

**HEADINGS OF DECISION IN CIVIL SUITS
IN THE COURT OF 1ST. ADDL. SENIOR CIVIL JUDGE, BHUBANESWAR**

***Present :- Pranab Kumar Routray,
1st Addl. Senior Civil Judge,
Bhubaneswar***

C.S No.759/2007

1. Budhibaban Sethi (**dead**)
 - 1(a) Shrinibash Sethi, aged about 45 years.
S/o Late Budhibaban Sethi
 - 1(b) Subash Chandra Sethi, aged about 41 years.
S/o Late Budhibaban Sethi
 - 1(c) Smt.Sabita Sethi, aged about 43 years.
D/o Late Budhibaban Sethi,
Wife of Gagan Bihari Sethi.
 - 1(d) Smt.Kabita Sethi, aged about 35 years,
D/o Late Budhibaban Sethi,
W/o Patitapaban Sethi,
 - 1(e) Kumari Babita Sethi, aged about 30 years,
D/o Late Budhibaban Sethi,
2. Basanta Kumar Sethi, aged about 59 years,
S/o of Late Banchha Sethi,

All are of village-Kendupatna, P.O-Dadha,
P.S.Nandakanan, District- Khurda.

... **Plaintiffs**

-Versus -

1. Smt. Manjubala Das, aged about 50 years,
W/o Rabindra Das.
2. Smt. Ashalata Das, aged about 45 years,
W/o Kangali Das.

Both are of village-Kendupatna,
P.O-Dadha, P.S.Mancheswar,
Via-Baranga, District- Khurda.

... **Defendants**

COUNSEL APPEARED

For Plaintiffs : Sri K.C.Kar & associates.

For Defendant No.1 : Sri P.K.Mohanty & associates.

For Defendant No.2 : Sri K.C.Swain & associates.

Date Of Conclusion Of Argument : **18 -05-2015**

Date Of Judgment : **18-06-2015**

(After Summer Vacation)

JUDGMENT

This is a suit for declaration of right title, interest, confirmation of possession and permanent injunction.

2. The case of plaintiff in brief is that the property described in the Schedule of plaint hereinafter referred to as the suit land appertaining to sabik plot no.520, area Ac.0.220 decimals under sabik khata no.863 in Mouza- Padasahi of District- Cuttack, corresponding to Hal Plot no.897 Hal khata no.404 in District- Khurda originally belonged to the father of defendants

namely Bharamar Naik who was absolute owner in possession over the same. He for his legal necessity sold the suit land to the father of the plaintiffs late Banchha Sethi by executing a conditional sale deed bearing No.5152 on dtd. 29-06-1964 on receiving consideration of Rs.200/- and gave delivery of possession. The said sale deed was a conditional sale-deed in which it was mentioned that if the executant Bharamar would refund the consideration amount to the father of plaintiffs within three years i.e from 29-06-1964 to 28-06-1967, then he would get back the suit land in his favour otherwise the conditional sale deed shall be treated as sale deed. Bharmar did not refund the consideration amount for which the father of the plaintiffs became absolute owner in possession of the suit land and after his death the plaintiffs being successors became the absolute owner in possession. Hence the defendants have no semblance of right, title and interest over the same. It is further case of the plaintiffs that their father being an old, illiterate schedule caste person was not aware of the settlement work and hence could not record the suit land in his favour rather the suit land got recorded in favour of his vendor Bharamar Naik in the year 1973. This fact was not known to the father of plaintiffs till 16-09-2007 untill defendants came to the suit land with the proposed purchasers to sale the same. The plaintiffs applied for Hal R.O.R and got aware of such recording. Hence this suit with prayer for declaration of right, title, interest, confirmation of possession and permanent injunction against the defendants.

3. Defendant nos. 1 and 2 have filed separate written statement. Defendant no.1 challenged the suit on its maintainability, cause of action, valuation, limitation and also refuted the other plaint averments. It is denied that Bharamar Naik for his legal necessity had sold away the suit land to the father of the plaintiffs late Banchha Sethi by executing conditional sale deed. It is specifically averred that no such sale deed has been executed. If any document to that effect is produced by the plaintiffs then it is a manufactured and tampered document and might have been prepared by giving false promise and inducement to his father. A forged document might have been prepared by father of plaintiffs in order to grab the property for which no action was taken by him during his life time in order to take back his possession and establish his right title and interest over the same. It is also denied that the plaintiffs' father is an old and illiterate schedule caste person who was not aware of the settlement work and hence could not get his name recorded in the R.O.R. The plaintiffs have created a flimsy story that they came to know about recording of the suit land in the name of father of defendants only on 18-09-2007 and thereafter obtained certified copy of Hal R.O.R. With this pleadings, it is prayed for dismissal of the suit with cost.

4. Defendant no.2 also challenged the suit on its maintainability, cause of action, valuation, non-joinder and mis-joinder of parties and improper description of the suit

property. It is also challenged that the suit is hit under Order-2, Rule-2 of C.P.C. It is denied that her father Bharamar Naik has ever transferred the suit land or any part thereof to the father of the plaintiffs. It is claimed that the defendants along with one Premananda Das being owner in possession over the suit land have been paying rent to government regularly through Premananda Das. The suit land is also subject matter of dispute in Title Suit No.263 of 1999 pending in the court of Adhoc Additional District Judge (Fast Track), Court No.II. That the plaintiffs have no right, title and possession over the suit land and the documents relying upon by the plaintiffs are void and fabricated documents and are filed only to harass the defendants. Hence prayed for dismissal of the suit with cost.

5. With the aforesaid pleadings on record the following issues have been settled:

ISSUES

- 1) Whether the suit is maintainable?
- 2) Whether there is cause of action to bring the suit ?
- 3) Whether the suit is under valued ?
- 4) Whether the suit is bad for non-joinder and mis-joinder of parties ?
- 5) Whether the suit is hit under Order-2 Rule-2 of C.P.C ?
- 6) Whether plaintiffs have acquired right, title and interest over the suit land on the basis of conditional sale?

- 7) Whether plaintiffs are entitled for the relief of confirmation of possession and permanent injunction as prayed for ?
- 8) To what other relief (s) the plaintiffs are entitled for ?

6. The original plaintiff no.1 has examined himself as P.W.1 and one of his co-villager as P.W.2 and produced and proved the sale-deed in original vide Ext.1 and the certified copy of R.O.R of the suit land vide Ext.2. On the other hand defendant no.1 examined herself as D.W.1 and brought rent receipt of the year 2014 vide Ext.A. One Akshya Jena and Krushna Mohan Sahu are examined as D.Ws.2 and 3 respectively. List of documents from both sides are given in detail at the foot of judgment.

With the aforesaid evidence on record the issues as framed are to be answered.

FINDINGS

7. Issue no.6

This is the principal issue. Hence,taken up at first. Plaintiffs claim that they have right title interest over the suit land on the basis of the conditional sale deed executed in favour of their father Banchha Sethi by the father of the defendants namely Bharmar Naik. On the other hand defendants denied execution of any sale deed by Bharmar Naik and if any documents is produced by plaintiffs, it is a manufactured and tampered document and it might have been prepared by giving false

promise and inducement. The sale deed is produced and proved vide Ext.1. It is a document more than 30 years old. Evidence on record reveals that the executants and the witnesses are dead. It is the basis for claim of title of the plaintiffs. It is produced from the custody of plaintiffs. Hence giving the full benefit of Section 90 of the Indian Evidence Act, the plaintiffs may be presumed to have established due execution of the document. However, they are still require to establish the contents of the document, particularly those relating to passing of consideration, delivery of possession etc.

8. P.W. 1 is original plaintiff No.1 who is son of Banchha Sethi, the beneficiary of the document. He has deposed that late Bharamar Naik had sold the suit land to his father for legal necessity and executed sale deed bearing No.5152 dated 29-06-1964 receiving full consideration and gave delivery of possession. He further deposed that the sale deed was executed by Bharamar Naik as per his instruction which was written by deed writer Bhagyadhar Jena who is dead since long. The executant readover the contents of the sale deed and the same was explained to him by the scribe in presence of the witness, himself and his father. He claims that he was present at the time of execution of the deed. He also proved the signature of executant Bhramar Naik who put his signature in his presence and also proved signature of the scribe and witness. In para 4 of his cross-examination, he has stated that the consideration amount of Rs.200/- was handed over in front of Sub-Registrar's Office. He denied to the suggestion

that Bhramar Naik has not executed any sale deed in favour of his father. P.W.1 further deposed that the aforesaid deed was conditional sale deed in which it was mentioned in the recital that within 3 years of execution of said deed the executant Bhramar Naik would return the consideration money to his father to get back the suit land or else the said deed be treated as absolute sale deed. On this point, he was cross-examined and in para 9 of his cross-examination he has admitted that he has not read contents of Exhibit 2 and he has heard about the conditions. But in the same para he stated that neither he nor his father have issued written notice to Bhramar Naik but after three years they orally requested Bhramar Naik for payment but he did not pay. Learned counsel for defendant argued that the alleged deed vide Ext.1 reveals that consideration amount was paid earlier whereas P.W.1 has deposed that it was paid in front of Sub-Registrar's Office. Analysing such evidence, it can be gathered that consideration money was not paid in presence of Sub-Registrar rather it was paid in front of Sub-Registrar's office i.e prior to execution and registration of the document. Regarding possession, P.W.1 has deposed in his cross-examination that possession of the land was given on the next day of registration of deed and delivery of possession was made in presence of witnesses Bhima Das and Duryodhan Behera. Defendants have denied execution of such a deed and have also taken the plea that if any document is produced by plaintiff then it is a manufactured and tampered document which might have been prepared by giving false promise and inducement to their father and the document is

also a forged one. Whereas defendant no.1 as D.W.1 could not prove the document vide Ext.1 as a forged document or as to how it was prepared by giving false promise and inducement or it is a manufactured and tampered document. Her cross-examination in para 20 reveals that she came to know about registration and execution of Ext.1 after filing of the suit and on inquiry she came to know that no such document was executed by Bhramar Naik but there is no proof in support of the said inquiry. The defendants have not challenged the signature appears on Ext.1 as not the signature of Bhramar Naik. In absence of specific pleadings and proof regarding forgery or preparation of the document through inducement and considering evidence of P.W.1 it is held that the contents of the document(Ext.1) is proved.

9. Learned counsel for defendant No.1 argued that the deed comes under the category of Section 58 (d) of the T.P. Act and the mortgage is usufructuary mortgage because possession of the suit land is delivered and the mortgagor authorized the mortgagee to retain such possession until payment of the mortgage money. But on perusal of Section 58 (d) of the T.P. Act it is found that the main condition to fulfill such type of mortgage is that the rents and profits of the property to be received by the mortgagee and the same be appropriated in lieu of interest of mortgaged money or partly by interest and partly by mortgage money. This apart, in this type of mortgage no time is fixed and there is no personal covenant. In the present case, there is no recital about interest or appropriation of rents and profits in

lieu of interest or mortgage money. Therefore, the submission of learned counsel that this case comes under Section 58 (d) of T.P. Act is not sustainable.

10. Learned counsel for defendant no.2 vehemently argued that the document vide Ext.1 is not a sale with condition rather it is a deed of mortgage with conditional sale. On the other hand, it is contended by learned counsel for the plaintiff that Ext.1 is a conditional sale deed. Now it is required to decide whether Ext.1 is a sale with condition or a deed of mortgage with conditional sale.

11. Section 58(c) of T.P. Act speaks about mortgage by conditional sale. Section 58(c) runs thus: “ *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 a 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.* ” In a decision between Mushir Mohammed Khan (Dead) By Lrs.-Vs.-Smt. Sajeda Bano & Ors. decided on 2nd March, 2000 by Hon'ble Apex Court wherein the Apex Court

said that proviso to this Clause was added by Act XX 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 re-conveyance is contained in the document which purports to effect the sale. This Proviso was considered in *Chunchun Jha-Vs.-Ebadat Ali & Anr.*, AIR 1954 SC 345 and came to be considered again in *Bhaskar Waman Joshi (D) & Ors.-Vs.-Shrinarayan Rambilas Agarwal (D) & Ors.* AIR 1960 SC 301, in which it was explained as under : “ But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. ”

11(a) The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention

of the parties was that the transfer was by way of security, it would be a mortgage. The Privy Council as early as in *Balkishen Das-Vs.-Legge*, (1899) 27 Ind. Appl. 58, had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of document in the light of surrounding circumstances.

11(b) Hon'ble Apex Court, in the case between *Bhoju Mandal-Vs.-Debanath Bhagat* reported in AIR 1963 SC 1906 have held that "there is a clear legal distinction that the question to which category a document belongs whether it is a mortgage by conditional sale or sale with a condition of re-purchase presents a real difficulty which can only be solved by ascertaining the intention of the parties on a consideration of the contents of a document and other relevant circumstances. In a decision reported in AIR 1992 SC 1236 between *Tomboli Ramanlal Motilal-Vs.- Ghanchi Chimanlal Keshabalal*, it is held that "if there is no relationship of debtor and the creditor, the question of it being a mortgage by conditional sale does not arise. Nomenclature of the document is hardly conclusive and much importance can not be attached to the nomenclature alone since it is real intention which requires to be gathered". Further, in a decision reported in AIR 2006 SC 3359 it is held that in case of a mortgage by conditional sale the debt subsists and right to redeem remains with the debtor but in case of sale with condition of

purchase the transaction does not evidence an arrangement of lending and borrowing and thus the right to redeem is not reserved thereby.

12. In the case reported in AIR 1992 SC 1236 cited supra, under the document the transferee has taken a certain amount not as a loan but to discharge his prior debt and outstanding, the property was sold conditionally for a period of 15 years, possession was given, at the same time the document stated “therefore you and your heirs and legal representatives are thereafter entitled to use, enjoy and leave the said houses under the ownership right”, further contained a clause that the executants shall repay the amount within a period of five years and in case he failed to repay, neither he nor his heirs or legal representatives will have any right to take both the said property, that after the period of five years the transferee will have a right to get the municipal record mutated in his name and pay tax, thereafter the transferee will have an absolute right to mortgage, sale or gift the said property. It was held that the transaction was not a mortgage by conditional sale but clearly a conditional sale with an option to repurchase.

13. As seen, there are a plethora of decisions starting from the era of Privy Council till the present days which distinguish between mortgage by conditional sale and sale with a condition to repurchase. But there is a very thin line of difference between these two categories which is to be gathered from the

contents of the document while making analysis to gather intention of parties in entering into the transaction.

14. Now coming to the contents of Ext.1 in order to gather whether this document is a mortgage by conditional sale or sale with condition to repurchase, perusal of the said document reveals that no where it is mentioned that the amount paid was towards mortgage consideration or a loan amount. No where it is also mentioned that the father of plaintiffs wanted to take the amount as loan and the father of the defendants agreed to lend the said amount. There was no stipulation of interest. Hence, the relationship of debtor and creditor is not found. There is no challenge that the consideration amount of Rs.200/- was also less than the real consideration amount for sale. The reason assigned by the transferrer is to repay his pre debt. The recital of Ext.1 further reveals that in case of failure to repay the consideration money of Rs.200/- within three years from 29-06-1964 to 28-06-1967 the transferee and after him his legal heirs will have exclusive right over the suit property and the transferee can deal with the property in any manner and neither the transferor nor his heirs or legal representatives will have any sort of right. In view of such recitals of Ext. 1 and as per the ratio of the cases cited supra particularly ratio of the case reported in AIR 1992 SC 1236 which is just befitting to this case, it is safely held that the contents of the deed does not say that the transaction is a mortgage by conditional sale but clearly says conditional sale with option to repurchase. The language of the deed also reveal that intention of the parties

was to enter into a transaction for conditional sale. Subsequent conduct of the parties in dealing with the property as gathered from oral evidence available on record speaks so. Hence, Ext.1 is not a deed of ' mortgage with conditional sale ' but a ' conditional sale deed '.

15. There is no evidence that the consideration amount was repaid by the father of the defendants or by the defendants within the stipulated period. Hence, the aforesaid sale became absolute after expiry of the stipulated period i.e. after 28-06-1967.

16. Considered the case from another angle. In a case between Madun Mohun Chowdhry-Vs.- Ashad Alli Bepari(1884) 10 Cal 68 it was held that a contract of mortgage by conditional sale is a form of security known under various names through out India, as ' Kut Kubala ' or ' Conditional Bills or sale ' in the presidency of Bengal. The essential of this mortgage is that on the breach of the condition of repayment, the contract executes itself and the transaction is closed and becomes one of absolute sale without any further act of the parties or accountability between them. This form of necessity has long been common in India. The fact is mentioned in Bengal Regulation I of 1798. In the case at hand, in Ext.1, it is mentioned that it is a ' Kanta Kabala '. Hence, considering the case from this angle, the ' Kanta Kabala ' vide Ext.1 has become absolute sale on expiry of three years from 29-06-1964.

17. Learned counsel for both the defendants forcefully submitted that the plaintiffs could have filed a suit for foreclosure instead of declaration of his right, title and interest. When it is already held that Ext.1 is not a mortgage with conditional sale, filing of a suit of foreclosure does not arise.

18. It is already held that the conditional sale has become absolute on 28-06-1967. Hence, the plaintiffs' father and after him, the plaintiffs have right, title and interest over the suit land since 29-06-1967. Accordingly, this issue is answered in favour of the plaintiffs.

19. Issue No.7

This issue relates to relief of confirmation of possession and permanent injunction. It is claimed by the plaintiffs that their father and after him they are in possession over the suit land since the date of execution of conditional sale deed Ext.1. On the other hand, it is claimed by the defendants that possession was never delivered to the father of the plaintiffs and they are in possession and have been paying rent. They have filed one rent receipt of the year 2014 vide Ext.A. Admittedly this is a lis pendent document and paid for entire suit khata. No rent receipt for any year prior to institution of suit is filed. However, when the predecessor in interest of the defendants namely Bhramar Naik, the executant of Ext.1 has declared therein that he has delivered possession in favour of Banchha Sethi, the predecessor in interest of the plaintiffs and when there is no

material on record that when and under which circumstances defendants have taken away possession of the land subsequently, possession of the plaintiffs over the suit land is hereby confirmed. It is already declared that the plaintiffs have right, title and interest over the suit land. Hence, the defendants and their agents are permanently restrained from interfering with the peaceful possession of the plaintiffs over the suit land. This issue is answered accordingly.

20. Issue Nos. 1, 2, 3, 4 and 5

These issues are formal in nature and for academic purpose. In view of findings under Issue No.6, the suit is not hit under Order 2 Rule 2 of CPC and that apart there is no specific plea in the written statement that as to how the suit is hit under the said provision. It is claimed by the defendants that the suit is undervalued. Ext.1 reveals that consideration amount paid in the year 1964 was Rs.200/- and the sale became absolute in the year 1967. So, the suit being valued at Rs.10,000/- for declaration can not be said as undervalued. There is no specific plea as regards to misjoinder of parties. The defendants have taken the plea that their brother Bishnu Charan Naik has been left for which the suit is bad for non-joinder of necessary party. As seen from the cross-examination of the witnesses from the side of defendants, Bishnu Charan Naik is not the natural son of the parents of the defendants and he was brought from a hospital and there is no deed of adoption executed in his favour. In view of such evidence, it is held that he is not a necessary party in the suit.

In view of findings under issue No.6 and 7, there is cause of action to bring the suit and the suit so filed is maintainable. These issues are answered accordingly.

21. Issue No.8

Except the reliefs granted above, the plaintiffs are not entitled for any other relief. Hence, it is ordered.

ORDER

The suit be and the same is decreed on contest against the defendants with cost. It is hereby declared that the plaintiffs have got right, title and interest over the suit land. Their possession over the same is hereby confirmed. The defendants and their agents are permanently restrained from interfering with the peaceful possession of the plaintiffs over the suit land.

***1st. Addl. Senior Civil Judge,
Bhubaneswar.***

The judgment is transcribed to my dictation by the Typist attached to this Court, corrected and pronounced by me in the open Court today on the day of 18th June, 2015 under my seal and signature.

***1st. Addl. Senior Civil Judge,
Bhubaneswar.***

List of Witnesses examined for the Plaintiffs:

P.W.1: Sri Budhibaban Sethi,

P.W.2 Sri Budheswar Behera.

List of Witnesses examined for the Defendants :

D.W.1: Smt. Manjulata Das @ Manjubala Das,

D.W.2 Sri Akhaya Jena,

D.W.3 Sri Krushna Mohan Sahoo.

List of Documents marked as Exhibits for the Plaintiffs:

Ext.1: Original sale-deed no.5752 dtd.29-06-1964 ;

Ext.1/a: Signature of Bharamar Naik on Ext.1 ;

Ext.1/b: Signature of scribe of sale-deed Bhagyadhar Jena ;

Ext.1/c: Signature of Bhima Das as witness on Ext.1 ;

Ext.1/d: Signature of Duryodhan Behera as witness on Ext.1 ;

Ext.2: Certified copy of R.O.R

List of Documents marked as Exhibits for the Defendants :

Ext.A: Rent receipt of the year 2014

*1st. Addl. Senior Civil Judge,
Bhubaneswar*