

**Leela Agrawal**

**v.**

**Sarkar & Anr.**

(Civil Appeal No(s).12538-12539 of 2024)

19 November 2024

**[Vikram Nath\* and Prasanna B. Varale, JJ.]**

### **Issue for Consideration**

Whether the mortgage deed dated 17.10.1990 constitutes a mortgage by conditional sale under Section 58(c) of the Transfer of Property Act, 1882 and whether the plaintiff is entitled to redeem the mortgage.

### **Headnotes<sup>†</sup>**

**Transfer of Property Act, 1882 – s.58(c) – Mortgage by conditional sale – The dispute centers around a piece of land and the plaintiff-respondent is the undisputed owner of this land – In 1990, the plaintiff in need of funds approached the defendant-appellant and mortgaged the suit land – In pursuant thereto, a mortgage deed dated 17.10.1990 was executed and registered – It was orally agreed that plaintiff could redeem the mortgage within three years – Thereafter, in 1993, the plaintiff attempted to redeem the mortgage – However, the defendant refused to accept the payment, asserting that, according to the terms of the mortgage deed, the mortgage had transformed into an absolute sale due to the plaintiff's failure to repay the amount within the stipulated time – Correctness:**

**Held:** The ingredients of a mortgage by conditional sale u/s.58(c) of the Act are as follows: (i) The mortgagor ostensibly sells the mortgaged property to the mortgagee – (ii) Such ostensible sale is subject to any one of the following conditions: On default of payment of the mortgage money on a certain date, the sale shall become absolute; or on payment of the mortgage-money on a certain date, the sale shall become void; or on payment of the mortgage-money on a certain date, the buyer shall re-transfer the property to the seller – (iii) The condition should be embodied

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in the same document which effects or purports to effect the sale – In the instant case, the mortgage deed indicates that the mortgagor agreed to mortgage her land to the mortgagee for a sum of ₹75,000 due to personal financial needs, so the first condition i.e. Ostensible Sale of the Property is satisfied – The mortgage deed contains explicit condition that upon default in payment within the stipulated period, the sale would become absolute, satisfying the second ingredient under the first condition specified in s.58(c) of the Act that on default of payment on a certain date, the sale shall become absolute – As far as the last ingredient is concerned, as required under the proviso of s.58(c), the condition regarding the conversion of the mortgage into an absolute sale upon default is embodied within the same document i.e., the mortgage deed dated 17.10.1990 – This is evident from the clauses of the mortgage deed – Therefore, it can be concluded that all the essential ingredients of a mortgage by conditional sale u/s.58(c) of the Act are satisfied in the present case as there was an ostensible sale of the property by the mortgagor to the mortgagee and the sale was conditional, stipulating that upon default of payment within three years, the sale would become absolute as well as that the condition was embodied in the same document, i.e. the mortgage deed, that effected the transaction – Also, the permissive possession by the plaintiff in the present case does not alter the character of the transaction – The mortgage deed dated 17.10.1990 constitutes a mortgage by conditional sale u/s.58(c) of the Act – The condition converting the mortgage into an absolute sale upon default is valid and enforceable. [Paras 14, 15, 16, 17, 18, 21, 26]

**List of Acts**

Chhattisgarh Land Revenue Code, 1959; Transfer of Property Act, 1882; Specific Relief Act, 1963.

**List of Keywords**

Mortgage Deed; Mortgage by Conditional Sale; Ostensible Sale; Redemption; Clog on Equity of Redemption; Mortgagor; Mortgagee; Permissive Possession; Intention of Parties; Default of Payment; Absolute Sale; Re-transfer; Mortgage-Money; Nature of Possession; Terms of the Mortgage Deed.

**Digital Supreme Court Reports****Case Arising From**

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 12538-12539 of 2024

From the Judgment and Order dated 06.09.2018 and 30.01.2019 of the High Court of Chhattisgarh at Bilaspur in FA No. 28 of 2004 and REVP No. 222 of 2018 respectively

**Appearances for Parties**

V. Chitambaresh, Sr. Adv., Kaustubh Shukla, Advs. for the Appellant.

C.B. Gururaj, Prakash Ranjan Nayak, Animesh Dubey, Apoorv Nautiyal, Arjun D. Singh, Ms. Ankita Sharma, Advs. for the Respondents.

**Judgment / Order of the Supreme Court****Judgment**

**Vikram Nath, J.**

1. Leave granted.
2. These appeals challenge the judgment and order dated 06.09.2018 passed by the High Court of Chhattisgarh at Bilaspur in First Appeal No. 28 of 2004, as well as the subsequent order dated 30.01.2019 in Review Petition No. 222 of 2018. The High Court dismissed both the appeal and the review petition filed by the appellant (defendant), thereby affirming the decree passed by the Additional District Judge, Manendragarh, District Korea, in Civil Suit No. 26-A/2001.
3. For clarity, the parties will be referred to by their original status in the suit. The appellant will be referred to as the defendant, and the respondent as the plaintiff.
4. The factual matrix leading to the present appeal is as follows:
  - 4.1 The dispute centers around a piece of agricultural land measuring 2 acres, bearing Khasra No. 202/7, situated in Patwari Halka No. 10, Manendragarh, near Hansiya River, Ward No. 1 (hereinafter referred to as “the suit land”). The plaintiff is the undisputed owner of this land.

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- 4.2 In 1990, the plaintiff, in need of funds, approached the defendant and mortgaged the suit land for a sum of ₹75,000. A mortgage deed was executed and registered on 17.10.1990.
- 4.3 The plaintiff contends that it was orally agreed that she could redeem the mortgage within three years by repaying a total sum of ₹1,20,000, which included the principal amount, interest, and expenses. She remained in possession of the suit land throughout this period.
- 4.4 In 1993, the plaintiff attempted to redeem the mortgage by offering ₹1,20,000 to the defendant. However, the defendant refused to accept the payment, asserting that, according to the terms of the mortgage deed, the mortgage had transformed into an absolute sale due to the plaintiff's failure to repay the amount within the stipulated time.
- 4.5 Aggrieved by the defendant's refusal, the plaintiff filed Civil Suit No. 26-A/2001 before the Court of Additional District Judge, Manendragarh, seeking redemption of the mortgage and a declaration that the defendant's claim of ownership was invalid.
- 4.6 The defendant contested the suit, asserting that the mortgage deed contained a condition converting it into a sale deed upon default and that the plaintiff had failed to repay the amount within three years. The defendant maintained that she had become the rightful owner of the suit land.
- 4.7 After considering the evidence and hearing both parties, the Trial Court decreed the suit in favor of the plaintiff on 14.11.2003. The court held that the condition converting the mortgage into a sale was a clog on the equity of redemption and allowed the plaintiff to redeem the mortgage by paying ₹1,20,000 to the defendant. This amount has been deposited by the plaintiff with the Trial Court and is lying in deposit as such.
- 4.8 Aggrieved by the Trial Court's judgment, the defendant filed First Appeal No. 28 of 2004 before the High Court of Chhattisgarh at Bilaspur. The High Court, by its judgment dated 06.09.2018, dismissed the appeal and affirmed the Trial Court's decision.
- 4.9 The defendant subsequently filed Review Petition No. 222 of 2018 before the High Court, challenging the dismissal of her appeal. The High Court dismissed the review petition on 30.01.2019.

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5. Being aggrieved with the judgments of the High Court in both the appeal and the review petition, the defendant has preferred the present appeal before this Court.

#### Arguments for the Defendant (Appellant)

6. Learned counsel for the defendant contends that the courts below erred in holding that the mortgage deed dated 17.10.1990 was a simple mortgage under Section 58(b) of the Transfer of Property Act, 1882.<sup>1</sup> It is submitted that the mortgage deed was, in fact, a mortgage by conditional sale as per Section 58(c) of the Act, containing a clear stipulation that if the plaintiff failed to repay the mortgage amount along with interest within three years, the mortgage would automatically convert into an absolute sale in favour of the defendant.
7. It is further argued that the plaintiff failed to tender the amount within the agreed period of three years, and therefore, the defendant lawfully became the owner of the suit land. It is emphasized that the terms of the registered mortgage deed were fully explained to the plaintiff, and there is no credible evidence to suggest otherwise. Furthermore, it is submitted that the plaintiff did not personally appear in the witness box to substantiate her claims. Instead, her husband, acting as her power of attorney holder, deposed on her behalf.
8. The learned counsel also contends that Section 165 of the Chhattisgarh Land Revenue Code, 1959,<sup>2</sup> does not apply to the present case. It is argued that the suit land is not agricultural land, as residential structures have been constructed on it, and therefore, the restrictions under Section 165 of the Code are inapplicable.
9. Lastly, it is submitted that the plaintiff failed to seek the consequential relief of possession in her suit. As per Section 34 of the Specific Relief Act, 1963, a suit for declaration without seeking consequential relief is not maintainable, and thus, the suit ought to have been dismissed on this ground alone.

#### Arguments for the Plaintiff (Respondent)

10. Opposing the appeal, learned counsel for the plaintiff supports the concurrent findings of the Trial Court and the High Court. It is

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1 In short, 'the Act'

2 In short, 'the Code'

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argued that the mortgage was a simple mortgage, and the condition purporting to convert it into an absolute sale upon default is a clog on the equity of redemption and is void. It is argued that the plaintiff remained in possession of the suit land throughout, cultivating it continuously, which indicates that the transaction was not a mortgage by conditional sale. The exorbitant interest rate of 4% per month is unconscionable and supports the plaintiff's contention that the terms were oppressive.

11. It is further argued that the plaintiff's husband, who deposed on her behalf, had personal knowledge of the transaction and was competent to testify. The evidence provided by him is credible and sufficient to support the plaintiff's case.
12. Regarding Section 165 of the Code, it is contended that the provision applies, rendering the mortgage invalid since the plaintiff was left with less than 10 acres of un-irrigated land after the mortgage.

**Analysis**

13. The central issue for determination is whether the mortgage deed dated 17.10.1990 constitutes a mortgage by conditional sale under Section 58(c) of the Act, and whether the plaintiff is entitled to redeem the mortgage. To address this issue, it is pertinent to examine the provisions of Section 58(c) of the Act, which has been reproduced hereunder:

**"Section 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:

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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 affect the sale.”

14. On a bare reading of this provision, it can be deduced that the ingredients of a mortgage by conditional sale under Section 58(c) of the Act are as follows:

- (i) The mortgagor ostensibly sells the mortgaged property to the mortgagee.
- (ii) Such ostensible sale is subject to any one of the following conditions:
  - On default of payment of the mortgage-money on a certain date, the sale shall become absolute; or
  - On payment of the mortgage-money on a certain date, the sale shall become void; or
  - On payment of the mortgage-money on a certain date, the buyer shall retransfer the property to the seller.
- (iii) The condition should be embodied in the same document which effects or purports to effect the sale.

We shall now examine whether these ingredients are satisfied in the present case by analyzing the terms of the mortgage deed dated 17.10.1990.

15. (i) **Ostensible Sale of the Property**

The mortgage deed indicates that the mortgagor agreed to mortgage her land to the mortgagee for a sum of ₹75,000 due to personal financial needs. Clause 1 of the mortgage deed is reproduced hereunder:

“1. That the mortgagor is the owner of the above land. The above land is mortgaged for a sum of Rs. 75,000 (seventy-five thousand). From today onwards possession of the above land will remain with the mortgagee with conditions purchaser. The above land prior to this has neither been mortgaged nor sold to anybody else. Mortgagee with condition purchaser can use this land from today onwards. Entire money is received in cash.”

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The use of the term “mortgage with condition to sell” and references to the mortgagee as “mortgagee with condition purchaser” indicate that the mortgagor ostensibly sold the property to the mortgagee, satisfying the first ingredient.

**16. (ii) Condition Attached to the Ostensible Sale**

The mortgage deed contains explicit conditions further in clause 1 that align with this condition:

“1.....

The above land has been mortgaged for a period of three years. If the mortgagor returns the above money along with interest within three years to the mortgagee, then the mortgagee and her legal heirs will return back the possession of the mortgaged land to the mortgagor.”

“If the mortgagor fails to return back the said money within a period of three years from the date of execution of this document, then the present mortgage deed will be treated as sale deed. Then the mortgagor and her legal heirs will have no right to claim their possession over the said land from the mortgagee. That after the expiry of the said period of mortgage, the mortgagee will herself become the owner of said land and the right of mortgagor to get release her land will automatically close.”

This establishes that upon default in payment within the stipulated period, the sale would become absolute, satisfying the second ingredient under the first condition specified in Section 58(c) of the Act that on default of payment on a certain date, the sale shall become absolute.

**17. (iii) Condition Embodied in the Same Document**

As required under the proviso of Section 58(c), the condition regarding the conversion of the mortgage into an absolute sale upon default is embodied within the same document i.e., the mortgage deed dated 17.10.1990. This is evident from the clauses cited above and further reinforced by Clause 6 and 7 of the mortgage deed as follows:

“6. That the right of foreclosure of mortgagor will automatically close after 3 years of registration of this



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document and will have no right of getting released this land and shall be debarred from the proceedings of releasing the said land.”

“7. That the expenses towards execution of this document will be borne by the mortgagor and after completion of the said period if the mortgagor with condition seller fails to repay the principal amount along with interest then this document will be treated as Sale Deed and the mortgagor with condition seller will have the right to demand the money towards expenses of this document from the mortgagee but the mortgagor will have no right to: claim interest on this amount.”

The inclusion of the condition within the same document satisfies the third essential ingredient as mandated by the proviso to Section 58(c) of the Act.

18. Therefore, it can be concluded that all the essential ingredients of a mortgage by conditional sale under Section 58(c) of the Act are satisfied in the present case as there was an ostensible sale of the property by the mortgagor to the mortgagee and the sale was conditional, stipulating that upon default of payment within three years, the sale would become absolute as well as that the condition was embodied in the same document, i.e. the mortgage deed, that effected the transaction.
19. At this juncture, we must address that the Trial Court and the High Court placed significant emphasis on the fact that the plaintiff remained in possession of the suit land after the execution of the mortgage deed. They inferred that since possession was not delivered to the defendant, the transaction could not be a mortgage by conditional sale but was instead a simple mortgage. However, this conclusion overlooks critical aspects of the evidence and the nature of the possession in the present case. It is an admitted position by both parties that the plaintiff (mortgagor) remained in possession of the suit land after the execution of the mortgage deed. Importantly however, the nature of this possession was permissive and for the purpose of safeguarding the property. This is also evident from the testimony of the defendant-DW1, Vijay Kumar Khedia, who stated in his deposition:

“After the documentation, Sarkar gave the possession of the land to my sister. Later on, Sarkar said that they will

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guard the land, so they will be allowed to live there.” Here, “Sarkar” refers to the plaintiff and her husband, and “my sister” refers to the defendant.

20. The permissive possession granted by the defendant to the plaintiff was a practical arrangement, given that the plaintiff was already residing on the land. This arrangement does not confer any additional rights upon the plaintiff beyond those specified in the mortgage deed. The Trial Court and the High Court erred in concluding that the continuous possession of the plaintiff negated the possibility of the transaction being a mortgage by conditional sale. The key factors that need to be considered are:
  - **Nature of Possession:** The possession was permissive and at the discretion of the defendant. It was not an indication of ownership or an absolute right but was granted to safeguard the property.
  - **Intention of the Parties:** The intention, as explicitly stated in the mortgage deed and corroborated by DW1’s testimony, was that the property would become the absolute property of the defendant upon default of payment within the stipulated period.
  - **Terms of the Mortgage Deed:** The mortgage deed allowed the defendant to use the land and specified that the right of the mortgagor to reclaim the property would be extinguished upon default.
21. The permissive possession by the plaintiff in the present case does not alter the character of the transaction. Allowing the plaintiff to remain on the land was a matter of convenience and does not affect the rights and obligations established by the mortgage deed. It is also pertinent to note that permitting the plaintiff to enjoy both the possession of the property and the benefit of the ₹75,000 received from the defendant, without fulfilling her obligations under the mortgage agreement, would result in unjust enrichment at the expense of the defendant. Therefore, the courts below erred in relying heavily on the aspect of possession to conclude that the transaction was a simple mortgage.
22. It should also be noted that the plaintiff failed to repay the mortgage amount along with the agreed interest within the stipulated period of three years. There is no credible evidence to suggest that she

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attempted to tender the amount within the time frame. Her assertion that the defendant refused to accept repayment is unsubstantiated.

23. It is to be also considered that the plaintiff did not enter the witness box to testify regarding her claims, including her understanding of the mortgage deed and the alleged refusal by the defendant to accept repayment. Her husband, acting as her power of attorney holder, deposed on her behalf. However, matters within the personal knowledge of the plaintiff could not be adequately addressed by her husband.
24. The plaintiff also contends that the mortgage is invalid under Section 165(2) of the Code, which restricts the transfer of agricultural land by a Bhumiswami if less than 10 acres of unencumbered un-irrigated land would remain with the transferor. However, the defendant asserts that the suit land is not agricultural land, as residential structures have been constructed on it. This is supported by the testimony of DW-1. The plaintiff failed to provide concrete evidence, such as revenue records or land use certificates, to establish the agricultural nature of the land or to demonstrate that she was left with less than 10 acres of unencumbered un-irrigated land after the transaction.
25. In the absence of clear evidence, the applicability of Section 165 of the 1959 Code cannot be presumed. Moreover, even if the provision were applicable, it would render the transaction voidable at the instance of the State or the affected party. Neither the State has challenged the transaction, nor did the plaintiff seek to have the mortgage declared void on this ground at the earliest opportunity.
26. In light of the observations and findings made, we find that the mortgage deed dated 17.10.1990 constitutes a mortgage by conditional sale under Section 58(c) of the Act. The condition converting the mortgage into an absolute sale upon default is valid and enforceable. The plaintiff failed to repay the mortgage amount within the stipulated period and did not provide credible evidence of any attempt to do so. Moreover, the plaintiff's failure to testify personally undermines her case. It is also observed that the applicability of Section 165 of the Code is not established.
27. The Trial Court and the High Court erred in disregarding the express terms of the registered mortgage deed and in holding that the

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condition was a clog on the equity of redemption without sufficient basis. The permissive possession of the suit land by the plaintiff does not negate the nature of the transaction. The conditions stipulated in the mortgage deed fulfil all statutory requirements of mortgage by conditional sale, and the intention of the parties regarding the same was clear and unambiguous. The Trial Court and the High Court erred in their interpretation by placing undue emphasis on possession without considering its permissive nature and the explicit terms of the mortgage deed.

28. Only as a caution, we may record here that the plaintiff's possession being admitted to the defendant right from the time of the mortgage and having continued throughout even till the time of filing the suit and even thereafter it would be open for the defendant to pursue appropriate remedy seeking possession in accordance to law.
29. The appeals are allowed and the suit filed by the plaintiff is dismissed. The judgments and decree passed by the High Court of Chhattisgarh at Bilaspur in First Appeal No. 28 of 2004 and Review Petition No. 222 of 2018, as well as the judgment and decree passed by the Additional District Judge, Manendragarh, District Korea, in Civil Suit No. 26-A/2001, are set aside and the suit is dismissed.
30. The Trial Court is directed to refund the entire amount deposited by the plaintiff, along with accrued interest on the amount in the fixed deposit since the date of deposit.
31. There shall be no order as to costs.

*Result of the case:* Appeals allowed.

*†Headnotes prepared by:* Ankit Gyan