

CASE NO.:
Appeal (civil) 4125 of 2001

PETITIONER:
Rama Devi

RESPONDENT:
Dilip Singh

DATE OF JUDGMENT: 14/03/2008

BENCH:
TARUN CHATTERJEE & HARJIT SINGH BEDI

JUDGMENT:
J U D G M E N T

HARJIT SINGH BEDI, J.

1. In this appeal by special leave the facts have been taken from the judgment of the first appellate Court as they have not been detailed in the judgment of the High Court.

2. The plaintiff-appellant Rama Devi executed a mortgage/sale deed dated 15th May 1974 for 6 Bigha and 10 Biswas out of her total land area of 12 Bigha 1 Biswa for Rs.13,000/- as she needed funds for her business. In the document aforesaid, it was recited that in case the amount of Rs.13,000/- plus interest at the rate of 24% per annum was returned to her within a period of 5 years the land would be re-conveyed to her. It is the case of the appellant that she had made a request to the respondent within the aforesaid period for re-transfer but the respondent had refused to accede thereto. This refusal prompted the appellant to issue two notices dated 27th April 1979 and 9th April 1981 to the respondent but he refused to accept the same but under the influence of the local people he returned the possession of the land to her in June 1984. As the necessary re-conveyance had not been executed by the respondent, the appellant filed a suit praying that:

(1) A decree for redemption of the conditional mortgage deed dated 15.4.1974, registered on 24th May 1974 be passed in favour of the plaintiff and against the defendant in respect of the property as detailed below:

Property in dispute situated in
Village Pokhrain, Tehsil Bhognipur,
District Kanpur Dehat \026 Area 6
Bighas 10 Biswas share out of 12
Bighas 1 Biswa of Plot No. 958.

(2) Relief of permanent injunction claimed restraining the defendant from interfering in plaintiff\022s possession.

3. The defendant respondent admitted the execution of the document dated 15th May 1974 but contested the suit on various grounds. On the pleading of the parties the following issues were framed:

1. Whether the document dated 15.5.74 executed between the parties is a conditional Benama, as has been stated by the plaintiff in para 1 of the petition or it is of the nature of complete sale (out and out sale with a condition of repurchase) as has been strated by the defendant, its effect in both the circumstances.

2. Whether the defendant in the month of June 1984 has returned the possession to the plaintiff and the plaintiff is in possession of the land in dispute. If yes, then its effect.

3. Whether the suit for amendment (redemption) is not maintainable in law.

4. Whether the deal in suit is a complete sale with the effect of Zamindari Abolition Act.

5. Whether the plaintiff has not got done the re-sale within the prescribed time as has been stated by the defendant.

6. To what relief the plaintiff is entitled to.

7. What the defendant was in possession of the agricultural land in dispute as a cultivator upto the year 1984, as is the submission of the plaintiff.

8. Whether the defendant had got the document dated 15.5.1974 in question executed in place of mortgage on interest, as conditional sale, by way of conspiracy and fraud\005\005\005\005..in case yes, then its effect.

4. The trial court in its judgment dated 20th March 1996 decided issue Nos. 1 and 4 together and held that the document dated 15th May 1974 was not a mortgage but was in fact a sale and that the respondent continued to be in possession of the land in dispute. On issue Nos. 3 and 5, the learned trial Judge came to the conclusion that the appellant did not have any right to get the property re-deemed and on issue No.7 reiterated that the document dated 15th May 1974 constituted a sale. On issue No.8, the trial court held that there was no evidence of fraud etc. and accordingly dismissed the suit vide judgment dated 20th May 1996. An appeal was thereafter filed by the unsuccessful plaintiff. The first appellate court framed two points for consideration and after examining the contents of the document dated 15th May 1974 and the evidence of the parties, endorsed the findings of the

trial court that the document aforesaid was in fact a deed of sale and not a mortgage and would also be deemed to be a sale under section 164 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 (hereinafter called the \023Act\024) and as this was a special Act, it would supercede all others and as such the provisions of the Transfer of Property Act would not be applicable. It was further concluded that as the appellant had not sought the re-conveyance within 5 years, as stipulated in the agreement of 15th May 1974 she had in any case lost her right to the re-conveyance. The argument of the learned counsel for the appellant that as section 155 of the Act placed an embargo on the transfer of agricultural land by a Bhumidhar which made the transaction of 15th May 1974 nonest in view of the provisions of section 166 of the Act, was also repelled by observing that section 155 would have no applicability in such a case. The first appellate court accordingly dismissed the appeal leading to a second appeal in the Allahabad High Court. The learned Judge by his order dated 25th January 2001 accepted the findings recorded by the two subordinate courts and dismissed the appeal. The present matter is here at the instance of the plaintiff.

5. The learned counsel for the appellant has raised several arguments in the course of the hearing. He has pointed out that the transaction of 15th May 1974 was a mortgage by way of conditional sale as envisaged under Section 58-C of the Transfer of Property Act and as such the appellant was entitled to seek its redemption within a period of 30 years and the findings of the courts below to the contrary limiting the period to 5 years was erroneous. It has also been reiterated that Section 164 of the Act was not applicable in view of the specific bar under Section 155 read with Section 166 on the transfer of possession of land by a Bhumidhar in order to secure a debt. The learned counsel for the respondent has, however, pointed out that there was a concurrent finding of fact that the transaction of 15th May 1974 was in fact a sale outright and as such the question of re-conveyance within 5 years or 30 years had to be ruled out. It has also been argued that even assuming that the aforesaid document constituted a mortgage, yet by the deeming provisions of Section 164, such mortgage would be deemed to be a sale in the hands of the transferee and as such the appellant had lost all her rights in the land in question.

6. We have heard the learned counsel for the parties and gone through the record. The three courts below have examined the document dated 15th May 1974 and concluded that it was in fact a sale and not a mortgage, as understood under section 58-C. In *Chunchun Jha vs. Ebadat Ali & Anr.* AIR 1954 SC 345, this Court has held that a document has to be construed and interpreted as a whole in order to arrive at a conclusion as to its true meaning and import and to determine whether it was a mortgage by way of conditional sale or a sale outright. We also find from the evidence on record that the possession had been transferred to the respondent herein at the time of the execution of the document on 15th May 1974 and the respondent continues to be in possession as of today as per the findings of the three courts below. We are, therefore, disinclined to interfere with the findings of fact for these reasons.

7. Even otherwise assuming for a moment that the transaction was in fact a mortgage, the appellant has lost all her rights in the property by virtue of the deeming provisions in section 164 of the Act. We reproduce Sections 155, 164 and 166 of the Act herein below:

\023Sec.155. Mortgage of land by a bhumidhar.

\026 No bhumidhar shall have the right to

mortgage any land belonging to him a such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced.

Sec.164. Transfer with possession by a bhumidhar to be deemed a sale. \026 Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan, and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall, notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of sections 154 and 163 shall apply.

Sec.166. Transfer made in contravention of the Act to be void. \026 [Every transfer made in contravention of the provisions of this Act shall be void.]\024

8. Relying on the express embargo placed by Section 155, Mr. Swarup has argued that as the land had been mortgaged by a Bhumidhar contrary to the provisions of Section 155, the said transaction was deemed to be void in terms of section 166. In this connection, the learned counsel has placed reliance on P.B.Maganbhai & Anr. vs. P.K.Ambaram & Ors. 1997 Allahabad L.R. Vol. 29, P.627. It has also been submitted that the very wording of section 164 showed that certain kinds of transactions would be deemed to be sales and as the finding of the courts below was that the agreement of 15th May 1974 was in fact a sale, the question of any deeming provision identifying a sale transaction as a deemed sale would not arise. The learned counsel for the respondent has, however placed reliance on Smt. Bhagwatia vs. Dy. Director of Consolidation at Deoria & Ors. 1982 Allahabad L.J. 29 and Sati Prasad & Anr. Vs. The Dy. Director of Consolidation, Kanpur & Ors. 1983 Allahabad L.J. 331 to contend that a mortgage by conditional sale would be deemed to be a sale by fiction of law and that section 155 of the Act would not be applicable in the present case as interest in the property had also been transferred and possession handed over to the respondent whereas section 155 talked only about possession.

9. We have considered the arguments advanced by the learned counsel for the parties. A bare perusal of section 155 would reveal that it would apply to a mortgage where the possession of land has been transferred or is agreed to be transferred in the future as security for the money advanced or to be advanced and it is such a transaction which is held to be void under section 166. Section 164 however talks about transfer of a holding or part thereof made by a bhumidhar by which possession has been transferred for the purpose of securing any payment of money etc. and it says that notwithstanding anything contained in the document of transfer or any law for the time being in force, such a transaction would be deemed to be a sale to the transferee and

to every such sale the provisions of Section 155 and section 166 would not apply. We find that the respondent's stand is supported by the judgments that have been cited. In Bhagwatia's case (supra), the petitioner's husband executed a usufructuary mortgage deed and possession had also been transferred to the mortgagee for securing re-payment of the loan. The learned Judge held that this mortgage would be deemed to a sale under section 164 of the Act. While dealing with an identical situation and to Section 164 this is what the learned Single Judge had to say:

It is apparent from the aforesaid section that the usufructuary mortgage of Bhumidhari land, where possession is transferred as security for payment of loan, would be covered by the provisions of S.164 and notwithstanding anything contained in the document of transfer or any law for the time being in force, it would be deemed to be sale to the transferee itself. It, therefore, follows that the covenant contained in the usufructuary mortgage deed in question that the mortgagor would be entitled to redeem the property by making payment of loan and within a period of three years is of no consequence as the transfer by way of usufructuary mortgage in question would be deemed to be sale under S.164 of the U.P. Zamindari Abolition and Land Reforms Act.

In the aforesaid case the question regarding legal status of the person who was put in possession in lieu of the interest was considered in the light of provisions of the U.P. Tenancy Act which was then in force when the possession was transferred to the creditor and his possession was considered to be on behalf of the owner himself. In the above mentioned case the interpretation of the S.164 of the U.P. Zamindari Abolition and Land Reforms Act was not involved nor was it dealt with. The provisions of S.164 of the said Act were not attracted to the facts of the aforesaid case. The aforesaid case is thus clearly distinguishable and is not applicable to the facts of the present case, where the question is involved is whether usufructuary mortgage would or would not be deemed to be a sale as provided under S.164 of the said Act.

Under S.164 of the U.P. Zamindari Abolition and Land Reforms Act it is provided that such a transaction would be deemed at all times and for all purposes to be sale to the transferee. It thus follows that it would be deemed to be sale from the very inception i.e. from the date of execution of the usufructuary mortgage and transfer of possession in pursuance thereof to the mortgagee. The provisions of S.60 of the Transfer of Property Act would, therefore, not be applicable to such mortgage and the mortgagor will have no right to redeem the mortgage and to claim possession from the mortgagee by offering to make payment of loan amount. The aforesaid statutory right of redemption as provided

under section 60 of the Transfer of Property Act would not be available to the mortgager Bhumidhar in view of the provisions of S.164 of the U.P. Zamindari Abolition and Land Reforms Act according to which for all times and for all purposes it would be deemed sale to the transferee. If the transfer amounts to sale by legal fiction under the aforesaid deeming provision, the transferor would be left with no right to redeem the property in question. The provisions with regard to the rights of mortgagor and mortgagee contained in the Chapter IV of the Transfer of Property Act would not apply to such mortgages which are hit by the provisions of S.164 of the U.P. Zamindari Abolition and Land Reforms Act.

A deeming provision in a statute postulates that a thing deemed to be something else is not, in fact, the thing which it is deemed to be something else, it is to be treated as if it is that thing, though in fact it is not.\024

10. We respectfully agree with the observations aforesaid and find them to be fully applicable to the facts of the present case. The argument of the learned counsel for the appellant that there could be no deemed sale under Section 164 of the Act, has also to be repelled in the light of the aforesaid observations. The judgment cited by the learned counsel for the appellant also has no relevance to the facts of this case. In view of the above findings, we are of the opinion that no further issue arises. We accordingly dismiss the appeal.