigmore's Evidence, p. 2406.) It has been best described by Wigmore stating that the rule is in no sense a rule of evidence but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process \027 the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of facts are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all. But this prohibition of proving it is merely that dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to "prove" it or "give evidence" of it; otherwise, any rule of law whatever might be reduced to a rule of evidence. It would become the legitimate progeny of the law of evidence. For the purpose of specific varieties of jural effects \027 sale, contract etc. there are specific requirements varying according to the subject. On the contrary there are also certain fundamental elements common to all and capable of being generalised. Every jural act may have the following four elements:

(a) the enaction or creation of the act;

(b) its integration or embodiment in a single memorial when desired;

(c) its solemnization or fulfilment of the prescribed forms, if any; and

(d) the interpretation or application of the act to the external objects affected by it."

Section 58 (c) of the Transfer of Property Act, 1882 defines mortgage by conditional sale in the following terms:

"(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."

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, and such a personal right would be lost, unless the same is exercised within the stipulated time.

In Pandit Chunchun Jha v. Sheikh Ebadat Ali & Anr [(1955) 1 SCR 174] this Court clearly held:

"\005We 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\005"

Yet again in Mushir Mohammed Khan (D) Lrs. v. Sajeda Bano (Smt.) & Ors. [(2000) 3 SCC 536] this Court upon construing Section 58 (c) of the Act and opined:

"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."

Referring to Chunchun Jha (supra) it was held:

"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"

In Umabai and Another v. Nilkanth Dhondiba Chavan (Dead) by Lrs. And Another [(2005) 6 SCC 243], wherein of us was a party, this Court held :

"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, Bhaskar Waman Joshi v. Narayan Rambilas Agarwal, K. Simrathmull v. S. Nanjalingiah Gowder, Mushir Mohammed Khan and Tamboli Ramanlal Motilal.)"

The High Court relied upon Smt. Indira Kaur & Ors. v. Sheo Lal Kapoor [(1988) 2 SCC 488] 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 hard-headed 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)4 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\005."

In the instant case, as noticed hereinbefore, 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.

In Ramlal and Another v. Phagua and Others [(2006) 1 SCC 168], this Court having regard to the peculiar fact situation obtaining therein opined:

"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."

As of fact, it was held therein that the sale deed in question was not a real sale deed but was by way of a surety. In that case, furthermore, the defendant categorically admitted that the plaintiff had taken loan. It is in that situation, the transaction was held to be a mortgage. Apart from it, there were other circumstances which led the court to arrive at the said conclusion. The said decision, therefore, cannot have any application in the instant case.

The question which now arises for consideration is as to whether the aforementioned order dated 22.3.1979 passed in Misc. Case No. 14/78 would operate as res judicata. Section 83 of the Transfer of Property Act reads as under:

"Power to deposit in Court money due on mortgage.- At any time after the principal money payable in respect of any mortgage has become due and before a suit for redemption of the mortgaged property is barred, the mortgagor, or any other person entitled to institute such suit, may deposit, in any court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage.

Right to money deposited by mortgagor.- The court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same court the mortgage-deed and all documents in his possession or power relating to the mortgaged property, apply for a and receive the money, and the mortgage-deed, and all such other documents so deposited shall be delivered to the mortgagor or such other person as aforesaid.

Where the mortgagee is in possession of the mortgaged property, the court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to re-transfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgement in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

The provision merely permits the mortgagor to deposit the mortgage

amount. Even in a case where such deposit is made, in the event the mortgagee refused to accept the deposit, the mortgagor would have no option but to institute a suit for redemption relying on the mortgage money deposited. The respondent did not file a suit for redemption. It may be that the appellant objected to the said deposit but despite the fact that the purported mortgage amount was allowed to be deposited, the same being not binding upon the mortgagee as he could not be compelled to accept the same, the question of applying the principles of res judicata would not arise. [See Chandramani Pradhan v. Hari Pasayat, AIR 1974 Orissa 47]. By reason of such deposit the status of the parties is not altered. For filing a suit for redemption by the mortgager, deposit under Section 83 is not a precondition.

It is well-known that the function of a court in terms of Section 83 Transfer of Property Act is procedural in nature.

For attracting the principles of res judicata, the submissions of Mr. Hansaria is that the court of the Munsif was a court exercising limited jurisdiction while entertaining an application under Section 83 of the Transfer Property Act and the decision of such a court of limited jurisdiction would also operate as res judicata. Strong reliance has been placed by Mr. Hansaria on Sulochana Amma v. Narayanan Nair[ (1994) 2 SCC 14]. He submitted that in that case a suit was filed before a court of limited pecuniary jurisdiction and in view of the decision thereon, explanation VIII to Section 11 of the Code of Civil Procedure was held to be attracted.

In Rajendra Kumar v. Kalyan (Dead) by Lrs. [(2000) 8 SCC 99] this Court merely held that the expression 'court of limited jurisdiction' is of wide amplitude. The Court made a distinction between a procedural statute and a substantive statute for applicability of the principles of res judicata. In that case the earlier suit was filed before a court of competent jurisdiction.

In Mahila Bajrangi (Dead) through Lrs. & Ors. v. Badribai w/o Jagannath & Anr. [(2003) 2 SCC 464] this Court clearly held that the principles of res judicata would be applicable only when an issue arose directly and substantially in an earlier suit, a finding regarding an incident or collateral question reached for the purpose of arriving at the final decision would not constitute res judicata.

In Union of India v. Pramod Gupta (D) by Lrs. & Ors. [JT (2005) 8 SC 203] this Court opined:

"28- The principle of res judicata would apply only when the lis was inter parties and had attained finality in respect of the issues involved. The said principle will, however, have no application inter alia in a case where the judgment and/or order had been passed by a court having no jurisdiction therefore, and/or in a case involving pure question of law. It will also have no application in a case where the judgment is not a speaking one."

The question of determination of being a pure question of law, the principles of res judicata shall have no application. Therefore, the High Court, in our opinion committed a manifest error in interfering with the judgment and decree passed by the trial court as also the appellate court in exercise of its jurisdiction under Section 100 of the Civil Procedure Code.

For the reasons aforementioned, the impugned judgment of the High Court cannot be sustained. It is set aside accordingly. The appeal is allowed with cost. Counsel's fee quantified at Rs. 5,000/-.