

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.546 of 2010

Against the judgment and decree dated 02.05.2009, passed by the learned Second Additional District and Sessions Judge, West Champaran, Bettiah in Title Appeal No. 82 of 1991 reversing the judgment and decree dated 19.07.1991, passed by the learned First Additional Munsif, Bettiah, in Title Suit No. 80 of 1985.

1. Sanjay Kumar Pandey @ Abhinu Kumar Pandey son of Daya Shankar Pandey resident of Village Bhediharwa, P.S. Sikarpur, District West Champaran.
2. Alok Pandey @ Alok Kumar Pandey son of Daya Shankar Pandey, resident of Village Bhediharwa, P.S. Sikarpur, District West Champaran.

... ... Plaintiffs/Respondents/ Appellant/s
Versus

1. Rajdeo Yadav S/o Parikha Yadav, resident of Village Bhediharwa, P.S. Sikarpur, District West Champaran.

... ... Defendant/Appellant/Respondent 1st set

2. Binod Kumar Pandey S/o Paras Pandey, resident of Village Dhankutwa, P.S. Sikta, District West Champaran.

... Defendant/Respondent /Respondent 2nd set

3. Asharfi Yadav, son of Parikha Yadav, resident of Village Dhankutwa, P.S. Sikta, District West Champaran.
4. Vyas Yadav Son of Parikha Yadav, resident of Village Dhankutwa, P.S. Sikta, District West Champaran.
5. Vimal Kumar Pandey, S/o Paras Pandey, resident of Village Dhankutwa, P.S. Sikta, District West Champaran.

... ... Defendant/Respondents/ Respondent/s 3rd Set

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Appearance :

For the Appellant/s : Mr. Jitendra Kishore Verma, Advocate

Mr. Lal Babu Singh, Advocate

Mr. Anjani Kumar, Advocate

Mr. Ravi Raj, Advocate

Mr. Abhay Nath, Advocate

Mr. Shreyash Goyal, Advocate

Mr. Abhishek Kumar Srivastava, Advocate



Ms. Kumari Shreya, Advocate

For the Respondent/s : Mr. J.S. Arora, Sr. Advocate

Mr. Ratan Kumar Sinha, Advocate

Mr. Manoj Kumar, Advocate

Mr. Rakesh Kumar, Advocate

Mr. Himanshu Shekhar, Advocate

Mr. Ravi Bhatia, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
CAV JUDGMENT

Date :26-05-2025

Heard Mr. Jitendra Kishore Verma, learned counsel representing the appellants, assisted by Mr. Lal Babu Singh, and Mr. J. S. Arora, learned senior counsel assisted by Mr. Ratan Kumar Sinha, learned counsel for the respondents.

2. This Second Appeal has been filed against the judgment and decree dated 02.05.2009, passed in Title Appeal No. 82 of 1991 by the learned Second Additional District and Sessions Judge, West Champaran, Bettiah, whereby the lower appellate court reversed the judgment and decree dated 19.07.1991, rendered in Title Suit No. 80 of 1985 by the learned First Additional Munsif, Bettiah, in which the suit filed by the plaintiff-appellants was partially decreed.

3. In order to gauge the matter in its correct perspective, it is necessary to briefly restate what the suit entails. The plaintiffs-appellants filed Title Suit No. 80 of 1985 for declaring the registered mortgage by conditional sale dated 15.04.1980 to be a mortgage and further sought a direction commanding



defendant/ respondent no. 1 to accept the mortgage amount of Rs. 4,000/- within a fixed time frame, execute a deed of re-conveyance (*wapsinama*) and deliver possession of the mortgaged property to the plaintiffs, failing which the plaintiffs prayed for execution of the re-conveyance deed through the process of the Court upon deposit of the mortgage amount. During the pendency of the suit, defendant/ respondent no. 5, who is the brother of defendant/ respondent no. 2, executed sale deeds dated 22.06.1981 (Ext. A and A/1) in favour of defendant/ respondent nos. 3 and 4, who are brothers of defendant/ respondent no. 1, thereby transferring half of the suit property along with certain other pieces of land. Thereafter, the plaintiffs amended the plaint to challenge the said sale deeds as illegal, fraudulent, inoperative, and not binding upon them. The plaintiffs contended that the land, in-question, was allotted to defendant/ respondent no. 2 during the partition, who subsequently mortgaged the same in favour of defendant/ respondent no. 1 to secure a loan of Rs. 4,000/. Accordingly, defendant/ respondent no. 2 executed a registered mortgage by conditional sale dated 15.04.1980 in respect of the property described in the plaint. The mortgage deed specifically stipulated that upon repayment or receipt of the mortgage loan amount of



Rs.4,000/-, the mortgagee would execute a sale deed in favour of the mortgagor and hand over possession of the land in question to defendant/respondent no. 2. The mortgage deed clearly specified that upon repayment or receipt of the mortgage loan amount of Rs.4,000/-, the mortgagee would execute a sale deed in favour of the mortgagor and hand over possession of the land, in question, to defendant /respondent no. 2.

4. The reconveyance to the original owner, defendant/respondent no. 2, was to be completed upon receipt of the original mortgage amount, without any increase or fixation of a new sale consideration, and could be executed at any time, as no specific time frame was specified in the deed. The instrument of mortgage by conditional sale was executed by defendant/respondent no. 2 with a clear understanding that the mortgage would be redeemed upon repayment of the debt, as the market value of the land at the relevant time was around Rs. 10,000/-.

However, the mortgage was executed for a loan amount of only Rs. 4,000/- on 15.04.1980, and the plaintiffs purchased the property for Rs.10,000/- within a year. Further, within the same year, the brothers of defendant/respondent no.1, defendant/respondent nos. 3 and 4 purchased half of the suit property for a consideration of about 6,000/-, although the sale deed mentions



more than half of the property. This indicates that, according to defendant no. 1 and his brothers, the value of the entire property was around Rs.12,000/-. Therefore, no reasonable person would sell property worth Rs.10,000 to Rs.12,000 for merely Rs.4,000. This supports the plaintiffs' assertion that the transaction was not an absolute sale with a condition of re-purchase, but rather a mortgage by conditional sale. Further, the mortgage deed is consistent with the third condition of Clause 58(c) of the Transfer of Property Act, 1882 (for short 'the Act'). The reason for the ostensible sale, or the technical drafting of the document, has been explicitly explained in the plaint to safeguard the transaction from the provisions of the Bihar Money Lenders Act. Under this Act, after the completion of seven years in cases of mortgage with the right of possession and enjoyment, the mortgage would automatically stand redeemed by operation of law without the need to repay the mortgage money to the mortgagee. However, considering the terms, conditions, and surrounding circumstances, the parties consistently treated the document as a mortgage deed rather than a sale deed. Further, the plaintiffs contend that defendant/ respondent no. 2, in need of further money, agreed to execute a sale deed in their favour upon receipt of the sale price of Rs.10,000/-, while reserving the



mortgage amount. Accordingly, sale deeds dated 12.08.1981 were executed in favour of plaintiff/appellant nos. 2 and 3 for the entire mortgaged property. Accordingly, the plaintiffs requested defendant/respondent no. 1 to execute the deed of re-conveyance (*Wapsinama*) upon receipt of the mortgage amount. Pursuant to the mortgage deed, the plaintiffs approached defendant/respondent no.1 by submitting a written application for redemption of the mortgage by depositing the mortgage amount and requesting the execution of the re-conveyance deed. However, defendant/respondent no. 1 refused to accept the payment and failed to execute the deed of re-conveyance (*wapsinama*), which led to the filing of the present suit for redemption.

5. Defendants/respondents nos. 1, 3, and 4 appeared and filed their respective written statements, contesting the suit and denying the plaintiffs' claims. The remaining defendants did not file any written statements but raised preliminary objections regarding the maintainability of the suit and other ornamental issues. Defendant /respondent No. 1, in his written statement, categorically denied the claim of any mortgage by way of conditional sale, asserting that he never agreed to execute a '*Vapsinama*' on payment of Rs.4,000/-. He further contended



that the suit is liable to abate under the provisions of Section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as 'the Consolidation Act'). The defendants further pleaded that the agreement for re-conveyance, mentioned in the mortgage deed, is void, as the instrument does not mention any fixed time for the property to be returned. Defendant No. 1 asserted that the registered mortgage deed dated 15.04.1980 was supposed to be executed for only half of the land, i.e., 6 kathas and 4½ dhurs. However, he claims that the deed was fraudulently executed for 12 kathas and 9 dhurs. Primarily, the mortgagee challenges the correctness of the land area mentioned in the registered deed, arguing that it should have reflected only half of the land specified in the document. It is further pleaded that a plain reading of the mortgage deed indicates that the mortgage was confined to only half of the total land. They asserted that, within a year of the mortgage, they claimed to have purchased half of the mortgaged property from defendant /respondent No. 5, who is the full brother of the mortgagor in this case. Defendant /respondent No. 5 contends that he and defendant/respondent No. 2 each hold a half share in the mortgaged property, and therefore, defendant/respondent No. 2 could have mortgaged



only his half of the property. Defendant /respondent Nos. 3 and 4 have fully supported the written statement of defendant /respondent No. 1 by making similar pleadings, with the intention of claiming ownership over at least half of the property. Therefore, it is clear that the cases of defendant /respondent No. 1 and defendant/respondent Nos. 3 and 4 are closely connected and have a common interest.

6. The further case of defendant/respondent Nos. 1, 3 and 4 is that defendant/respondent no.5 (Vimal Kumar Pandey), being the full brother of respondent No. 2 (Binod Kumar Pandey), executed another sale deed dated 22.06.1981 in respect of 7 Kathas and 3.5 dhurs of land from the same plot numbers 623 and 625. This deed was in favour of defendant/respondent Nos. 3 and 4, namely Asarfi Yadav and Vyas Yadav, who are full brothers of defendant/ respondent No. 1. Thereafter, their names were duly mutated in the government revenue records as the owners of the purchased land. Thereafter, defendant/respondent No. 2 sold the entire 12 Kathas and 9 Dhurs of land in favour of the plaintiffs-appellants, Sanjay Kumar Pandey and Alok Pandey, both sons of Daya Shankar Pandey, through a registered sale deed dated 12.08.1981. It was alleged in the deed that the land had been mortgaged in favour of defendant/respondent No. 1 by



the deed dated 15.04.1980, which was in fact a mortgage deed. It is pleaded that neither defendant/ respondent No. 2 nor defendant /respondent No. 5 filed their written statements, and the suit proceeded *ex parte* against them. However, they later appeared as witnesses in the suit on behalf of the respective parties.

7. After going through the pleadings and carefully considering the rival contentions advanced by the parties, the trial court has framed eight issues for adjudication. The suit was adjudicated based on both oral and documentary evidence adduced by the parties in support of their respective cases. The learned trial court decreed the suit partially in favour of the plaintiffs, holding that they were entitled to redeem the suit land. Accordingly, issues nos. 4 and 5 were decided in favour of the plaintiffs. However, issues no. 6 and 7 were not decided in their favour. The challenge to the sale deeds executed in favour of Defendant Nos. 3 and 4 was left undecided due to the pendency of consolidation proceedings, and holding the suit to have abated as regards issue No. 6 pertaining to the validity of sale deeds (Exts. A & A/1), the trial court decreed the suit partially in favour of the plaintiffs, except issue No. 6.

8. Being aggrieved by the judgment dated 19.07.1991



passed by the learned trial court, defendant/respondent No. 1 preferred an appeal, bearing Title Appeal No. 82 of 1991. The plaintiffs, in turn, filed a cross-objection assailing the findings of the trial court on issues nos. 6 and 7, specifically relating to the abatement of the suit insofar as it related to the challenge against the sale deeds executed in favour of defendant/respondent Nos. 3 and 4. After hearing the parties, the learned lower appellate court framed a single point for determination in the Title Appeal, specifically: *Whether the disputed deed dated 15.04.1980 executed by defendant/respondent No. 2 in favour of defendant/respondent No. 1 is a simple mortgage deed or a mortgage by way of conditional sale?*

9. After analyzing the materials on record and the submissions of the parties, the instrument dated 15-04-1980 was construed as an absolute sale deed by the learned lower appellate Court. The findings of the learned trial court were reversed, and the judgment and decree of the trial court were set aside. However, the cross-objection filed by the plaintiffs/appellants was dismissed as not pressed. The present Second Appeal has been filed by the plaintiffs-appellants against the aforesaid judgment and decree of the learned Court of Appeal.

10. Learned counsel for the appellants submits that the



present case primarily relates to the redemption of a mortgage by conditional sale dated 15.04.1980 (marked as Ext. 6 on behalf of the plaintiffs and Ext. C on behalf of the defendants), executed for a consideration of Rs.4,000/- in respect of 12 kathas and 9 dhurs of land recorded under Khata No. 184, Plot Nos. 623 and 625, by defendant No. 2 in favour of defendant No. 1. Subsequently, by a sale deed dated 12.08.1981 (Ext. 1 and 1/A), the mortgagor, defendant No. 2, sold the entire mortgaged property to plaintiff Nos. 2 and 3, who were minors at that time, through their father, plaintiff No. 1, for a consideration of Rs. 10,000/-. Accordingly, the plaintiffs, having purchased the mortgaged property from its rightful owner, stepped into his shoes and instituted the present suit for redemption. The only issue in this Second Appeal, as mentioned above, pertains to interpretation of true nature of the transaction described in Exhibit C, especially when considered along with the surrounding circumstances. The answer to this question is crucial, as it will decide the outcome of the present appeal.

11. Before going into the arguments on this point, it is important to first refer to the relevant part of Section 58(c) of the Act, which defines a 'mortgage by conditional sale' which read as follows:-



“58. (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 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.”

12. Learned counsel for the appellants submits that, on a plain reading of the recitals of Ext. C in its entirety, it is evident that although the document is titled as a "Sale with a Condition to Re-purchase," its true nature and substance is that of a registered mortgage by conditional sale. The transaction satisfies the essential conditions laid down under Section 58(c) of the Act .Learned counsel for the appellants submits that on a plain reading of the recitals of Ext. C in its entirety, it is evident that



although the document is titled as a "Sale with a Condition to Re-purchase," its true nature and substance is that of a registered mortgage by conditional sale. The transaction satisfies the essential conditions laid down under Section 58(c) of the Act. It is specifically stipulated in the document that upon repayment of the mortgage amount, the purchaser (mortgagee) shall re-transfer or reconvey the property to the original owner (mortgagor), thereby fulfilling the proviso to Section 58(c). The entire transaction is contained in a single registered document, with no fixed time for repayment, allowing the mortgagor to redeem the property even after 10 or 20 years by repaying only the original mortgage amount of Rs. 4,000/-. This absence of time limitation or additional consideration strongly indicates that the transaction was intended as a mortgage, not a sale. Learned counsel for the appellants further submits that if the parties intended an absolute sale with a right to repurchase, a fixed time frame and a higher repurchase price would have been specified. However, in the present case, the consideration remained identical to the original mortgage amount, and the obligation to restore possession upon repayment further supports that the transaction is a mortgage by conditional sale, not an absolute sale. Moreover, there exists a clear liability to hand over possession upon redemption.



13. At the relevant time, the market value of the property was significantly higher than the mortgage amount of Rs.4,000/-. This is evident from the fact that within one year, the plaintiffs purchased the land for Rs. 10,000/-, and the own brothers of defendant/respondent No. 1, namely defendant/respondent Nos. 3 and 4, purchased half of the mortgaged property for about Rs 6,000/-. It is apparent from these sale deeds in favour of the plaintiffs as well as defendant/respondent Nos. 3 and 4 that the market value of the land in question was considerably greater at the time of execution of the disputed deed. The transaction was merely a mortgage and involved taking a loan of Rs. 4,000/- for the entire property without any intention to sell it. Reference in this regard may be made to a decision of the Hon'ble Apex Court in the case of ***Ganpati Babji Alamwar & Ors. vs. Digambarrao Venkatrao Bhadke & Ors.***, reported in **(2019) 8 SCC 651**. Learned counsel further submits that the higher market value of the property at the relevant time than the mortgage money is indicative of the fact that the transaction is really a mortgage and not a sale and is an important factor in judging the true nature of the transaction. It is further submitted that although the deed (Ext. C) granted mutation rights, both parties consistently treated the transaction as a mortgage, not a



sale. Defendant/respondent No. 1, the mortgagee, did not get the land mutated in his name based on the mortgage deed. The rent receipts relate to the sale deed in favour of defendant/respondent Nos. 3 and 4 for half of the lands, not in the name of defendant/respondent No. 1 as mortgagee. The issuance of rent receipts showing Defendant/Respondent No. 1 as mortgagee is, therefore, incorrect and misleading.

14. It is further submitted that although the deed (Ext. C) gave the right to get the land mutated, both parties treated the transaction as a mortgage, not a sale. Defendant/respondent No. 1, who was the mortgagee, never got the land mutated in his name based on this deed. The rent receipts shown are actually based on the sale deed in favour of defendant/respondent Nos. 3 and 4 for half of the land, not for the full property, and not in the name of defendant/respondent No. 1. Therefore, the argument that the rent receipts prove ownership is misleading since those were never issued in the name of defendant/respondent No. 1 and only relate to half of the property under a different sale deed. As such, these receipts do not support the defendant's claim. It is further contended that another significant aspect is that if the entire property, i.e., 12 kathas 9 dhurs, had actually been sold, as claimed by defendant/respondent No. 1, there would have been



no justification for his full brothers, defendant/respondent Nos. 3 and 4, to purchase half of the same property. Since the transaction, as recorded in Ext. C, has never been challenged or questioned through any suit or counterclaim, it is deemed to apply to the entire 12 kathas 9 dhurs of land. Therefore, if defendant/respondent No. 1's stand is that the deed was an absolute sale, there would have been no occasion for his brothers to again purchase a portion of the same land from the brother of the mortgagor. This contradiction clearly goes against the defendant's claim that it was a sale. Learned counsel for the appellants places reliance in the case of ***Vithal Tukaram Kadam & Anr. vs. Vamanrao Sawalaram Bhosale & Ors.***, reported in **(2018) 11 SCC 172** wherein the Apex Court, in paragraphs 14 to 17, has clearly held that a mortgage by conditional sale is an ostensibly a sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with Section 58(c) of the Act and such characteristics will clothe the agreement as 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. These aspects have to be cumulatively considered along with the conduct/ intention of the parties, the



recitals of the deed and other attending circumstances to judge the true nature of the transaction. In the said judgment, the document was styled as a sale deed but was ultimately considered as mortgage by conditional sale. Further reliance has been placed on the judgment in the case of ***Tulsi and Others vs. Chandrika Prasad and Others***, reported in **(2006) 8 SCC 322**, particularly paragraphs 16, 17, 22, and 24. In this judgment, the Hon'ble Supreme Court, while analyzing the true nature of a transaction, held that in order to be a mortgage by conditional sale, the transaction should be embodied in one document and further in that case there was an important factor like in this case the mortgagee/ transferee did not get itself mutated despite the right of mutation given (**Para 22 and 24**). The re-conveyance/retransfer was to be made for the same price, and the transaction was incorporated in one document and the advance of loan and return thereof being part of the same document creates the relationship of debtor and creditor and would be covered by proviso to Section 58 (c). This view has been taken in the case of ***Bhimrao Ramchandra Khalate v. Nana Dinkar Yadav (Tanpura) & Anr.***, reported in **(2021) 9 SCC 45**, particularly in paragraphs **4, 5, 10-13, and 24-26**. The Hon'ble Supreme Court reiterated this view in ***Srinivasaiah v. H.R.***



Channabasappa reported in **(2017) 12 SCC 821 (paras 22-25)**.

This issue has been considered in a case where the transaction was embodied in two documents but executed on the same day contemporaneously and even in that circumstances considering the inadequacy of the price in the document as compared to the market value, the Hon'ble Supreme Court held the transaction to be mortgage by conditional sale. This principle was reiterated in the case of **Ramvilas and Another vs. Karim Khan & Another**, reported in **(2017) 1 PLJR 212 (SC)**, particularly in paragraphs 5 to 11. Learned counsel for the appellants submitted that, considering the aforesaid citations, it is evident that the parties intended to create a mortgage only, not a sale deed. However, the lower appellate court, while reversing the well-reasoned judgment of the trial court, did not provide a properly reasoned or substantiated order. Instead, it rendered a cryptic judgment, recording mere conclusions without adequately considering the facts, circumstances, and applicable legal principles, so much so that it relied upon the decision reported in **AIR 1962 Patna 53**, which lays down a law contrary to the laws as laid down by the Hon'ble Apex Court in the decisions reported in **(2018) 11 SCC 172**, **(2019) 8 SCC 651**, and **(2017) 1 PLJR 212 (SC)**, while the decision of this Court has laid down that the intention of the



parties has to be ascertained from the document itself and not from the surrounding circumstances, and further that inadequacy of the price does not alter the nature of the transaction. This view of this Court is patently perverse and runs contrary to the settled law laid down by the Hon'ble Apex Court. It is further submitted that the intention of the deed is to be gathered from the recitals of the deed and the conduct of the parties, as has been held by the Hon'ble Apex Court on the judgment in the case of **B.K. Muniraju vs. State of Karnataka & Ors.**, reported in (2008) 4 SCC 451 (Para 18).

15. The learned lower appellate court failed to consider the fact that the document was called a "sale deed" for a specific reason, which was clearly mentioned in the plaint. The parties did this to avoid the effects of the Bihar Money Lenders Act, so that the mortgagee would not lose his money after seven years because of automatic redemption. However, both parties always understood and treated the document as a mortgage by conditional sale. So far as the relief concerning the challenge to the sale deeds executed in favour of defendant nos. 3 and 4, marked as Exts. A and A/1, is concerned, it was held to have abated under the provisions of Section 4(c) of the Act. Against this finding, a cross-objection/cross-appeal was filed, but the



same was dismissed as not pressed, as recorded in the impugned judgment. Consequently, the present second appeal has been held to be not maintainable on that count. Furthermore, it has been observed that unless and until the said sale deeds are set aside or declared illegal, no relief could be granted. The learned lower appellate court also held that a separate appeal ought to have been filed against the rejection of the cross-objection. However, it is submitted that the challenge to the aforesaid sale deeds was incorporated by way of amendment and did not constitute an inseparable part of the original plaint seeking a decree for redemption, especially considering that the purchasers under the impugned sale deeds (defendant/respondent nos. 3 and 4) were not the mortgagee (defendant/respondent no. 1), but rather strangers to the mortgage transaction. In such circumstances, the right of redemption, being a continuous and substantive right, remains unaffected. It is a settled principle of law that "once a mortgage, always a mortgage" and the right of redemption is never extinguished except in accordance with law. Therefore, the present suit for redemption is maintainable and can be decreed irrespective of whether the subsequent sale deeds have been assailed, set aside, or held valid. The cross-objection filed by the appellants against the sale deeds marked as Ext. A and A/1 was



dismissed as not pressed. The said issue regarding the validity of those sale deeds still open and has not attained finality. It is significant to observe that the trial court did not uphold the sale deeds as valid; rather, it held that the suit, insofar as it related to those sale deeds, stood abated. Furthermore, the question of their validity remains *sub judice* before the consolidation authorities, and upon conclusion of the consolidation proceedings, the suit in respect of the said sale deeds is liable to be revived for adjudication.

16. As far as the question of abatement is concerned, it relates to the suit having been abated in relation to the sale deeds dated 22.06.1981 and if they are affected by Section 4(c), the learned counsel for the appellants submitted that Section 4(c) only contemplates abatement of a suit with reference to the date of institution of the suit, and not with reference to the date of the sale deeds. Moreover, the said provision does not affect the validity of the sale deeds in any manner. Section 4(c) merely puts the adjudication of the suit in abeyance by abating it upon the commencement of consolidation proceedings, as has rightly been done by the learned trial court. However, it does not render the sale deeds void or illegal, as has been attempted to be argued. The learned trial court has nowhere held that the sale deeds



marked as Exts. A and A/1 are invalid due to the pendency of consolidation proceedings, to justify the contention that the plaintiffs' sale deeds are similarly affected. The validity of the plaintiffs' sale deeds has never been challenged in the suit neither by way of counter-claim nor by filing a separate suit. Learned counsel for the appellants further submits that the plaintiffs' claim for redemption, is based on the contention that the entire mortgaged property was exclusively allotted to defendant/respondent no. 2 in the partition, and that therefore a decree for redemption cannot be granted unless the partition is proved, is wholly misconceived. The plaintiffs' case is that the entire property was granted exclusively to defendant/respondent no. 2 in the partition, and accordingly, he mortgaged the entire property. The redemption claim is also made for the entire property, not merely a portion thereof. Hence, there is no legal impediment for granting a decree of redemption in respect of the whole property to the plaintiffs. The plaintiffs seek redemption of the whole property, not only for themselves but also for any future holders of interest in it. This approach is both lawful and justified. Had the redemption been sought only partially, or in respect of an undivided or unspecified portion, the mortgagee (defendant/respondent no.1) might have raised objections.



However, such grievances cannot be entertained in the present case where the redemption is claimed for the entirety of the property. Moreover, defendant/respondent no. 1 cannot be allowed to represent or act on behalf of defendant nos. 3, 4, or 5, because they have lost their right to challenge the mortgage deed dealing with the entire property.

17. *Per contra*, Mr. J. S. Arora, learned senior counsel for respondent nos. 1, 3, and 4, submitted that the plaintiffs-appellants' main contention is that the land in question, claimed to have been purchased from defendant/respondent no. 2, was wholly allotted to him in a partition with defendant/respondent no. 5 remained unproved, with no material brought on record to support such a claim or to establish the illegality of the two sale deeds dated 22.06.1981 executed by defendant/ respondent no. 5 in favour of defendant/ respondent nos. 3 and 4. These sale deeds relate only to half of the disputed property and were executed purportedly based on a partition, which has not been proven. It is further submitted that the plaintiffs have sought reliefs in respect of the sale deed dated 15.04.1980, contending that it ought to be treated as a mortgage deed and that consequential reliefs be granted accordingly. However, such relief cannot be granted without first establishing the plaintiffs' title over the suit land.



Defendant/ respondent no. 3 and defendant/ respondent no. 4 purchased 7 kathas and 3.5 dhurs of land, about half of the suit property through a sale deed dated 22.06.1981 from defendant/ respondent no. 5. Thereafter, defendant/respondent no. 2 sold 12 kathas and 9 dhurs of land to the plaintiffs-appellants through a registered sale deed dated 12.08.1981. This sale deed is subsequent to the sale deed in favour of defendant/ respondent no. 3 and defendant/ respondent no. 4. Relief with respect to the suit property cannot be granted without first holding that the sale deeds dated 22.06.1981 in favour of defendant/ respondent no. 3 and defendant/ respondent no. 4 are illegal and that they are not entitled to possession of the same. Learned senior counsel for the respondents submitted that the plaintiffs have not sought a declaration of their title over the suit land. Issue No. 4 was rightly framed to determine whether the sale deed dated 15.04.1980 ought to be declared a deed of mortgage. Issue No. 5 related to whether the plaintiffs possess the right to redeem the mortgage. Concurrently, Issues Nos. 6 and 7 were framed by the trial court to examine the validity of the sale deeds dated 22.06.1981, specifically whether these deeds are forged and inoperative, and whether they are rendered invalid under Section 4(c) of the Consolidation Act. It is further submitted that both



the courts below have failed to decide Issue Nos. 6 and 7, instead holding that the same are barred by Section 4(c) of the Consolidation Act. Consequently, the primary relief sought remained undecided. Therefore, the grant of relief for redemption of the mortgage and recovery of possession of the suit property from the defendants would be wholly impermissible and unwarranted, and such relief cannot be granted to the plaintiffs-appellants. The learned trial court, while considering Issue Nos. 7 and 8 relating to the sale deeds dated 22 and 23 June 1981, held that the relief sought in respect of these two sale deeds could not be granted due to legal and technical grounds, particularly in the light of the provisions of Section 4(c) of the Act. Learned senior counsel further submitted that the parties have admitted that a partition took place within the family; however, there is a dispute between them regarding the mode of partition.

18. It is alleged by the plaintiffs that the partition took place in such a manner that the entire land of the plot in question was allotted to defendant/ respondent No. 2. On the other hand, defendant/ respondent No. 5 asserts that the plot was divided equally, with half portion of the land allotted to defendant/ respondent No. 2 and the other half portion of the land allotted



to defendant/ respondent No. 5. This dispute regarding the mode of partition could only have been challenged by defendant /respondent No. 2, who, significantly, did not raise any such challenge. The plaintiffs were not entitled to question the partition, having no direct claim and holding a subsequent sale deed dated 12.08.1981. It is further submitted that since a portion of the suit land was purchased by defendant/respondent Nos. 3 and 4 from defendant/respondent No. 5 and has remained in their possession, the plaintiffs are not entitled to recover possession of that land unless and until the sale deed in favour of defendant/ respondent Nos. 3 and 4 are declared illegal. It is further submitted that the present suit is not one for declaration with a consequential relief of injunction. Relief No. 1A in the plaint represents the main and substantive relief, as the cancellation of the sale deeds dated 22.06.1981 was essential for granting the relief of redemption of mortgage under Relief No. 1A. Therefore, in the present case, Relief No. 1A stands as the principal relief sought by the plaintiffs. Reliance has been placed on the judgment in the case of ***Padhiyar Prahladji Chenaji vs. Maniben Jagmalbhai & others*** reported in ***(2022)12 SCC 128***, wherein the Hon'ble Apex Court has observed that "*main reliefs sought by the plaintiff in the suit were cancellation of the sale*



deed and declaration and the prayer of permanent injunction restraining Defendant 1 from disturbing her possession can be said to be a consequential relief. Therefore, the title to the property was the basis of the relief of possession. If that be so, in the present case, the relief for permanent injunction can be said to be a consequential relief and not a substantive relief as observed and held by the High Court. Therefore, once the plaintiff has failed to get any substantive relief of cancellation of the sale deed and failed to get any declaratory relief, and as observed hereinabove, relief of injunction can be said to be a consequential relief". The Hon'ble Apex Court further observed in para 25 of the said judgment that "an injunction is a consequential relief and in a suit for declaration with a consequential relief of injunction, it is not a suit for declaration simpliciter, it is a suit for declaration with a further relief."

19. Reliance has also been placed on the judgment of the Hon'ble Apex Court in the case of ***Shiv Kumar & Anr. v. Union of India & Ors.***, reported in ***(2019) 10 SCC 229 (para 22)***, where the Court observed that "a person cannot claim the land or declaration once no title has been conferred upon him to claim that the land should be given back to him. A person cannot enforce and ripe fruits based on a void transaction to start



claiming title and possession of the land by seeking a declaration under Section 24 of the 2013 Act (the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013), it will amount to conferment of benefit never contemplated by the law."

20. Upon analyzing the materials on record and the impugned judgments, this Court finds that the present suit was originally filed for a declaration that the registered document dated 15.04.1980, executed as a conditional sale, is in fact a mortgage deed. The plaintiffs prayed for a direction commanding defendant/ respondent No. 1 to accept Rs. 4,000/- as mortgage money and redeem the said mortgage within a stipulated time by executing a re-conveyance deed (*Wapsinama*) as per the terms set out in the original mortgage deed dated 15.04.1980, and to hand over possession of the suit property to the plaintiffs. The plaintiffs also prayed that, if the defendants failed to comply, the court to ensure execution of the re-conveyance deed after deposit of the mortgage amount. Thereafter, by way of amendment, Relief 1A was incorporated into the plaint, wherein the plaintiffs challenged the sale deeds dated 22.06.1981, executed by defendant/ respondent No. 5 in favour of defendant/respondent Nos. 3 and 4, as illegal, fraudulent, inoperative, and not binding



upon them. A cross-objection/cross-appeal was filed against this finding; however, it was dismissed as not pressed, as recorded in the impugned judgment. Consequently, the suit now stands confined only to the original relief.

21. On 01-03-2017, at the time of admission of the present second appeal, a substantial question of law was framed, namely: *“whether the document in question (Ext. C) constitutes a transaction of mortgage or a transaction of sale.”*

22. The plaintiffs' claim is that the registered deed dated 15.04.1980, though described as a conditional sale (wapsinama), was, in effect, a mortgage. This contention was answered in favour of the plaintiffs by the learned Trial Court, which held that the transaction was, in fact, a mortgage and not an absolute sale. However, this finding was reversed by the learned Lower Appellate Court, which construed the instrument dated 15.04.1980 as an absolute sale deed and accordingly set aside the judgment and decree passed by the learned Trial Court.

23. A complete reading of the document, particularly Ext. C, in the light of Section 58(C) of the Act, shows that upon payment of the mortgage money, the buyer/mortgagee is required to transfer/sell back/reconvey the property to the mortgagor. It is also apparent from the document that the entire



transaction is embodied in a single registered document, wherein no specific time frame has been provided for the repayment of the mortgage money. This grants the executant the liberty to repay the mortgage money whenever arranged, without the option to pay an amount exceeding the mortgage money, as the defendants agreed to reconvey the property at the same price. The valuation of the property and the transaction value along with 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. This view has been taken in the case of ***Vithal Tukaram Kadam*** (supra). In another judgment, in the case of **Bibi Fatima & Ors. v. M. Ahmad Hussain & Ors.**, reported in **(2017) 11 SCC 832**, the Hon'ble Supreme Court held that '*the question whether a transaction is a mortgage by conditional sale or a sale with a condition of re-purchase has to be decided on the basis of the interpretation of the document itself. The intention of the parties is the determining factor. The intention has to be gathered, in the first place, from the document.*' Moreover, the consideration amount being lesser than the market



value is another circumstance by which the document can be treated as a mortgage by conditional sale.

24. It is evident from the records, specifically Exhibits A and A/1, that half of the suit property was purchased by defendant/respondent Nos. 3 and 4 for a consideration of Rs. 6,000/- about a year later. It is also apparent that defendant no. 1, the mortgagee, did not get his name mutated in the government revenue records based on the said mortgage deed. Furthermore, it is undisputed that only one document was executed on 15.04.1980. The proviso to Clause (c) of Section 58 of the Transfer of Property Act, 1882, was inserted by Section 19 of the Transfer of Property (Amendment) Act, 1929 (Act XX of 1929). The proviso was introduced in this clause only to set at rest the controversy about the nature of the document; whether the transaction would be a sale or a mortgage. It has been specifically provided by the amendment that the document would not be treated as a mortgage unless the condition of repurchase was contained in the same document by which the mortgage was created. In view of the proviso to Section 58(c) of the Transfer of Property Act, the document should be construed as a mortgage.

25. A close scrutiny of the above-mentioned judgments of



the Hon'ble Apex Court would make it clear that the title given to a document is not conclusive in determining the nature of the document. The real intention of the parties has to be inferred by taking into consideration the recitals of the document along with other attending circumstances, especially when there is an ambiguity. Ext. 6 / Ext. C would suggest that the document was styled as a conditional sale by the parties.

26. On perusal of the document, it would suggest that there is a recital in the document as if a conditional sale deed was executed by Defendant No. 2 to Defendant No. 1 for a sale consideration of Rs. 4,000/-. However, the document proceeds to say that the seller would repay the very same consideration whenever arranged, without the option to pay an amount exceeding the mortgage money, as the defendants agreed to reconvey the property at the same price. The purchaser can enjoy the property during the said period till the repayment. The market value of the suit property was Rs. 10,000/-, as stated above. When the market value of the suit property was Rs. 10,000/-, what was the necessity for Defendant No. 2 to sell the same to Defendant No. 1 for Rs. 4,000/- was not explained. When the property was sold for a meagre sum well below the market value, it certainly leads to a conclusion that the



transaction was a mortgage. It is an admitted fact that Defendant No. 1, even after execution of Ext. 6 / Ext. C in the year 1980, till the filing of the suit in the year 1985, nearly five years, there was no mutation of revenue records in favour of Defendant No. 1. All these attendant facts, with the recital in the document that the purchaser could enjoy the property till the repayment of consideration money, compel this Court to come to the conclusion that the parties intended to treat Ext. 6 / Ext. C as a mortgage transaction, and the same cannot be treated as a sale deed with a condition for reconveyance, even though it was styled as *Baynama Bashart Wapsi*.

27. Accordingly, the substantial question of law formulated in this case is answered in favour of the appellants.

28. Insofar as the suit relates to the sale deeds marked as Exhibits A and A/1, the matter stands abated, and the validity of these documents will be determined upon publication of a notification under Section 26A of the Consolidation Act. It is relevant to note that the validity of the plaintiffs' sale deed was never challenged in the present suit, either by way of a counterclaim or through a separate suit.

29. In view of the discussions made hereinabove, this Court is of the considered opinion that the judgment and decree



dated 02.05.2009 passed by the learned 2nd Additional District and Sessions Judge, West Champaran, Bettiah, in Title Appeal No. 82 of 1991, whereby the appeal filed by defendant no. 1 was allowed and the plaintiffs' suit for redemption was dismissed, is not sustainable in law and on facts.

30. Accordingly, the impugned judgment and decree dated 02.05.2009 are set aside. Consequently, the judgment and decree dated 19.07.1991, passed by the learned 1st Additional Munsif, Bettiah, in Title Suit No. 80 of 1985, are restored and affirmed.

31. In the result, the appeal succeeds and is allowed.

32. There shall be no order as to costs.

33. Pending interlocutory application(s), if any, stand disposed of.

34. Let the lower court records be transmitted to the Court below forthwith.

(Khatim Reza, J)

shyambihari/-

AFR/NAFR	AFR
CAV DATE	16-01-2025
Uploading Date	26-05-2025
Transmission Date	

