

IN THE HIGH COURT OF JHARKHAND AT RANCHI

Second Appeal No. 114 of 2004

1. Braj Kishore Sahu
 2. Awadh Kishore
 3. Binod Prasad
 4. Pramod Prasad
- **Appellants**

Versus

1. Shri Tribhuwan Nath Sahdeo
 2. Shri Niranjan Nath Sahdeo
 3. Smt. Kalindi Devi
- **Respondents**

With

Second Appeal No. 117 of 2004

1. Braj Kishore Sahu
 2. Awadh Kishore
 3. Binod Prasad
 4. Pramod Prasad
- **Appellants**

Versus

1. Shri Tribhuwan Nath Sahdeo
 2. Shri Niranjan Nath Sahdeo
 3. Smt. Kalindi Devi
 4. Nirmala Kumari
 5. Bidhatri Kumari
- **Respondents**

CORAM: HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY

For the Appellants : M/s Shamim Akhtar & Abhay Shankar, Advocates

For the Respondents : M/s Manjul Prasad, Sr. Advocates

Mr. Baban Prasad, Advocate

C.A.V. ON 23 .03.2022

PRONOUNCED ON 28 / 04 / 2022

1. Appellants are the plaintiffs in both these appeals who are before this Court in appeal against the judgment of affirmance in Title Appeal Nos. 66 and 67 of 1993. Title Appeal No. 66 of 1993 arises out of the judgment and decree in Title Suit No. 6/1987 and Title Appeal No. 67 of 1993 arises out Title Suit No. 7/87.
2. Both the appeals arise out of common judgment delivered by Additional district Judge Lohardaga in Title Appeal No. 66 and 67/93. They have been heard together and shall be disposed of by a common judgment.

3. Mortgage Title Suit No. 6 and 7 of 1987 was filed by Ram Dayal Sahu against Lal Pashupati Nath Sahdeo for foreclosure and to debar the defendant from redeeming the mortgage property comprising land measuring 1.28 acres fully detailed in both the plaints.
4. The plaintiffs brought the suit for foreclosure of the mortgage against the defendant, Lal Pasupati Nath Sahdeo. The mortgage deed dated 29.1.1972 was executed by Lal Pasupati Nath Sahdeo to Ram Dayal Sahu, father of the plaintiff for a sum of Rs.2000. The deed of mortgage was with respect to the land measuring an area 1.28 acres fully detailed in the schedule of the plaint. The terms and conditions of the mortgage deed was that the property shall be redeemed within five years of the mortgage, failing which the mortgage deed would be deemed to be of absolute sale. The mortgagor failed to repay the amount of Rs.2000 within the stipulated period. The name of the mortgagee was mutated and rent receipt issued on his payment of rent the plaintiff was not a professional moneylender. On the default in payment of the mortgage amount the suit was filed under section 67 of the transfer of property act for foreclosure.
5. It is the case of the defendant that mortgage money of Rs.2000 was tendered on 27th December 1974 and the same was received by the plaintiff to return the mortgage deed and also to deliver the back in possession of the mortgage land. It is specific defence of the defendant that suit was hit by the Bihar Moneylenders Act. The plaintiff has been enjoying the usufruct of the land in suit by advancing a mortgage amount of Rs.4000 by both the mortgage deeds. The annual income of the said land was not less than Rs.5000 and thus the plaintiff has earned about Rs.85,000 from the said land. The term of mortgage placing embargo on the redemption of mortgage of property by shortening the period within which the redemption could be sought, was a clog on redemption and as such *void ab initio*. The period of redemption is 30 years provided by statute which cannot be shortened by the term of mortgage. It has been denied that it was a mortgage by conditional sale.
6. On the basis of the pleadings of the parties the following main issues were framed :
Issue No. IV – Whether mortgage deed became absolute sale by lapse of time?

Issue No. V – Whether the plaintiff has acquired right, title and interest over the suit property?

Issue No. VI – Whether the suit hit by Section 12 of the Bihar Moneylenders Act?

Issue No. VII – Is the plaintiff entitled to get decree for forfeiture against the defendant?

7. The learned trial court dismissed the suit on the ground that the defendant had a right to redeem within 30 years from the date of execution and he can't be prevented from equity of redemption against law. It has also been held that this was not a case of sale with option to repurchase therefore it came under the provision of section 58 of the Transfer of Property Act. The deed was styled as conditional sale if the mortgagor failed to redeem the same within 5 years, but the nature and intention of the deed and executor was to mortgage the land to secure the loan. The suit was also hit by section 12 of the Bihar Moneylenders Act. Even in case of foreclosure the defendant had a right of repayment under Order 34 of CPC.
8. The learned court of first appeal concurred with the finding of fact and dismissed the appeal.
9. Whether a document is a mortgage deed or a mortgage with conditional sale is a question of fact and both the Courts below have held that it was not a mortgage with conditional sale. It has been held in *Ganpati Babji Alamwar v. Digambarrao Venkatrao Bhadke*, (2019) 8 SCC 651 that whether an agreement is a mortgage by conditional sale or sale with an option for repurchase is a vexed question to be considered in the facts of each case. An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale. The valuation of the property, and the transaction value, along with the duration of time for reconveyance, are important considerations to decide the nature of the agreement. There will have to be a cumulative consideration of these factors, along with the recitals in the agreement, intention of the parties, coupled with other attendant circumstances, considered in a holistic manner. The language used in the agreement may not always be conclusive. In view of the above, I do not find any infirmity in the findings of fact recorded by the Courts below that it was a not a mortgage by conditional sale.

10. This appeal has been admitted to be heard on the following substantial question of law:

Whether the learned lower appellate court has erred in holding that the suit was premature on the ground that defendant had right of redemption under article 63 of limitation Act up to 30 years?

11. It has been held in ***L.K. Trust v. EDC Ltd., (2011) 6 SCC 780*** that

“The mortgagor under Indian law is the owner who had parted with some rights of ownership and the right of redemption is the right which he exercises by virtue of his residuary ownership to resume what he has parted with. In India this right of redemption, however, is a statutory one. A right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage itself subsists. The judicial trend indicates that dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not debar the mortgagor from filing a second suit for redemption so long as the mortgage subsists. This right cannot be extinguished except by the act of parties or by the decree of a court”.

In the above stated position of fact and law, the clause purporting to limit and restrict the period of limitation for redemption was in conflict with the provision of Article 61 (a) of the limitation and was a clog on the equity of redemption. There was no infirmity in the order of the learned appellate Court to hold that the mortgagor had a right of redemption for a period of thirty years.

The substantial question of law is accordingly answered in favour of the defendant/respondent.

I do not find any infirmity in the impugned Judgment.

Both the appeals are, accordingly, dismissed with cost. Consequently, I.A. No. 3169 of 2008 in S.A. No. 114 of 2004 and I.A. No. 2328 of 2004 in S.A. No. 117 of 2004 stand disposed of.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi
Dated the 28th April, 2022

AFR / AKT