

## PATNA HIGH COURT

Shiva Narayan Sah

Vs

Baidya Nath Prasad Tiwary

A.F.A.D. No. 560 of 1969

(Shambhu Prasad Singh and A.N. Mukharji, JJ.)

02.03.1973

### JUDGMENT

#### **Shambhu Prasad Singh, J.**

1. This Second Appeal by the defendants is directed against the concurrent judgment of the courts below decreeing the suit of the plaintiffs. The suit was for a declaration that the original plaintiff whose heirs are respondents before this Court acquired valid title to Schedule 1 property by a registered sale deed dated 18th March, 1960 and was entitled to the custody of the registration receipt of the said deed on payment of Rs. 765/- in favor of defendants first party and Rs. 1300/- in favor of defendants second party. The original plaintiff also sought a direction that defendants second and third parties be ordered to deposit the deed of mortgage by conditional sale and the registration receipt in token of payment of Rs. 1300/- in court and to give up possession of the disputed property in her favor.

2. The admitted facts are that on 3rd December, 1956 defendant No. 1 executed a deed for Rs. 1300/- in favor of defendant No. 2 in respect of the disputed property. According to this deed the property was to go back to defendant No. 1 on payment of the amount aforesaid if paid before 13th Baisakh, 1371 Fs (corresponding to 9th May, 1964). If the amount was not paid by that date the property was to become absolute property of defendant No. 2. On 18th of March, 1960 defendant No. 1 sold the disputed property to the plaintiff under a registered sale deed (Exhibit 5/a) for a consideration of Rs. 3500/-. Out of this Rs. 1200/- was paid in cash, Rs. 1535/- was left in deposit for payment to different creditors including defendant No. 2 or defendant No. 1 and the remaining amount of Rs. 765/- was to be paid at the time of exchange of equivalents. On 18th of April, 1960 defendant No. 1 by a registered deed cancelled the aforesaid sale deed. On 23rd of April, 1960 he executed another registered sale deed in favor of defendant No. 3. The consideration of this sale deed was also Rupees 3500/-. It may be stated here that defendant No. 3 is the step-mother of defendant No. 2.

3. The main question which arises for decision in the appeal is whether title had passed to the plaintiff before the execution of the sale deed by defendant No. 1 in favor of defendant No. 3 on 23rd of April, 1960. According to the case of the plaintiff, title passed to her with the execution

and registration of the sale deed. According to the case of the appellants, title could pass only on payment of full consideration at the time of exchange of equivalents and as full consideration was not paid before the date of cancellation deed or execution of the sale deed in favor of defendant No. 3, the plaintiff could not acquire any title in the property by virtue of Exhibit 5/a. The case of defendant No. 2 further was that the deed dated 3rd December, 1956 was not a deed of mortgage by conditional sale but it was a deed of sale with condition of re-purchase and, therefore, the deed could not be redeemed. It may be stated here that the case of the plaintiff further was that much before the date of cancellation, she had tendered Rs. 765/- to defendant No. 1 and Rs. 1300/- to defendant No. 2 and they had refused to accept the amount.

4. The courts below have accepted the case of the respondents that title passed to the original plaintiff with the execution and registration of the sale deed. They have further accepted their case that the balance of consideration money of Exhibit 5/a and the mortgage money under the deed dated 3rd December, 1956 was tendered by the original plaintiff in March, 1960 to defendants 1 and 2 respectively and they refused to accept the money. They have further held that the deed dated 3rd December, 1956 was a deed of mortgage by conditional sale and could be redeemed.

5. Mr. S. C. Mukherji, learned counsel for the appellants, has urged three points before us; (i) that according to the terms of Exhibit 5/a, the sale deed dated 18th March, 1960, title could not pass to the vendee until full consideration money was paid; (ii) the courts below have erred in holding that the deed dated 3rd December 1956 was a deed of mortgage by conditional sale and could be redeemed - it was a deed of sale with condition of re-purchase; and, (iii) the court of appeal below, the final court of fact, has not considered the relevant evidence on the question of tender of the balance of consideration money and the money under the deed dated 3rd December, 1956.

6. In support of his first contention Mr. Mukherji has placed before us Exhibit 5/a. The document, after stating how the consideration money was to be paid, recites " in short, having received the entire consideration money in full. I put the claimant in possession of the land and house described in column No. 5" . According to Mr. Mukherji this recital in the sale deed clearly shows that title was not to pass until the entire consideration money was paid. He has further contended that the facts that the registration receipt was with the vendor and possession was not delivered to the vendee also show that title was not to pass till exchange of equivalents. He has also drawn our attention to a recital in the deed according to which, as already stated, Rs. 765/- was to be paid at the time of exchange of equivalents. On the other hand, Mr. R. S. Chatterji, learned counsel for the respondents, has submitted that as bulk of the consideration money which was to be paid to defendant No. 1 was already paid and the document does not expressly say that title was not to pass till the payment of the balance of the consideration money, title did pass to the vendee with the execution and registration of the deed. We have examined the authorities cited by learned counsel for the parties. Three of the decisions relied on by Mr. Mukherji are (i) *Md.*

*Murtaza Hussain v. Abdul Rahman*<sup>1</sup>, (ii) *Motilal Sahu v. Ugrah Narain Sahu*<sup>2</sup>, and. (iii) *Panchoo Sahu v. Janki Mandar*<sup>3</sup>, All these three are Bench decisions of this Court and they do support the contention of Mr. Mukherji, Of the cases relied on by Mr. Chatterji : *Makhanlal Marwari v. Hanuman Bux*<sup>4</sup>, and *Radhamohan Thakur v. Bipin Behari Mitra*<sup>5</sup>, are also Bench decisions of this Court. These decisions are distinguishable on facts. Relying on the

decisions cited by Mr. Mukherji we hold that according to the terms of Exhibit 5/a title did not pass to the vendee with the execution and registration of the deed. It was to pass at the time of exchange of equivalents when the vendee was required to pay the balance of the consideration money to the vendor and the vendor was to hand over registration receipt to the vendee.

7. It is, however, argued by Mr. Chatterji in the alternative that even if title under Exhibit 5/a did not pass to the vendee on 18th March, 1960, it did pass when she tendered Rs. 765/-, the balance of the consideration money to defendant No. 1 and he refused to accept it. Two of the plaintiff's witnesses, namely, P.Ws. 2 and 4, have stated in their evidence that the original plaintiff did tender the amount of Rs. 765/- to defendant No. 1 in March, 1960 and he refused to accept it and hand over the registration receipt. This evidence has been accepted by both the courts below. Their finding, therefore, that there was tender by the original plaintiff of the balance of the consideration money and refusal by defendant No. 1 to accept the same is a finding of fact and cannot be challenged in the second appeal. The original plaintiff did all what she was required to do for the exchange of equivalents. It was defendant No. 1, the vendor, who refused to perform his part. In our opinion, therefore, title did pass to the vendee of Exhibit 5/a in March, 1960 when she tendered the balance of consideration money to defendant No. 1. It was not open to defendant No. 1 to refuse to accept the amount which was offered within a reasonable time and then to cancel the sale deed and execute another sale deed in respect of the same property in favor of respondent No. 3. Therefore, though we differ from the courts below that title under Exhibit 5/a passed to the vendee with the execution and registration of the deed we find that it did pass before execution of the deed of cancellation on 18th April, 1960 and execution and registration of Exhibit C the sale deed by defendant No. 1 in favor of defendant No. 3.

8. Mr. Mukherji has next contended that since the vendee did not deposit the balance of the consideration money in court on the alleged refusal by defendant No. 1, it cannot be taken to be a valid tender in the eye of law. In support of this contention he has relied on two decisions; *Gopiram Kashiram v. Shankar Rao*<sup>6</sup>. and *Rakhal Chandra Chakladdar v. Baikuntha Nath Barai*<sup>7</sup>. In Gopi Ram Kashi Ram's case the appeal before the High Court arose out of a suit for possession and mesne profits. In that suit the defendant took a plea that he was willing to pay the mortgage money to the plaintiff and, therefore, the suit should be dismissed. In these circumstances, it was observed that mere readiness on the part of the mortgagor to pay the debt was not sufficient and money should have been deposited in court. In Rakhal Chandra Chakladdar's case the observation that the plea of tender holds good only if that is accompanied by deposit in court was made with reference to Section 150 of the Bengal Tenancy Act. Of course, their Lordships also referred to Section 38 of the Contract Act. These cases, therefore, in our opinion, cannot be considered as authority for the proposition that if tender is not accompanied by deposit in court, title would not pass to the vendee if he tenders the consideration money to the vendor within a reasonable time and the vendor refuses to accept it. Section 55 (5) (b) of the Transfer of Property Act itself says that the buyer is bound to pay or tender at the time and place of completing the sale, the purchase money to the seller or such person as he directs. The section does not say that if there is a tender and there is a refusal by the seller the buyer is bound to make a deposit of the purchase money in court. So far as sale deeds are concerned, they are to be governed by the provisions of the Transfer of Property Act. Therefore, there is no substance in the aforesaid contention of Mr. Mukherji.

9. The contention of the appellants that the deed dated 3rd December, 1956 was not a mortgage by conditional sale but a sale with a condition of repurchase, rather a deed of out and out sale was not allowed to be raised in the courts below on the ground that no such plea was raised in the written statement of defendant No. 1 or that of defendant No. 3. The court of appeal below further on examination of that deed held that it was a deed of mortgage by, conditional sale and was redeemable. The deed has not been translated and included in the paper book. Therefore, it is not possible for us to take a different view on the question from that taken by the courts below. It may be stated here that even according to the written statement of defendant No. 3 the deed was redeemable. He only asserted that it could not be redeemed before 13th Baisakh, 1371 Fs. According to the observation made by the court of appeal below this was just contrary to what was recited in the deed, namely, it was redeemable before the aforesaid date. Thus, we find no substance in the second contention of Mr. Mukherji either.

10. As to the last contention of Mr. Mukherji that the court of appeal below has not considered the evidence, we find that it is true that the court of appeal below has not discussed the evidence of the witnesses in detail but its judgment was one of affirmance. The trial Court has discussed the evidence of witnesses in detail and the court of appeal below has agreed with the view taken by that court. In that view of the matter, the judgment of the lower appellate Court cannot be said to be bad in law on the ground that it has not discussed the evidence of the witnesses on the question of tender of the balance of consideration money of Exhibit 5/a and of mortgage money under the deed dated 3rd December, 1956 in detail. We have already accepted the findings of the court below while dealing with the first contention of Mr. Mukherjee.

11. Mr. Mukherji has also argued that no decree for redemption of the deed dated 3rd December, 1956 could be passed because the mortgage money was not deposited in court as required by Section 83 of the Transfer of Property Act. It is not necessary for a mortgagor to deposit the mortgage money in court before instituting a suit for redemption. Three remedies are open to him; (i) he may tender the mortgage money privately to the mortgagee under Section 60 of the Transfer of Property Act; (ii) he may deposit the money in court under Section 83 of that Act; or, (iii) he may institute a suit for redemption under Section 91 of the Act. He can avail himself of any of these remedies and cannot be compelled to resort to any one of the remedies in particular. A suit for redemption cannot fail on the ground of non-deposit of money in court is also supported by a Bench decision of this Court in *Dinanath Rai v. Rama Rai*<sup>8</sup>,

12. For the foregoing reasons, we find no merit in the appeal and it is, accordingly, dismissed with costs.

Appeal dismissed.

Cases Referred.

<sup>1</sup> AIR 1949 Pat 364

<sup>2</sup> AIR 1950 Pat 288

<sup>3</sup> AIR 1952 Pat 263

<sup>4</sup> Pat LJ 168

<sup>5</sup> AIR 1938 Pat 505

<sup>6</sup> AIR 1950 Madh Bha 72

<sup>7</sup> AIR 1928 Cal 874

<sup>8</sup> ILR 6 Pat 102