

# SUPREME COURT OF INDIA

Atul Chandra Das

Vs.

Rabindra Nath Bhattacharya

C.A.No.8793-8794 of 2013

(K.M.Joseph and Ashok Bhushan,JJ.,)

04.04.2019

## JUDGMENT

**K.M.Joseph,J.,**

1. The appellants are the legal representatives of one Atul Chandra Das. These appeals are directed against the common judgment of the Calcutta High court dismissing the First Appeal No.7 of 1989 and First Appeal No.8 of 1989. The appeals were filed by Atul Chandra Das against the dismissal of E.S. No.782 of 1979 filed by him for ejection of the respondents from the plaint schedule property and decreeing of Suit no.1271 of 1980 filed by Wait he respondents which would be referred to as the title suit. Thus, the appeals before us are lodged against the concurrent finding of the courts below and maintained by special leave granted by this Court.

2. The case set up by Atul Chandra Das is as follows:

By a registered deed of conveyance dated 28.11.1959 (the parties shall be referred to as in the position in the trial Court), the defendants sold for consideration the plaint schedule property to one Bholanath Auddy (hereinafter referred to as "Bholanath"). Simultaneously, Bholanath created tenancy in favour of the defendants at the monthly rent of Rs.50/-. It was agreed that the share of corporation tax shall be paid by the defendants. It was also agreed between Bholanath and defendants that the defendants were to vacate and deliver possession on the expiry of two years from 28.11.1959. Thereafter, an agreement for sale was entered into on 15.8.1960 between Bholanath and Atul Chandra Das. He agreed to sell plaint schedule property for Rs.9000/-. Since Bholanath failed to perform the obligation, O.S. No.171 of 1962 was filed by Atul Chandra Das for specific performance. On 30.11.1977 a decree was passed in favour of Atul Chandra Das. In terms of decree he deposited the balance consideration and finally a sale deed was executed in his favour. He claimed to be the landlord of the building and alleging that defendants have no right to occupy the premises, he sought recovery of possession by evicting the defendants. The defendants filed written statement. That apart they also filed the other suit namely Suit No.1271 of 1980. Therein the

following averments were made inter alia:

Smt. Annapurna Devi (since deceased) was the owner for life of the property and on her death, her three sons namely Late Ashutosh Bhattacharya, Late Dulal Krishna Bhattacharya and Rabindra Nath Bhattacharya (hereinafter referred to as 'Bhattacharyas and who are the defendants in the suit filed by Atul Chandra Das and plaintiffs in O.S. No. 1271/1980) were given absolute rights, in terms of the will executed by Bijoy Kr. Ghosal, the owner of the property. They set up the case that a sum of Rs.8000/- came to be borrowed from Bholanath on 28.9.1959. To secure Rs.8000/- Bhattacharyas mortgaged by conditional sale, on 28.11.1959 the plaint schedule property in favour of Bholanath. In order to give effect to mortgage an agreement for sale was entered into on 07.12.1959 with Aboya Devi (since deceased wife of Late Ashutosh Bhattacharya and deceased Late Karuna Bhattacharya, the wife of first plaintiff in a title suit and Late Smt. Rama Devi, daughter of Annapurna Devi) who were the nominees of the mortgagors for the agreement to sell of the house on payment of a sum of Rs. 10,000/- which was settled to be the mortgage money, no rate of interest having been stipulated. Two years was agreed to be the period of redemption of mortgage. The title deeds were to be kept with Bholanath by way of further security. The agreement which is referred to by Atul Chandra Das as an agreement for sale in his favour dated 15.8.1960 is described as a collusive and fraudulent agreement and it was entered into before the expiry of period of redemption. The plaint schedule property comprised of a three storied building standing upon an area of 1 cottah and 8 chittackas of land and the value at the relevant time would not have been less than Rs.30,000/-, the annual municipal value being Rs.1469/- declared at that point of time. Bholanath was a mere mortgagee in a mortgage by conditional sale. The specific performance suit was described as a collusive suit. Bhattacharyas claimed to be the owners being legatees under the will. The relief sought by the plaintiffs in O.S. No.1271 of 1980 is relevant. The relevant portion reads as below:-

"20. For the purpose of jurisdiction the suit is valued for declaration with consequential relief of perpetual injunction at Rs.51/- there being no objective standard of valuation and objectively for Rs.8500/- and Court fee stamp of Rs.4.15 is paid on the sum of Rs.51/- being the value for declaration with injunction and court fee stamp Rs.525.00 is paid on the sum of Rs.6500/- being balance of the principal due the total court fee paid being Rs.529.15p. The plaintiffs therefore pray-

(a) That the suit be decreed for:-

(i) Declaration that the sale dated 28.11.59 for the consideration of Rs.8000/- of the property described in the schedule "A" below by Sm. Annapurna Devi since deceased, Ashutosh Bhattacharyya, since deceased and the plaintiff nos.1 and 2 to Bholanath Duddya, since deceased followed by the condition of re-transfer as per agreement for sale dt. 7.12.59 by Bholanath Auddya since deceased in favour of Sm. Abhoya Devi, since deceased Sm. Karuna and Sm. Rama Devi since deceased,

on payment of Rs.10,000/- within 2 years was on ostensible sale amounting to a mortgage by conditional sale and the sellers in the said deed of sale were mortgagors and the buyer therein was the mortgagee and the period of redemption was 2 years as provided in the said agreement for sale dt. 7.12.59.

(ii) declaration that either the defendant Nos. 2 to 7 are the present mortgagee being the heirs and legal representatives of the said Bholanath Auddya, deceased or in alternative the defendant no. 1 is the present mortgagee, by subrogation having stepped in the shoes of the said Bholanath Auddya by purchase.

(iii) declaration that the right of redemption of the said mortgage by conditional sale is still subsisting and the plaintiffs are entitled to redeem the said mortgage on deposit of the mortgage money amounting to Rs.8500/- in court or such amount as may be determined by the Court or payment of the same to who ever may be declared to be the mortgagees or mortgagees.

(iv) Declaration that the agreement dated 15.08.60 between the said Bholanath Auddya since deceased and the defendant No. 1 for sale of the property described in the schedule "A" below is a collusive and fraudulent agreement and not enforceable in law.

(v) Declaration that the decree dated 30.11.77 of the Hon'ble High Court at Calcutta in Suit No. 171 of 62 for specific performance of contract for the sale of the property described on the schedule "A" below was obtained by practicing fraud upon the court by the defendant No. 1 and the said Bholanath Auddya since deceased collusively.

(vi) declaration that the said decree of the Hon'ble High Court at Calcutta and the conveyance executed thereunder on 26.3.79 by the Registrar Original Side of the said Hon'ble High Court for sale of the property described in the schedule "A" below in favour of the defendant No. 1 are not enforceable in law and the defendant No. 1 cannot take any advantage under the said decree and/ or the said conveyance in enforcement of the same.

(vii) declaration that the defendant No. 1 has no right title and interest in the property described in the schedule "A" below either as owner or as landlord nor has any right to file the Ej. Suit no. 782 of 1979 in the city civil court, Calcutta now pending before the Ld. Registrars' Bench and/ or proceeding with the same. That the suit be decreed for perpetual injunction restraining the defendant No. 1.

i. From enforcing the said decree dt. 20.11.77 in suit no. 171 of 62 of the Hon'ble High Court at Calcutta and/ or enforcing the conveyance dt. 26.3.79 executed by the Registrar Original side, High Court at Calcutta in favour of the defendant No. 1 under the said decree and/ or taking any advantage under the said decree and/ or taking any and/ or the said conveyance and interfering with the possession of the plaintiffs in the property described in the schedule "A" below in any way including

recording his name in Calcutta Corporation and/ or in the Calcutta Collectorate.

ii. From preceding with the Ej. Suit No. 782 of 79 now pending before the Id. Registrar's Bench City Civil Court, Calcutta.

iii. For temporary Injunction to the effect as prayed for in prayer Nos. b(i) and (ii) above till the disposal of this suit.

iv. That the suit be decreed for Rs.8500/- or such other sum as may be determined by the court as the present balance of the mortgage money payable by the plaintiffs for redemption of the mortgage.

c. That the property described in schedule "A" below be freed from the mortgage on deposit in court or payment to whoever will be declared to be the mortgagee or mortgagees by the plaintiffs of the mortgage money to be decreed by the court.

d. That the suit be decreed for Costs.

e. That the suit be decreed for any other relief or reliefs to which the plaintiffs may be entitled under law and equity. "

3. The trial Court proceeded to consider the evidence and on the basis of same came to the conclusion that there is no merit in the case set up by Atul Chandra Das. It was found to be a case of mortgage by conditional sale and suit filed by Atul Chandra Das was dismissed and the suit filed by the Bhattacharyas came to be decreed. As already noticed, the High Court has confirmed the said decree.

4. We heard the learned counsel for the appellant and learned counsel for the Bhattacharyas.

5. The learned counsel for the appellant would submit before us that the courts below have proceeded to find that the sale dated 28.11.1959 executed by the previous owners, namely the defendants in favour of Bholanath was a mortgage without noticing that such a finding will be in the teeth of the proviso to Section 58(c) of the Transfer of Property Act. In other words, in order to constitute a mortgage by way of conditional sale, the proviso to Section 58(c) of the Transfer of Property Act mandates that the condition of agreement to sell which is what is relied upon by the Bhattacharyas to make Bholanath a mortgagee must have been incorporated in one document. In this case on the other hand, there is no dispute that the Bhattacharyas relied upon a separate and distinct document namely an agreement to sell executed by Bholanath in favour of the Bhattacharyas dated 7.12.1959. There is no condition for reconveying the property contained in the sale deed dated 28.11.1959.

6. The second submission is that the courts have gone wrong in relying on Section 37A of the Bengal Money-Lenders Act, 1940 (hereinafter referred to as 'the State Act' ). It is her contention that the suit filed by the Bhattacharhyas was not filed under the State Act. There was no account demanded within the meaning of the Act. Support was sought to be drawn

from the judgment of the Single Bench reported in Swarnalata Tat v. Chandni Charan Dey and Ors. AIR 1984 Calcutta page 130.

7. The last submission is as follows:-

Section 37(A) contained under the State Act is repugnant to Central Law namely Section 58 (c) of the Transfer of Property Act.

8. Per contra, the learned counsel for the respondent supported the judgment. He submitted that Bholanath had not obtained any title under the purported sale deed dated 27.11.1959. He could not have conveyed any title to the Atul Chandra Das. The suit for specific performance was a collusive suit.

9. Section 58(c) of the Transfer of Property Act reads 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 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]"

It is undoubtedly true that under Section 58(c), the proviso makes it indispensable to constitute a transaction a mortgage that one of the conditions mentioned in Section 58(c) be incorporated in the document by which the conditional sale is effected. However, it is now time to refer to Section 37(a) of the State Act. It reads as under:-

"37(a) Saving as to mortgage by conditional sale. - In the case where any loan is secured by a mortgage and the mortgagor ostensible sells the mortgaged property on any of the conditions specified in sub-section (c) of section 58 of the Transfer of Property Act, 1882 (4 of 1882) then, notwithstanding anything to the contrary contained in the proviso to the said sub-section, the transaction shall always be deemed to be a mortgage by a conditional sale and the mortgagee a mortgagee by conditional sale for the purpose of the said sub-section."

10. Keeping Section 58(c) side by side with Section 37(a) of the State Act, the conclusion is inevitable that the State legislature has intended to override the effect of proviso to Section 58(c) of the Transfer of Property Act by enacting Section 37(a) in the State Act. Section 37(a) was incorporated by way of an amendment in the State Act. Reading of Section 37(a) brings out the Legislative intent with unambiguous clarity and therefore the High court was right in relying upon Section 37(a) of the State Act to find that though it was by agreement dated 07.12.1959 which is a separate document that condition to make it

a mortgage was incorporated it would not make any difference. We may also notice that despite the sale deed dated 27.11.1959, the Bhattacharyas continued to be in possession of the plaint scheduled property and it has been found that they paid the taxes. It is further found that the market value of the property would not have been less than Rs.30 thousand as on the date of the alleged sale namely 27.11.1959.

11. The next contention is that suit filed by Bhattacharya was not under the State Act. Support was sought to be drawn from the judgment of the Single Judge reported in Swarnalata Tat case (Supra). Para 12 of the judgment relied upon by the appellants reads as follows:-

"12. The first question which calls for determination is whether the present suit is a suit under the Bengal Money Lenders Act, 1940 (hereinafter referred to as the said Act). Section 36(1) of the said Act empowers the Court to re-open a decree in any suit to which the Act applies or in any suit brought by a borrower for relief under the Section, to re-open the transaction whether the suit has been heard ex parte or otherwise. Nowhere in Section 36, it is provided that a fixed court fee of Re. 1 is to be paid for initiating proceeding under Section 36 of the said Act. Section 38 provides that any borrower may make any application at any time to a Court which would have jurisdiction to entertain suit by the lender for the recovery of the principal and interest of a loan before or after the commencement of the said Act for taking accounts and for declaring amount due to the lender. Such application shall be in the prescribed form and shall be accompanied by a fee of one rupee and on receipt of such application the Court shall cause a notice thereon to be served on the lender. The Court shall thereafter take an account of the transaction between the parties and declare the amount, if any due and payable but not due by the borrower to the lender, whether as principal or interest or both. A proceeding under Section 38 shall be deemed to be a suit for the purpose of Section 11 of the Civil P.C. 1908. Admittedly, the plaintiff has not filed any application under Section 38 of the Act far less in the prescribed form. As such the question of payment of a fixed court fee of one rupee would not arise. Section 38 does not contemplate any suit. It enables a borrower to make an application in the prescribed form asking the Court to take an account and to declare the amount due to the lender. Merely because a fixed court fee of one rupee has been paid, the suit cannot be corrected into an application under Section 38 of the said Act. Assuming that the Court should have treated the suit as an application under Section 38 of the said Act, even then the plaintiff cannot succeed in her contention. The requirements of Section 38 have not been complied with. There is no prayer for taking account and for declaring the amount due to the lender. No borrower can call in and the procedure prescribed under Section 38 unless he asks for account and determination of the amount due to the lender. Even if the loan is secured, the borrower need not ask for redemption. He will be at liberty to file an application for determination only of the amount due from him. This was not done by the plaintiff, who claims to be the successor-in-interest of the borrower. On the contrary, the plaintiff has asked, inter alia, for the following reliefs in the plaint:—

(a) For a decree declaring the aforesaid transaction is a loan transaction and declaring that the aforesaid deed of sale is an ostensible deed of sale as a security to repayment of the said loan is repaid.

(b) For a decree of permanent injunction restraining the defendant No. 1 from claiming any right of ownership in the property in suit by virtue of the aforesaid deed of sale. Having regard to the provisions of Ss. 36 and 38 of the said Act and the averments made in the plaint and the reliefs claimed in the suit, I am unable to accept the contention of Mr. Mullick that the present suit is suit under the Bengal Money Lenders Act, 1940."

12. It is at once necessary to notice Section 2(12) of the State Act which defines the word "loan".

"2(12). "loan" means an advance, whether or money or in kind, made on condition or repayment with interest and includes any transaction which is in substance a loan but does not include-

- (a) \* \* \* \*
- (b) \* \* \* \*

(c) A loan taken or advanced by, by the Central Government or any State Government or by any local authority in West Bengal;

(d) A loan advanced before or after the commencement of this Act -

(i) by a bank; or

(ii) by a co-operative life insurance society, co-operative society, insurance company, life assurance company, Life Insurance Corporation of India, mutual insurance company, provident insurance society or from a provident fund;

(e) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, (26 of 1881) other than a promissory note;

(f) Omitted by W.B. Money Lender Amendment Act, (Act IV of 1931)

(g) \* \* \* \*

(h) a loan made to or by the Administrator General and Official Trustee of West Bengal or the Commissioner of Wakfs or the Official Assignee or the Official Receiver of the High Court in Calcutta;

(i) a loan or debenture in respect of which dealings are listed on any Stock Exchange;"

13. Commercial loan is defined in Section 2(4) of the State Act. Section 2(22) defines suit to which this Act applies. It reads as follows:-

"2(22) "suit to which this Act applies" means any suit or proceeding instituted or filed on or after the 1st day of January, 1939 or pending on that date and includes a proceeding in execution-

(a) for the recovery of a loan advanced before or after the commencement of this Act;

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act; or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act."

14. Section 36 comes under the heading 'Reopening of transactions' . It deals with the power of the Court to exercise all or any of the various powers which are mentioned therein. Sub Section 4 of Section 36 reads as follows:-

"36(4). This Section shall apply to any Suit, whatever it forms may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement of security in respect of a loan or for the redemption of money such security."

15. It will be noticed that a Suit for redemption is mentioned as suit to which Section 36 applies. Section 38 undoubtedly enables the borrowers to seek a direction for taking accounts.

16. We have noticed the relief which was sought in the suit which was considered by the learned Single Judge in Swarnalata Tat AIR 1984 Calcutta 130. In fact, Court in the said case could not find a mortgage proved also. The reliefs on the other hand in the suit filed by Bhattacharya include reliefs relating to redemption in the form it is asked for. In fact, no issue in this regard was taken before the Trial Court. We see no reason to non-suit, the Bhattacharyas on this ground which is taken for the reasons which we have given.

17. The last contention taken is that Section 37(a) of the State Act is repugnant to Section 58 (c) of the Central Act namely, the Transfer of Property Act. The contention runs as follows:-

Money lending falls as entry (30) in the State List. Transfer of Property other than agricultural land falls in Entry 6 in the concurrent list. The State legislature in enacting Section 37(a) of the State Act, a law relating to money lending has made a

law which is inconsistent and therefore, repugnant to the law made by the Parliament in Section 58(c) of the Transfer of Property Act. This contention is taken for the first time in this Court. We also see no merit in the same at any rate. Section 37(A) is traceable to the Entry 'Transfer of Property' which is found in the concurrent list. Article 254 of the Constitution of India reads as follows:-

"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States

(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State: Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

18. In this case proceeding on the basis that there is an inconsistency between Section 58(c) of the Transfer of Property Act and Section 37(A) of the State Act, in view of the assent given by the President, the matter falls under Article 254(2). Therefore, despite the inconsistency, Section 37(A) of the State Act will prevail in the State.

19. The argument that being part of State Act which is the Money Lending Act and Money lending is in the state list and therefore, it is a case of legislative, incompetence, does not appeal to us. We have found that the provisions of 37(A) is traceable to the Entry 'Transfer of Property' in the Concurrent List and that Article 254(2) saves the provision.

20. We see no merit in the appeals and the appeals