SUPREME COURT OF INDIA

Vimal Chand Ghevarchand Jain

Vs.

Ramakant Eknath Jajoo

C.A.No. 1784 of 2009

(S.B. Sinha and Dr. Mukundakam Sharma JJ)

23.03.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Plaintiff is the appellant before us.

Father of the respondent was owner of four godowns and the land surrounding them admeasuring 1 acre and 4 guntas being Survey No.462, situated at Village Saikheda, Taluka Niphad, and District Nasik. The said godowns were numberd as Grampanchayat No.753 to 761. Indisputably, a deed of sale was executed by the father of the respondent in favour of Vimal Chand Ghevar Chand Jain & Co., a partnership firm, on or about 29.6.1974. The said deed of sale was registered at Mumbai. Respondent himself was a witness to the said deed of sale.

On or about 1.7.1978, the possession of the said property was allegedly handed over to the father of the respondent as a licensee at an agreed licence fee of Rs.1,257.50 per month. The said partnership firm was dissolved pursuant whereto the appellant became the owner of the said property. Appellants contend that the respondent had made payments towards licence fee by a cheque but when deposited, the same was dishonoured.

On the said contention, appellant filed a suit for recovery of possession which was marked as Special Suit No.330 of 1987 praying, inter alia, for the following reliefs :

(a) That it be declared that the Defendant has no right, title or interest of any nature whatsoever in respect of the property, viz., being the plot of land admeasuring one acre four gunthas or thereabouts, that is 5,324 sq. yards (44 gunthas x 121 sq. yds.) equivalent to 4451.53 sq. meters, along with 6 (six) corrugated iron-sheet godowns, one house and one well thereon, known as Kandechichawli situated at Gram Panchayat Nos.753 to 761 in the village Saykheda, Sub-District Niphad, District Nasik or say part thereof, or to store or keep any goods, articles or things therein or to use, enter upon or remain upon the said property or any part thereof, and that the Defendant is in wrongful use and occupation of the said property.

(b) That the Defendant be ordered to remove himself, his servants, agents and all his goods, articles and things from the said property.

(c) That the Defendant by himself, his servants and agents or otherwise howsoever be restrained by a perpetual order and injunction of this honourable Court from in any manner storing or keeping any goods, articles or things or using, occupying or entering upon or remaining in use and occupation of the said property or any part thereof.

(d) That the Defendant be ordered and decreed to pay to the Plaintiffs the sum of Rs.45,270/- being the arrears of storage charges and/or compensation for the period of three years prior to the institution of the suit at the rate of Rs.1,257.50 per month with interest on Rs.45,270/- at the rate of 18% per annum from the date of filing of the suit till the Defendant remove himself, his servants and agents and his goods, articles and things from the said property.

(e) That pending the hearing and final disposal of the suit, the court receiver or some other fit and proper be appointed Receiver of the said property, with all powers under Order 40, Rule 1 of the Code of Civil Procedure.

(f) That pending the hearing and final disposal of the suit, the Defendant by himself, his servants and agents or otherwise howsoever, be restrained by an Order and Injunction of this Hon'ble Court, from in any manner, storing or keeping any goods, articles or things or using or entering upon or remaining in use or occupation of the said property or any part thereof.

(g) That pending the hearing and final disposal of the suit, the Defendant, his servants and agents or otherwise howsoever, be restrained by an order and Injunction of this Hon'ble Court from in any manner dealing with or disposing of, or alienating or encumbering or creating any right, title or interest in favour of any one in respect of the said property or any part thereof."

3. Respondent, in his written statement, denied and disputed the said transactions. We may notice some of the statements made therein :

"25. The title of the suit property was with my Advocate. After that I have received the title. Plaintiffs have never objected to that. I was never the owner nor having possession after this suit. I have made a wrong application to put my name as owner. And enclosed statement in English. Plaintiffs are calling this statement in English as Sale Deed. Neither me nor my father have executed any Sale Deed. We have never sold the suit property.

26. Thinking that, I store onions in the suit property the plaintiffs have created a wrong story of storage charges and asked for a big amount from me which is not acceptable by me. Plaintiffs are doing business of earning interest illegally for which they use various names. Various firms are being opened. All these firms and names are bogus. Few days back plaintiffs in the plaint. One bogus firm was opened in 1981 by the plaintiffs. Some relations have been shown by that firm with me. That firm has given some cheques to me. Some entries have been made by that firm for that cheque given to me. After some neat calculation it has been shown that the cheque is for storage charges has started in the plaints. Plaintiffs have collected a lot of information on about me. I understand that plaintiffs are making open plans and skillfully make some transactions and showing some relation file suits and get orders.

27. The relation of licensor and licensee was never existing between us and no Deed has been executed. Plaintiffs have applied for title name in record of rights after filing the suit and thus various wrongs have been committed. Plaintiffs have pressurized my servants and given them attraction of money and succeeded obtaining various xerox copies of some papers. After arranging many things various photos have been taken. Besides this, plaintiffs are doing various other business.

28. Plaintiffs have arranged to pay taxes of the suit property, and paid the taxes of Saikheda on 11.1.88 and 23.1.88 and received the receipt. The cashier accepting the tax does not have a responsibility of inquiring that who is paying the tax and is been never inquired..

29. Plaintiffs have been recorded in cross-examination at the time of making application from title names in record of rights at Saykheda. At that time plaintiffs have accepted many many things which are stated here. At that time, false Sale deed was produced which plaintiffs have stated as registered. Revenue authorities have ordered to mention plaintiffs names in the column of `other rights'. Out of such other rights plaintiffs does not get any right to the property. Further, order of revenue authorities is illegal, and is out of the law and out of their rights of making order and such order is a nullity. Because of such order plaintiffs does not get any rights and therefore plaintiffs suit is wrong not tenable."

4. Before the learned Trial Judge, the defendant-respondent did not examine himself. He, however, examined three witnesses in support of his plea with regard to possession.

The learned Trial Judge, inter alia, framed the following issues :

"1. Does plaintiff prove that was In affirmative registered as M/s Kewalchand Baniram & sons

2. Does the plaintiff prove that In Negative he purchased the suit property by registered sale deed dated 29.6.78 as alleged?

3. Does plaintiff prove that the In negative" defendant is licensee and that he was paying the storage charges Rs.1257.50 ps. P.m. to the plaintiff?

5. One of the issues, as noticed hereinbefore, framed is as to whether the plaintiff purchased the property. The learned Trial Court held that Sections 91 and 92 of the Indian Evidence Act has no application. It was opined that the circumstantial evidences show that the sale deed was executed only by way of a money lending transaction. It was held that the appellants have failed to prove that the suit property was purchased by them by reason of the aforementioned deed of sale dated 29.6.1978.

On the said findings, the suit was dismissed.

An appeal was preferred by the appellant thereagainst. During the pendency of the said appeal, the written statement was amended by inserting paragraph 25A therein which reads as under :

"25A)Along with the said sale deed of the said dated 29/6/1978 this defendant is saying this also that this sale deed is nominal and of the bogus nature that was never implemented and through it the plaintiff had never got any type of ownership and he is not getting it and the same was not in the mind of the father of plaintiff and defendant and never he was not keeping this in his mind. The possession of the property was never given to the appellant. In this matter the true fact is such that the firm of the plaintiff namely M/s. Ghevarchand Bhaniram & Co. and its partners are doing the business of money lending. His other firms also doing the money lending business. The Firm and its partners and their other firm and the father of the defendant in between them many transactions/dealings was taken place and now it is also inexistence. There was no reason to purchase the property by the said firm afsiya Kheda and not at all. There is a necessity of the money amount to the father of the defendant. Therefore, the father of the defendant had taken the amount of Rs.50,000/- (Fifty Thousand Rupees) as a loan from the said firm and its co-sharers. And the mortgage of the said amount is given in writing the said sale deed at Bombay by the father of the defendant. There is no intention of the implementation of that sale deed and never and the same was not in the mind of both the persons (plaintiff and defendant) and never it in their minds at all. And according to it the possession is not given and never possession is taken. The returning back of the payment of loan is done in time to time. In this way the said sale deed is mortgaged as the money lender transaction and through it the plaintiff or its firm had not obtained any ownership and they did not obtained its actual possession. Therefore, the contents written in the said contents written in the said sale deed are not admitted by the defendant and he is not accepted it and before it the suit which is brought by the plaintiff cannot be maintained. Therefore, the suit of the plaintiff should be cancelled."

Respondent examined himself thereafter. He, inter alia, by way of an affidavit, stated :

"3. Appellant/plaintiffs have filed the present suit on the sale deed dated 29/6/1978 and plaintiff claim to have owner by means of the said sale deed and claim that the respondent are licensee and the suit is filed for obtaining possession from respondents. I have in my written statement denied plaintiffs claim of ownership and have claimed that said sale deed is sham and without effect and plaintiffs do not get any ownership rights because of the said sale deed. Said sale deed is without any legal effect and is sham document in the nature of security for money lending.

4. In respect to the sale deed dated 29.6.1978 present respondent states that said sale deed is sham and was never given effect to and the plaintiff did not and presently do not acquire any ownership rights by the said sale deed and respective fathers of the plaintiff and the respondent had no such intention. The possession of the property had never been handed over to the appellant. The fact is that plaintiff's firm M/s. Ghevarchand Bhaniram and Co. and its partners carry the business of

money lending. There other firm also carries the same business of money lending. There were and there are many money lending transactions between the said firms and defendant's father. Said firm had no reason to purchase the property at Saikheda. As defendant's father was in need of money he had borrowed as a loan a sum of Rs.50,000/- from said firm and its partners and defendant's father had executed the said so called sale deed dated 29.6.1978 as a security for the said loan amount. As the plaintiff firm and its partners have no license for money lending business they have obtained the said so called sale deed from defendant's father at Mumbai. It was never meant to be given effect to and is not presently meant to be given effect to and accordingly possession was not transferred and is not transferred. Plaintiff's loan amount was repaid from time to time and said sale deed was executed as a document for security for the money lending transaction and the plaintiff or his firm has not & never acquired any ownership rights because of the said sale deed and has not acquired actual possession. Therefore, said so called sale deed and its contents are not admitted to defendant and the suit filed on its basis cannot be maintained plaintiff's suit be dismissed."

6. In his cross-examination, however, he accepted that his firm named `Eknath Gondiram Jadoo' was an income-tax payee from 1954-55. He had also been paying income-tax individually. Books of account have been maintained by the firm regularly. He accepted his signature in the cheque having been issued as proprietor of his firm. He furthermore admitted that his firm had business relations with Ghevarchand Bhaniram & Co. He moreover stated :

"I have been shown Sale deed in the plaint. This deed bears my signature as a witness. I was personally present at the time of registration of this Sale Deed. At that time me and my father were residing in Mumbai. My father was very old. For the sake of convenience, we have registered the sale deed in Mumbai, since me, my father and Shri Ghevarchand Seth were staying in Mumbai. We have not taken any legal opinion before registration. Account of this transaction was privately kept by me. I do not remember that at time of registration, Sub-Registrar had told my father about the Deed of sale of property. It is not true that possession was given at the time of registration of Sale Deed. At the time of Sale, my father has also handed over the original title documents of the property, from whom we have purchased the property; to Shri Ghevarchand Sheth. My father has not given any notice that he has not sold the property to Shri Ghevarchand Sheth's firm. When this transaction occurred, we owe Rs.50,000/- to Shri Ghevarchand Sheth's Firm. To show this loan, I have written proof and oral. The proof has not been produced in the Court for which I have no reason to say. After this transaction of loan I won't be able to say whether I have taken any other loans from them. In the

Accounting year 1978-79, my firm owe to Shri Ghevarchand firm Rs.50,000/- was not shown in our A/c books. It is also true that even in income tax return I have not shown this loan taken from Ghevarchand firm, because I was not to repay this money to them even afterwards. I have shown suit property as my firms property in Registrar of firm. I cannot answer this question. It is not true that my father has sold his private property to Ghevarchand Bhaniram. The possession is given, this clause in sale deed is not true Rs.50,000/- was rcd. By my father as is mentioned in the Sale Deed by my father, I cannot say anything about it." (Emphasis supplied)

7. The First Appellate Court framed an additional issue as to whether the deed of sale deed of sale was executed as a security for the amount of money lending of Rs.50,000/- and was not intended to be acted upon as a sale deed.

Upon taking into consideration the evidence brought on record by the parties, the learned Trial Court enumerated the following circumstances to hold against the appellant :

"(i) For the property of Rs.50,000/- the monthly charges for its occupation of Rs.1,257.50 appear excessive. With such amount in 4 years, the entire price of the property can be realized which is not befitting to the common course of transaction.

(ii) There is evidence on record that for the godown, the society is paying Rs.45/- per month only to the defendant.

(iii) The plaintiffs are businessmen and were not likely to allow the rent/licence fee accumulated for 40 months. During this period there would have been a demand in writing.

(iv) The second cheque of Rs.10,000/- at Exh.93 is similar type of cheque paid after 15 months of the earlier. Charges of 15 months were to the extent of Rs.18,862.50. How such part payment after 15 months is accepted even though the earlier cheque was dishonoured and no steps for the recovery are taken is not explained by the plaintiffs. In fact, when the monthly charges ere agreed, the payments would have been made regularly by the defendant and if not so, would have been insisted by the plaintiffs. The dealing between the parties, however, are not accordingly."

8. The High Court also enumerated the circumstances in favour of the appellants.

In regard to the question that the defendant-respondent never took the plea of transaction being that of a loan, the Appellate Court held that the said defect was cured by reason of the alternative stand taken by the respondent, holding:

"It is no doubt true that the alternative defence is raised at a very late stage. There is no substance in the submission of the counsel for the appellants that the intention behind executing a document is the state of mind of that person and he must disclose about it, at the earliest opportunity. That if he discloses later on, it can be considered as an after thought.

But then in the present case the strong circumstantial evidence discussed above, when makes out a reasonable probability of the execution of the sale deed with otherwise intention, omission on the part of the defendant to state it specifically will not affect him much. Moreover, we cannot forget that in our system the pleadings are drafted by the advocates on the basis of the information given by their clients. Pleadings are prepared by the Advocates as per their knowledge and experience and if any wrong is committed by the Advocate in making out the deference or if any material thing is omitted, the same is glaringly coming before us emerging out before us from the circumstance then we need not attach much importance to the defects in the pleadings and omission. The settled position of law, therefore, says that moffusil pleadings are to be liberally construed."

9. The First Appellate Court, however, did not believe that part of the case of the appellant that the amount of loan had been repaid.

It was in the aforementioned situation directed :

"1. The appeal is partly allowed with costs.

2. Judgment and decree of the Trial Court is hereby set aside and the suit is partly decreed as under :

The plaintiff's suit for mandatory injunction as well as prohibitory injunction and for the storage charges at the monthly rate of Rs.1,257.50 stands dismissed.

The plaintiff are, however, entitled to the amount of Rs.50,000/- with interest thereon @ 6% per annum from 29.6.1973 till its realization.

The plaintiffs are entitled to the costs of the suit.

The defendant do deposit the said amount or pay the same to the plaintiffs immediately failing with the plaintiff can recover it through the court."

10. The High Court dismissed the Second Appeal preferred there against, inter alia, opining :

"It is true that initially such defence was not raised in the written statement, however, in the first appeal the amendment of the pleadings was sought and it was allowed by the court and by way of the amendment the respondent-defendant raised such contentions. The order of allowing the amendment was not challenged by the appellant in further proceedings. In view thereof the submissions of Mr. Sugadre, learned counsel for the appellant that in the absence of substantive pleadings the courts below have committed error in entertaining the plea that the sale deed was not intended to be acted upon and it was a money transaction must be rejected. The submission of Mr. Sugdare based on the judgment of the Supreme Court in Roop Kumar (supra) also deserves to be rejected outright. It is true that under Section 91 of the Evidence Act, oral evidence against the terms of contract is not permissible, but to this provision exception is made out by Section 92 which allows such oral evidence as per the third proviso thereto. It is well settled, that a plea that title has not passed on the execution of the sale deed can be raised to rebut the contents of the document and intention of the parties behind executing the document can be gathered from the recitals in the document or by other attending circumstances. It is thus clear that from the circumstantial evidence if it is inconsistent with the recitals of the document, it is open for the court to infer that the contents of the document are rebutted. This is what exactly the courts below have done. Taking overall facts and circumstances of the case into consideration, in my opinion, the courts below have rightly held that the document was not intended to be acted upon and it was executed by way of security. I find no reason to interfere with the findings of fact. I find sufficient material on record to sustain those findings. In the circumstances the appeal deserves to be rejected. Order accordingly."

11. Mr. Shyam Diwan, learned senior counsel appearing on behalf of the appellant would urge :

(i) The courts below committed a serious error insofar as they failed to adhere to the best evidence rule as contained in Sections 91 and 92 of the Indian Evidence Act.

(ii) First Appellate Court as also the High Court furthermore committed a serious error insofar as they failed to take into consideration that subsequent plea raised by the respondent by way of amended written statement and his evidence could not have been relied upon; particularly when he has utterly failed to prove either taking of loan or repayment thereof.

12. Mr. Jaideep Gupta, learned senior advocate appearing on behalf of the respondent, on the other hand, contended

i) Three courts having arrived at concurrent findings of fact, this Court should not interfere therewith.

ii) The purported deed of sale spells out the real transaction between the parties as would be evident from the following :

"It is a condition of this sale that in case the Purchasers shall be deprived of possession of the said property (said premises) or any part thereof by virtue of any act of Vendor or his heirs or assigns or successors in interest or by any person claiming title thereto vendor and his estate shall be bound to compensate the Purchasers for such loss or damage arising from such act and shall be liable to refund the purchase money with interest or by any person claiming title thereto the Vendor and his estate shall be bound to compensate the Purchasers for such loss or damage arising from such act and shall be liable to refund the purchase money with interest from the date of the deprivation or accrual of such loss."

(iii) Nature of transaction being a money lending one as would appear from the purported deed of sale itself and the plaintiff-appellant having failed to prove its case of creation of a leave and licence, the judgment of the Trial Judge is unassailable in view of the extrinsic evidence that the transaction was a sham one and, thus, could not be eschewed and for the said purpose Section 92 of the Indian Evidence Act does not debar adduction of additional evidence.

(iv) Although the burden of proof was on the respondent, he must be held to have discharged the same fully.

13. The deed of sale dated 29.6.1978 was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. Respondent was the son of the vendor. He was an attesting witness. In his written statement, he categorically denied execution of the said deed of sale. He also denied that he had attested the document. He even did not examine himself before the learned Trial Judge. His witnesses merely proved his possession. The fact that the respondent's father was put in possession with effect from 1.7.1978 was in dispute. What was in dispute was the character of his possession. Did he continue to possess the godown as owner thereof or on the basis of leave and licence was the question, which was not considered in its proper perspective by any of the three courts below.

14. The learned Trial Judge without any pleading in that behalf proceeded to determine the nature of transaction and opined that in effect and substance, the transaction was a money lending one.

No such issue was framed as no such contention was raised in the written statement. Respondent realized his mistake. He, therefore, amended his written statement and examined himself as a

witness.

15. It is true that the written statement was permitted to be amended. Additional evidence pursuant thereto was also permitted to be adduced. The First Appellate Court, however, had a duty to properly appreciate the evidence in the light of the pleadings of the parties. While doing so, it was required to pose unto itself the correct questions. The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him by the learned Trial Court. {[See Kamakshi Builders v. Ambedkar Educational Society & Ors. [AIR 2007 SC 2191]}.

16. The First Appellate Court, however, having regard to the amendment carried out in the written statement setting up a totally inconsistent plea from the one taken before the learned Trial Court by the respondent posed a question as to whether the respondent has discharged the burden placed on him.

For the said purpose, critical analysis of the prevarication of the stand taken by the respondent from stage to stage also became relevant. It is true that when a pleading is amended, it, subject to just exceptions, takes effect from the date when original one is filed. It is also true that the Appellate Court, in exercise of its discretionary jurisdiction and subject to fulfillment of the conditions laid down under Order XLI Rule 27 of the Code of Civil Procedure, may allow the parties to adduce additional evidence.

Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him proprio vigore. [(See Ranganayakamma & Anr. v. K.S. Prakash (D) By Lrs. & Ors. [2008 (9) SCALE 144]

17. It is for the aforementioned purpose, the deed of sale was required to be construed in proper perspective. Indisputably, the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and

in equity of the vendor. The said clause uses the terms "granted, released, conveyed and assured or intended or expressed so to be with their and every of their rights, members and appurtenances unto and to the use and benefits of the said purchasers for ever subject to payment of all rent, rates taxes..."

It was stipulated :

"He, the Vendor has now has in himself good right, full power and absolute authority to grant, release, convey and assure the said premises hereby grants, released, assured or intended to be unto and to the use of the Purchasers in the manner aforesaid and that shall be lawful for the purchasers from time to time and at all times hereafter peaceably and quietly to hold, enter upon, have occupy, possess and enjoy the said premises hereby granted with their appurtenances and receive the rents, issues and profits thereof and every part thereof to and for their own use and benefits without any suit, lawful eviction, in eruption, claim and demand whatsoever from or by the Vendor or by any person or persons lawfully or equitably claiming or to claim by, from under or in trust for him or any of him AND that free and clear and freely and clearly and absolutely acquitted, exonerated released and for ever discharged or otherwise by the Vendor well and sufficiently saved, defended, kept harmless and indemnified of, from and against all former and other estates, titles, charges and incumbrances whatsoever either already or to be hereafter had made, executed occasions or suffered by the Vendor or by any other person or persons lawfully or equitably claim or to claim by, from under or in trust for him or any of him AND FURTHER that the Vendor and all persons having or lawfully or equitably claiming any estate, right, title and interest or law or in equity in the said premises hereby granted, released, conveyed, assured or intended so to be or any part thereof by, from under or in trust for him the vendor or any him shall and will from time to time and all times hereafter at the test and costs execute all such further and other lawful reasonably acts, deeds, things matter conveyances and assurances in law whatsoever for the better, further and more perfectly and absolutely, granting, realizing conveying and assuring the said premises and any part thereof hereby granted, released, conveyed and assured unto and to the use of the purchasers in manner aforesaid as shall or may be reasonably required by the purchasers, their successors or assigns or their counsel in law."

18. It further contains a stipulation that the purchaser had been in possession of the property and the original sale deed dated 15.7.1968 was handed over. One of the stipulations in regard whereto the contention of the respondent that the deed of sale in fact was a money lending transaction was raised reads as under :

"It is a condition of this Sale that in case the Purchasers shall be deprived of possession of said property (said premises) or any part thereof by virtue of any act of Vendor or his heirs or assigns or successors in interest or by any person claiming title thereto the vendor and his estate shall be bound to compensate the Purchasers for such loss or damage arising from such act and shall be liable to refund the purchase money with interest or by any person claiming title thereto the Vendor and his

estate shall be bound to compensate the Purchasers for such loss or damage arising from such act and shall be liable to refund the purchase money with interest from the date of the deprivation or accrual of such loss."

19. A document, as is well known, must be construed in its entirety. Reading the said in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged under Section 54 of the Transfer of Property Act. In Bishwanath Prasad Singh v. Rajendra Prasad& Anr. [(2006) 4 SCC 432], this Court held :

"16. A deed as is well known must be construed having regard to the language used therein. We have noticed hereinbefore that by reason of the said deed of sale, the right, title and interest of the respondents herein was conveyed absolutely in favour of the appellant. The sale deed does not recite any other transaction of advance of any sum by the appellant to the respondents which was entered into by and between the parties. In fact, the recitals made in the sale deed categorically show that the respondents expressed their intention to convey the property to the appellant herein as they had incurred debts by taking loans from various other creditors.

It was furthermore observed :

"19. It is of some significance to note that therein the expressions "vendor", "vendee", "sold" and "consideration" have been used. These expressions together with the fact that the sale deed was to be executed within a period of 23 months i.e. up to June 1978, evidently the expression "vaibulwafa" as a condition was loosely used.

20. Furthermore, the agreement was also executed for a fixed period. The other terms and conditions of the said agreement (ekrarnama) also clearly go to show that the parties understood the same to be a deed of reconveyance and not mortgage or a conditional sale.

21. The terminology "vaibulwafa" used in the agreement does not carry any meaning. It could be either "bai-ul-wafa" or "bai-bil-wafa".

22. It will bear repetition to state that with a view to ascertain the nature of a transaction the document has to be read as a whole. A sentence used or a term used may not be determinative of the real nature of transaction."

Despite the fact that the term `baib-ul-wafa' was used in the transaction, this Court held that the document in question was a deed of reconveyance and not a mortgage with conditional sale, stating :

"23. Baib-ul-wafa, it was held by the trial court connotes only an agreement for sale. In terms of Section 91 of the Evidence Act, if the terms of any disposition of property is reduced to writing, no evidence is admissible in proof of the terms of such disposition of property except the document itself."

It relied upon a decision of this Court in Ishwar Dass Jain v. Sohan Lal [(2000) 1 SCC 434] and Roop Kumar v. Mohan Thedani [(2003) 6 SCC 595] to which we would revert to a little later.

20. Indisputably when a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. {See R. Janakiraman Vs. State Rep. by Inspector of Police, CBI, SPE, Madras (2006) 1 SCC 697 para 24]; Roop Kumar Vs. Mohan Thedani [(2003) 6 SCC 595, para 19]; and State Bank of India & Anr. Vs. Mula Sahakari Sakhar Karkhana Ltd. [(2006) 6 SCC 293 paras 23 to 32]}.

21. We would, therefore, proceed on the premise that it was open to the respondent to adduce oral evidence in regard to the nature of the document. But, in our opinion, he did not discharge the burden of proof in respect thereof which was on him. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon. Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent.

Respondent paid certain amount by cheque towards the licence fee. It was for him to show on what account the money was paid. Only because the parties had other transactions by itself was not sufficient to hold that the defendant has discharged his onus. If the sum of Rs.50,000/- was the amount of loan wherefor the deed of sale was executed by way of security, having regard to his admission that the firm is an income-tax payee and maintains books of account in regular course of business, failure on his part to produce any documentary evidence merited drawing of an adverse inference.

Why he did not examine himself before the Trial Court or before the Appellate Court? He should have furnished an explanation in this regard to prove his plea. Why he failed to produce documentary evidence had also not been explained. The approach of the First Appellant Court in relying upon certain circumstantial evidence was also of no use. Why the plaintiffs have purchased

the properties at village Saikheda or why they had allowed another tenant to continue were not decisive far less relevant for construction of a document.

The First Appellate Court had arrived at a conclusion first and then started to assign reasons in support thereof. It, as indicated hereinbefore, did not pose unto itself the correct questions. Apart from wrongly placing the burden of proof on the plaintiff, even adverse inference against the defendant had not been drawn. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security.

Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind.

Although evidences had been brought on record to show that upon grant of leave and licence, the keys of godowns had been handed over but in respect thereof no contrary findings had been arrived at.

We would assume that the parties entered into an arrangement as a result whereof the father of the respondent was to continue in possession. The character of his possession, however, changed from that of an owner to a licensee. A legal fiction in a situation of this nature is created in terms whereof the owner becomes dispossessed and regains possession in a different capacity, namely, as a licensee.

If the appellant was able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that apparent state of affairs was not the real state of affairs.

It was for the defendant in a case of this nature to prove his defence. The First Appellant Court, therefore, in our opinion, misdirected itself in passing the impugned judgment insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration.

A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was

not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction.

22. In any event, the said stipulation could not have been read in isolation. The judgment of the First appellate Court was, therefore, perverse. The High Court, thus, failed to consider the real dispute between the parties.

23. In view of the findings aforementioned, it is not necessary for us to enter into the question as to whether the extrinsic evidence was admissible to show that a transaction of sale was, in fact, a sham one.

24. We cannot also accept the contention of Mr. Gupta that the decree should be allowed to be sustained with reference to the aforementioned stipulation in the deed of sale that in case the plaintiffs are dispossessed, the defendants would pay compensation. Such a case had never been made out. Such a question cannot be allowed to be raised for the first time before us.

25. In any event, in view of the conduct of the respondent, he cannot claim equity. An equitable relief can be prayed for by a party who approaches the court with clean hands.

26. We, therefore, have no hesitation in holding that in the facts and circumstances of this case, the plaintiff's suit should have been decreed.

27. For the reasons aforementioned, the impugned judgments are set aside with costs throughout. The appeal is allowed with costs. Counsel's fee assessed at Rs.25,000/-.