

**IN THE HIGH COURT AT CALCUTTA**  
(CIVIL APPELLATE JURISDICTION)

PRESENT:

**THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY**

**S.A. 104 of 2017**

**CAN 1 of 2012**

**CAN 2 of 2016**

**SAFIA BEGUM & ORS.**

**VS.**

**PARBATI DEVI PANDEY (LRS)**

**ANANDA PRASAD PANDEY & ANR.**

For the Appellants : Mr. A.K. Rakshit, Adv.

For the Respondents : Mr. Gopal Chandra Ghosh, Adv.  
Mr. Uttam Kr. Bhattacharyya, Adv.  
Mr. Kaustav Mishra, Adv.

Hearing concluded on : 11<sup>th</sup> August, 2023

Judgement on : 4<sup>th</sup> October, 2023

**Siddhartha Roy Chowdhury, J.:**

1. This second appeal challenges the judgement and decree passed by learned Additional District Judge, 1<sup>st</sup> Court, Paschim Midnapore in Title (Mortgage) Appeal No. 5 of 2010 affirming thereby the judgement and decree passed by learned Civil Judge (Junior Division), 3<sup>rd</sup> Court, Paschim Midnapore in Mortgage Suit No. 43 of 1996.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, the plaintiff filed the suit claiming *inter alia*, that the father of the plaintiff borrowed a sum of Rs. 2000/- from the defendant for the purpose of marriage of the plaintiff and for that he had to

mortgage the suit for 25 years. It was further agreed that the defendant would enjoy the usufruct of the property in lieu of interest. The defendant having enjoyed its usufruct till 1986 handed over the possession of the property to the plaintiff, as the property was gifted to him by his father. Since then the plaintiff has been possessing the suit property. It is further contended that the deed of mortgage was in the form of deed of sale. The defendant though agreed to execute a deed releasing the property but did not execute the same.

4. Hence by filing the suit the plaintiff prayed for declaration that the loan amount with interest thereon, was received by the defendant, who never acquired right, title interest over the property in suit as well as possession. The deed in question is mortgage deed and not a deed of sale and the defendant is to return it.
5. The suit was contested by the defendant by filing written statement denying all material allegations. It is the specific case of the defendant that father of the plaintiff wanted to sell the property on the eve of the marriage of his son Sk. Osman Ali. The defendant accepted the offer and purchased the property by a registered deed of sale and got her name mutated and since purchased, she has been possessing the property. The father of the plaintiff died in 1979. There was never any talk to return the deed of sale to the plaintiff. The property was never mortgaged.
6. Learned Trial Court after considering the evidence on record dismissed the suit. The plaintiff made an unsuccessful attempt to get the judgement of learned Trial Court reversed in Title (Mortgage) Appeal No. 5 of 2010. Hence the second appeal which was admitted on the following question of law :-

1. Whether the learned courts below committed substantial error of law in not applying the legal test for consideration as to whether a transfer in question is loan or out and out sale?
2. Whether the additional evidence sought to be adduced establishes the case of the plaintiff that the defendant subsequently executed a deed of conveyance of the property in suit in favour of the plaintiff?
3. Whether the learned Additional District Judge committed substantial error of law in not holding that the defendant was 14/15 years old being minor girl on the date of the execution of the alleged sale deed dated 4.5.1961 (Exhibit 'A') and, as such, she was not competent to enter into was void and the transaction in question could not be said to be out and out sale?
4. Whether the courts below committed substantial error of law in not holding that the alleged deed of sale dated 4.5.1960 (Exhibit 'A') had been only marked as 30 years old document but there was no evidence of the fact in respect of the sale deed particularly when the defendant was only 14 years old at that time of the alleged deed of sale and she was also not capable of proving anything at that time?
7. Mr. A.K. Rakshit, learned Counsel for the plaintiff submits that the appeal has virtually become infructuous as the property which was in the

possession of the defendant was released by executing deed and possession of the property is with the plaintiff/appellant. All that the appellant requires is to get those documents admitted as additional evidence before this Court. Drawing the attention of the Court to the copy of deed executed and registered on 13<sup>th</sup> December, 2001, Mr. Rakshit submits that the deed of re-conveyance was executed and after redemption of mortgage the property has been delivered to the defendant. Upon perusal of the document I find that the plaintiff obtained an ex parte decree in Mortgage Suit No. 46 of 1996 on 27<sup>th</sup> January, 1998. The said decree was put into execution and in the said execution proceeding being Other Execution No. 6 of 1998, the deed was executed by the Court. But as a matter of fact the ex parte decree passed against the defendant was set aside vide order dated 31<sup>st</sup> May, 2004 and the suit was ultimately disposed of on contest. Therefore, the said document executed on 3<sup>rd</sup> May, 2001 and registered on 13<sup>th</sup> December, 2001 cannot be considered to be a relevant document to adjudicate the appeal. Hence the petition under Order 41 Rule 27 of the Code of Civil Procedure is of no avail and stands rejected.

8. It is contended by Mr. Rakshit that at the relevant point of time when the deed was executed, the plaintiff was minor. Hence the transfer was not legal and valid. But from the attending facts of the case as well as from the recital of the deed Exhibit-A, it appears that the property was owned by the father of the plaintiff S.K. Tousodhyak Ali and not by the plaintiff. The father of the plaintiff being an adult, was competent to contract and he executed the deed in question. Therefore, the minority of the plaintiff at the relevant point of time cannot be a factor to be

considered in deciding the legality and validity of such transfer. The claim of the plaintiff that at the relevant point of time he was minor, no way affects the transaction that took place between the father of the plaintiff who was the owner of the property and the defendant.

9. It is contended by the plaintiff that the deed in question was actually mortgaged by conditional sale.

The document Exhibit-A is the manifestation of transfer of title in favour of the defendant purchaser. The question whether given transaction is a mortgage by conditional sale or a sale outright is to be gathered from the language used in the document itself.

10. The real question would be the legal effect of the words used in the documents and not the intention of the parties. In this regard, we can profitably use the decision of Hon'ble Supreme Court pronounced in the case of **PANDIT CHUNCHUN JHA VS. SHEIKH EBADAT ALI & ANR.** reported in **AIR 1954 SC 345** wherein it is held :-

*“6. The first is that the intention of the parties is the determining factor: see Balkishen Das V. Legge (1). But there is nothing special about that in this class of cases and here, as in every other case where a document has to be construed the intention must be gathered, in the first place, from the document itself. If the words are express and clear., effect must be given to them and any extraneous enquiry into what was thought or intended is ruled out. the real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended.”*

11. Section 58 (c) of the Transfer of Property Act enunciates :-

*“Section 58(c) in The Transfer of Property Act, 1882*

*(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: 1[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.]”*

12. The language of Section 58 (c) of the Transfer of Property Act is unambiguously clear that no transaction shall be deemed to be a mortgage unless the condition as laid down in the document which effects or purports to affect the sale. The document Exhibit-A is bereft of any such statement or condition.
13. Though it is adverted by the plaintiff that the defendant has surrendered the possession of the property in favour of the plaintiff but such statement remains unsubstantiated. The plaintiff further claimed that the mortgage was usufruct mortgage. The defendant after obtaining the possession of the property mortgaged, enjoyed the usufructs against the loan and its accrued interest, thereafter in the year 1986 handed over the possession. No document was produced by the defendant to substantiate such claim.
14. When the language of the Exhibit-A, a registered document, unerringly demonstrates that the father of the plaintiff transferred the property by sale according to law and the recital of the document does

not support the contention of the plaintiff, I do not find any reason to differ with the concurrent view expressed by the learned Courts below. In my humble opinion, the appeal is bereft of merit and should be dismissed, which I accordingly do. All substantial questions of law are thus answered. Consequently the appeal stands dismissed. Pending applications, if any, stand disposed of.

15. The department is directed to send down the lower Court record along with copy of judgement to the learned Trial Court.
16. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

***(SIDDHARTHA ROY CHOWDHURY, J.)***