

**AFR****HIGH COURT OF CHHATTISGARH, BILASPUR****First Appeal No. 72 of 2004**

Santosh Mahobiya, S/o. Mohanlal Mahobiya, Hindu, Aged About 36 Years, Present R/o. Fekanbai Yadav House, In Front Of Gopal Mandir, Vivekanand Ward No.8, Durg, Tahsil & District Durg (C.G.).

**---- Appellant****Versus**

Smt. Mahendra Tamboli, W/o. Ram Krishna Tamboli, Hindu, Aged About 40 Years, R/o. Dayasagar Press Ke Pichhe, Baraipara Ward No.28, Durg, Tahsil & District Durg (C.G.).

**---- Respondent**

For Appellant : Mr. H.B.Agrawal, Sr. Advocate with Smt. Meera Jaiswal, Advocate

For Respondent : Mr. Vimlesh Bajpai, Advocate

**Hon'ble Shri Justice Goutam Bhaduri****Judgment On Board****03.01.2019**

1. The present appeal is against the judgment and decree dated 02.01.2004 passed in Civil Suit No.7A of 2002 by the 7<sup>th</sup> Additional District Judge, Durg, whereby the suit for specific performance was dismissed by holding that the sale was ostensible and money was directed to be returned with interest. The instant appeal is by the plaintiff.
2. As per the plaint allegation, the defendant Smt. Mahendra Tamboli owned a house admeasuring 322 sq.ft. at Baraipara Durg wherein she is residing and because of some need of money she wanted to sell the same and agreed to sell the same for Rs.1,00,000/- and agreement of sale was executed on 19.08.2000. It was further pleaded that on 19.08.2000 an amount of Rs.60,000/- was paid as an earnest money whereas the rest of the amount of Rs.40,000/- was to be paid on 19.08.2001. The plaintiff stated that as per the

terms on 20.08.2001 he went with the amount of Rs.40,000/- to defendant so as to execute the sale deed but the defendant refused to accept the same and thereby refused to execute the sale deed. The plaintiff stated that he was ready and willing to execute the sale deed on his part but breach was committed by the defendant, as such, notice was served to the defendant on 23.08.2001 to execute the sale deed and despite receipt of the notice, the defendant failed to execute the sale deed. Therefore, the suit for specific performance was preferred.

3. The defendant filed her written statement and stated that she had not executed any agreement of sale. It is stated that the husband of the defendant had obtained a loan of Rs.40,000/- for his business and when the amount was demanded, the plaintiff stated that he do not have an amount but he will arrange for the same. Therefore, the money was arranged from one Swami Mahant Goutamanand Bramhachari and eventually the amount of Rs.40,000/- was arranged by way of loan. It was further stated that the terms were arrived at that a sham agreement of sale would be executed and in lieu of Rs.40,000/- loan, interest would be of Rs.20,000/- and Rs.60,000/- would be said to have been paid; whereas agreement of ostensible sale of Rs.1,00,000/- was agreed to be executed which would be returned after the amount is paid. The defendant stated therefore an ostensible agreement of sale was executed on 19.08.2001 and only Rs.40,000/- was paid and in lieu thereof the loan amount of Rs.60,000/- was written in the agreement and the actual amount was paid by one Swami Goutamanand Brahmachari, who was a saint. The defendant stated that the alleged agreement of sale was for security and the loan was not meant for any sale.

4. On the basis of the pleading, the trial Court framed three issues and dismissed the suit for specific performance, however, decreed the suit for return of Rs.60,000/- to be paid back to the plaintiff.
5. Learned counsel for the appellant would submit that the evidence of the parties would show there is an admission exists in respect of the receipt of the amount, therefore, the oral evidence as against the documentary evidence of agreement Ex.P-1 cannot be accepted. He further submits that the trial Court completely misdirected itself and failed to appreciate the law, thereby the dismissal of the suit for specific performance. It is further stated that the return of amount of Rs.60,000/- was contrary to the own finding of existence of the agreement, therefore, the finding is apparently perverse on the face of it, which needs to be corrected by the appellate Court.
6. Per contra, counsel for the respondent would submit that the very existence of the agreement itself is in doubt. He submits that as per the statement of PW-2, PW-3 & PW-4, contrary statement come to fore as one of the witness has stated that the agreement was executed before him whereas it is contradictory by other witness. Therefore, when the agreement itself is in doubt, the suit for specific performance cannot be decreed and the finding of the Court below is well merited which do not call for any interference.
7. Heard learned counsel appearing for the parties and perused the record and evidence.
8. Reading of the judgment of the learned Court below would show that burden was shifted on the defence raised by the respondent wherein it was stated that the respondent has received the amount by way of a loan, therefore, it was the duty of the plaintiff to prove

that it was not a loan and it was an agreement of sale. Perusal of Ex.P-1 which is an agreement of sale scribed as *Ikrarnama* wherein first party has been shown as Smt. Mahesh Tamboli, the seller and second party has been shown as Santosh Mahobiya, plaintiff/appellant. Reading of the agreement shows that the double storied house admeasuring 322 sq.ft. situated behind Dayasagar Press, Baraipara, Durg, was agreed to be sold for Rs.1,00,000/- and out of that sale consideration of Rs.1,00,000/-, Rs.60000/- was paid as earnest money and rest of Rs.40,000/- was agreed to be paid by 19.08.2001 and the registry would be executed. The said document is signed by five persons one is Smt. Mahendra Tamboli, respondent as first party, Santosh Mahobiya, appellant /plaintiff as second party and the witnesses are (i) Mahant Goutamanand Bramhachari, (ii) Laxminath Tamboli and (iii) Ramkrishna Tamboli. The finding of the Court below that since the defendant had pleaded that it was a loan, therefore, the burden would be shifted on the plaintiff that it was not a sale agreement appears to be not according to the law as Section 58(c) of the Transfer of Property Act covers such transaction. For sake of brevity, Section 58(c) of the Transfer of Property Act is reproduced as under.

*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

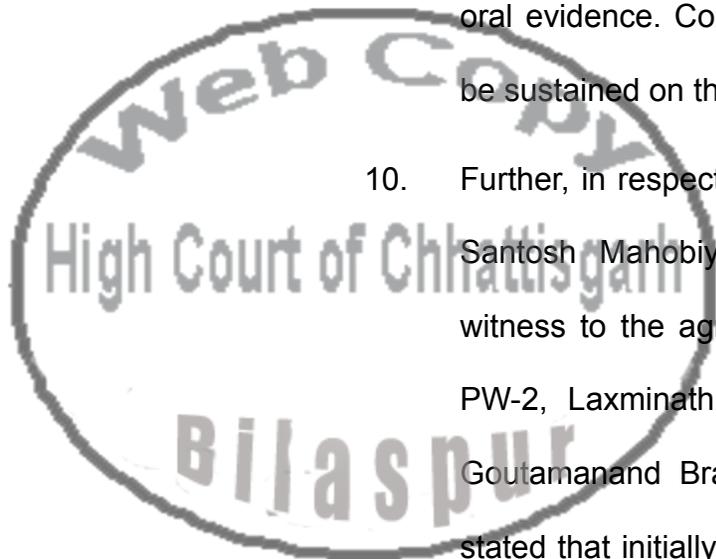
on condition that on such payment being made the buyer shall transfer the property to the seller,

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].

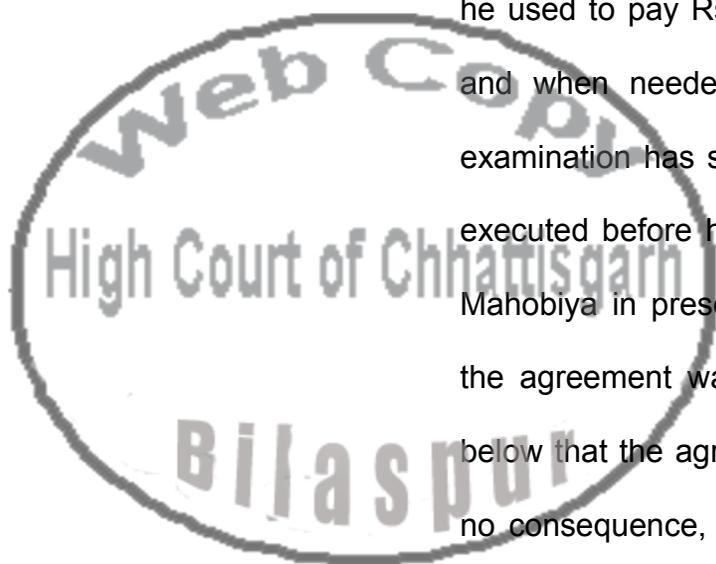
9. Reading of the aforesaid provision would show the defendant though had raised the defence that it was a loan but the transaction is not been embodied in the document Ex.P-1, therefore, as per the proviso clause the transaction cannot be deemed to be a mortgage as condition do not have been incorporated in the document Ex.P-1 except the defence and the oral evidence. Consequently, the finding of the trial Court cannot be sustained on this issue.

10. Further, in respect of the existence of the agreement, the plaintiff Santosh Mahobiya has examined himself as PW-1 and the witness to the agreement Navin Kumar Agrawal is examined as PW-2, Laxminath Tamboli is examined as PW-3 and Mahant Goutamanand Bramhachari is examined as PW-4. PW-1 has stated that initially he along-with Ramkrishna Tamboli, husband of the defendant, went to the house of one Navin Kumar Agrawal, Advocate to prepare an agreement and the terms of the agreement was settled earlier at his house and after 15-20 days earlier to execution of the agreement dated 19.08.2000. On 19.08.2000 they went to the house of Navin Agrawal and subsequently at 9-9:30 to 10:00 p.m. the agreement was executed in the house wherein Mahant Goutamanand was also present and Navin Agrawal also came to his house. Navin Agrawal who was examined as PW-2 though had stated that the terms of the sale was not settled before him but agreement was scribed by him,



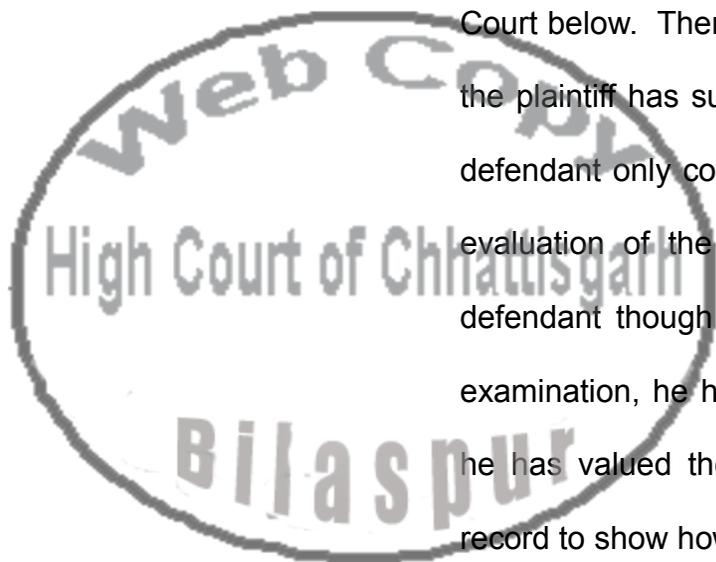
which finds support from the fact that PW-1 had stated that earlier to the agreement of sale, terms were settled 15-20 days earlier. Laxminath Tamboli, PW-3, who was landlord wherein Santosh Mahobiya was residing has also supported the fact that agreement was executed before him. He also deposed that the terms of settlement were not before him but such statement would not destroy the existence of the agreement Ex.P-1, which has been established and the signature has also been proved. Likewise, PW-4, Mahant Goutamanand, had categorically stated that Santosh Mahobiya used to provide him service and in lieu thereof he used to pay Rs.2000/- which were kept alongwith him and as and when needed the amount was paid. PW-4 in the cross examination has stated the similar averment that Ex.P-1 was not executed before him but when he went to the house of Santosh Mahobiya in presence of Laxminath Tamboli and Navin Agrawal the agreement was scribed. Therefore, the finding of the Court below that the agreement was not executed in front of them is of no consequence, as the plaintiff has come out with the fact that the terms were settled prior to agreement was executed. Therefore, what was the terms of settlement would be reflected from Ex.P-1. Further more, the terms having been settled and scribed in oral evidence to exclude the terms would be not allowed under Section 92 of the Indian Evidence Act.

11. Further more, the defendant stated that the husband of the defendant has demanded a loan of rs.40,000/- which was arranged by the plaintiff and thereafter a fiduciary agreement of sale was executed which is Ex.P-1, thereby the defendant admitted the existence of agreement (Ex.P-1) but stated that it was for a mortgage. No such averments have been contained in



the document. Therefore, it would be difficult to accept such defence in view of proviso to section 58(c) of the Transfer of Property Act the document was of a mortgage.

12. With respect to willingness to perform the part of contract, Santosh Mahobia the plaintiff has proved the notice dated 28.03.2001 by Ex.P-2 and stated that he is ready and willing to perform his part of contract by payment of remaining balance of Rs.40,000/-. During the course of arguments, it is also averred and shown a document that after decree has been passed an amount of Rs.40,000/- in Civil Suit no.15-A/2002 was deposited before the Court below. Therefore, the willingness to perform the contract by the plaintiff has sufficiently been discharged. As against this, the defendant only contended that it was a loan. With respect to the evaluation of the property that it was valued much more, the defendant though has examined witness D.W.3 but in the cross examination, he has stated that according to his own evaluation, he has valued the property. No document has been placed on record to show how such market value of the property was arrived. In view of this it would be difficult to accept the sole testimony of D.W.-3 that the value of property on the date of agreement was much higher. The trial Court has further directed for return of amount with Rs.60,000/- interest which prima facie is contradictory to the finding of its own. The agreement having admitted and if it is held to be mortgage then necessarily the agreement has to pass through the test as per Section 58(c) proviso to clause of Transfer of Property Act, 1852 and in absence thereof, the same cannot be held that it was a mortgage. As a result, the return of Rs.60,000/- as has been ordered cannot be accepted.



13. After close scrutiny of the entire evidence and the facts on record, I am of the opinion that the finding of the court below is completely perverse and cannot be allowed to sustain. Accordingly the impugned judgment and decree is aside and the suit is decreed. The defendant is directed to execute the sale deed within a further period of 3 months from the date of decree. In absence thereof, the consequence of execution will follow and the trial Court would be obliged to execute the said sale deed. In view of this, the cost of the suit is also allowed. The respondent shall also be obliged to pay the cost of the suit. The appeal is allowed.

Sd/-  
**(Goutam Bhaduri)**  
Judge

