

MUSHIR MOHAMMED KHAN (DEAD) BY LRS.

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v.

SMT. SAJEDA BANO AND ORS.

MARCH 2, 2000

[S. SAGHIR AHMAD AND Y.K. SABHARWAL, JJ.]

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Transfer of Property Act, 1882—Section 58(c) proviso and (d)—Mortgage by conditional sale and usufructuary mortgage—Parties executed three documents—Sale deed, agreement of re-conveyance and a rent note—By sale deed property sold by plaintiff in favour of defendant—By agreement of reconveyance of property by defendant in favour of plaintiff property reconveyed on payment of sale price within stipulated time—In terms of rent note plaintiff paying rent of the property to defendant—True nature of transaction to be ascertained having regard to all documents—Held, the transaction is not a mortgage by conditional sale as the condition of reconveyance is not contained in the documents by which the property was sold—Further, an agreement of reconveyance does not constitute part of the transaction by which usufructuary mortgage is created.

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Plaintiff-respondents sold the property for a price less than its original price to the defendant-appellants by executing a sale deed. Property was further reconveyed on payment of sale price within stipulated time by executing agreement of reconveyance by the defendant in favour of the plaintiff. In terms of the rent note, plaintiff had to pay rent to the defendant. Plaintiff filed suit for redemption treating the transaction as mortgage. Both the trial court and the lower appellate court dismissed the suit. High Court held the transaction between the parties as mortgage and not sale of the property. Hence this appeal.

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Disposing of the appeal, the Court

HELD : 1.1. Where the parties executed three documents-the sale deed, agreement of reconveyance and rent note almost contemporaneously, all the three documents have to be taken into consideration to find out the true nature of the transaction. [74-C]

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1.2. The three documents being sale deed, agreement of reconveyance and rent note read together would not constitute a mortgage by operation of proviso to section 58(c) of the Transfer of Property Act, as the condition

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A of re-purchase is not contained in the documents by which the property was sold and the transaction between the parties cannot be held to be a "mortgage by conditional sale." [73-C-D]

B *Chunchun Jha v. Ebadat Ali & Anr.*, [1955] 1 SCR 174; *Bhaskar Waman Joshi (D) & Ors. v. Shrinarayan Rambilas Agarwal (D) & Ors.*, [1960] 2 SCR 117; *P.L. Bapuswami v. N. Pattay Gounder*, AIR (1966) SC 902 and *Vidhyadhar v. Mankikrao & Anr.*, [1999] 3 SCC 573, relied on.

Narasingerji Gyanagerji v. P. Parthasaradhi, AIR (1924) PC 226; and *Balkishan Das v. Legge*, (1899) 27 Ind. Appl. 58, cited.

C 1.3. If the documents cannot be treated as creating a mortgage on account of the prohibition contained in proviso to section 58(c) these documents would not create a mortgage of another kind. Though in a usufructuary mortgage, the possession has necessarily to be delivered to the mortgagee, an agreement for reconveyance is not obtained from him.
D An agreement of reconveyance does not normally constitute part of the transaction by which unfructuary mortgage is created. [73-G; 74-A-C]

Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor, AIR (1988) SC 1074, distinguished.

E *Govind Prasad Chaturvedi v. Hari Dutt Shastri*, [1977] 2 SCR 877, cited.

F 2.1. The property was ostensibly transferred to the defendant for a price less than the market value which must have considerably appreciated when the property was purchased by the plaintiff when it was sold by him to the defendant. Even though the defendant knew that within two years the value of the property would further escalate, he agreed on a reconveyance on the original price for which it was sold to him. [76-B-D]

Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor, AIR (1988) SC 1074, relied on.

G 2.2. Having regard to the circumstances of the case, parties were allowed time to negotiate a settlement, but they have failed to arrive at a compromise. Therefore, defendants are directed to pay a sum of Rs. Two lakhs forgoing the arrears of rent up-to-date within three months from the date of the judgment failing which the appeal shall stand dismissed with
H costs. [77-C; E]

U. Nilan v. Kannayyan (Dead) through Lrs., JT (1999) 7 SC 621, relied on. A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9 of 1988.

From the Judgment and Order dated 27.8.87 of the Madhya Pradesh High Court in S.A. No. 107 of 1983. B

S.K. Gambhir, Anil K. Sharma, Awanish Sinha and Vivek Gambhir for the Appellant.

Dr. R.B. Masodkar and K.L. Taneja for the Respondents.

The Judgment of the Court was delivered by C

S. SAGHIR AHMAD, J. Habibur Rehman, who is since dead and is represented by the present respondents, was the owner of a house situated in Gali Masjid Peerji in Ibrahimपुरa, Bhopal, which he had purchased for a sum of Rs.3,000 through a registered sale deed dated 24.2.1949. On 28.12.1955, he executed a sale deed in respect of this house in favour of the appellant, Mushir Mohammed Khan, who also is dead and is represented by the present appellant, for a sum of Rs.1,000 only. A few days later, namely, on 3rd January, 1956, Mushir Mohammed Khan executed an agreement in favour of Habibur Rehman agreeing to re-convey the said house if the amount of Rs.1,000 was paid back to him within a period of two years. Habibur Rehman also executed a rent note in favour of Mushir Mohammed Khan on the same day. Both the documents, namely, the sale deed dated 28.12.1955 and the agreement for re-conveyance, executed on 3rd January, 1956, were registered on 5th January, 1956. In terms of the rent note, Habibur Rehman started paying Rs.20 as rent for the house in question to Mushir Mohammed Khan. D E F

Treating the above documents as mortgage, Habibur Rehman, who shall hereinafter be referred to as plaintiff, filed a suit for redemption which was dismissed by the trial court on 5th of July, 1979. The appeal filed thereafter was also dismissed by the Vth Addl. District Judge, Bhopal on 21.12.1982. But the second appeal filed by the plaintiff was allowed by the Madhya Pradesh High Court by the impugned judgment dated 27.8.1987. G

Learned counsel appearing on behalf of the appellant [hereinafter referred to as 'defendant'] has contended that the High Court was in error in treating the transaction between the plaintiff and the defendant as mortgage. He contended that since the condition of re-conveyance was not contained in H

A the same document by which the property was sold by the plaintiff to the defendant, the document could not be treated to be a deed of mortgage. It is contended that the agreement by which the defendant agreed to re-convey the property in question to the plaintiff was an entirely separate transaction between the parties and even if that document was read along with the sale deed executed earlier, the cumulative effect of both the transactions would not result in a “mortgage” and they will remain two separate transactions, namely, a sale deed by which the property was transferred to the defendant and an agreement by which the defendant agreed to re-convey the property to the plaintiff.

C Learned counsel for the plaintiff, on the contrary, contended that the judgment passed by the High Court, in the circumstances of the case, was wholly justified inasmuch as the property which was purchased by the plaintiff himself for a sum of Rs.3,000 was transferred to the defendant for a sum of Rs.1,000 only which was far less than the real value of the property which, with the lapse of time, escalates specially in big cities like Bhopal where the property in question is situate and, therefore, the transaction cannot be treated as an out and out sale but a mortgage which was executed by the plaintiff to secure the loan of Rs.1,000 advanced by the defendant. He also contended that the plaintiff who has remained in possession throughout, has already invested huge amount of money in the improvement of the house and has made additional room on the first floor which the plaintiff would not have done if he had sold the property absolutely in favour of the defendant. He contended that the conduct of the plaintiff in selling the property for a lower price than its actual value and investing huge amount even after the sale transaction indicated that the plaintiff knew and believed that he was still the owner of that property, which he would redeem one day. The transaction, by conduct, was, therefore, a mortgage and not a sale.

Let us first analyse the High Court judgment on this question before proceeding to consider the respective contentions of the parties’ counsel.

G The High Court took into consideration both the documents together, namely, the Sale Deed [Exh. P-2] executed by the plaintiff in favour of the defendant and the Agreement of Re-conveyance [Exh. P-3] in the light of the so-called surrounding circumstances and came to the conclusion that the transaction between the parties was a mortgage and not an absolute sale of the property in question in favour of the defendant. After having come to the conclusion that the transaction was a mortgage and not a Sale Deed, the High

Court attempted to find out the nature of the mortgage. On account of the Proviso to Clause (c) of Section 58 of the Transfer of Property Act, it came to the conclusion that since the condition for re-conveyance of the property in favour of the plaintiff was not contained in the Sale Deed [Exh. P-2], the transaction could not be treated as a "mortgage by conditional sale". The High Court, thereafter, came to the conclusion that the prohibition contained in the above Proviso would operate only in respect of "mortgage by conditional sale", but not in respect of any other mortgage as the Proviso was appended to Clause (c) of Section 58 only. The High Court then proceeded to consider the ingredients of Clause (d) and recorded a finding that the transaction between the parties was a usufructuary mortgage. Having thus found the transaction to be a mortgage, the High Court, while reversing the judgment passed by the trial court and the lower appellate court, decreed the suit of the plaintiff.

The question whether there was a transaction of mortgage or sale between the parties is to be decided, not only in the light of the recitals made in the deed, but also in the light of other circumstances which are established on record. It is true that there is a difference between a "mortgage by conditional sale" and a "sale with a condition to re-purchase"; the basic fact remains that the form of transaction is not always the final test and the true test is the intention of the parties in entering into the transaction.

"Mortgage by conditional sale" is defined in the Clause (c) of Section 58 which provides as under :

"(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."

A Proviso to this Clause was added by Act XX of 1929 so as to set at rest the conflict of decisions on the question whether the conditions, specially the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principal deed. The Legislature enacted that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect the sale.

B This Proviso was considered in *Chunchun Jha v. Ebadat Ali & Anr.*, AIR (1954) SC 345 = [1955] 1 SCR 174, and came to be considered again in *Bhaskar Waman Joshi (D) & Ors. v. Shrinarayan Rambilas Agarwal (D) & Ors.*, AIR 1960 SC 301 = 1960 (2) SCR 117, in which it was explained as under :

D “But it does not follow that if the condition is incorporated in the deed effecting or purporting to effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction.”

E The Court further considered the distinction between “mortgage by conditional sale” and a “sale with a condition of re-purchase” and observed as under :

F “The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive.

G The definition of a mortgage by conditional sale itself contemplates

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an ostensible sale of the property. As pointed out by the Judicial Committee of the Privy Council in *Narasingerji Gyanagerji v. P. Parthasaradhi*, 51 Ind. App. 305 [AIR 1924 PC 226], the circumstance that the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, the appearance being laboriously maintained by the words of conveyance needlessly iterating the description of an absolute interest or the right of repurchase bearing the appearance of a right in relation to the exercise of which time was of the essence is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.”

The view expressed by this Court in *Bhaskar's* case (supra) was repeated in the same words in *P.L. Bapuswami v. N. Pattay Gounder*; AIR (1966) SC 902 :

“The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and the mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified. The distinction between the two transactions is the relationship of debtor and creditor and the transfer being a security for the

A debt. The form in which the deed is clothed is not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the documents viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts.”

C These decisions were considered again in *Vidhyadhar v. Mankikrao & Anr.*, AIR (1999) SC (1st) Supp. 1441 = [1999] 3 SCC 573 and it was observed as under :

D “47. The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage. The Privy Council as early as in *Balkishen Das v. Legge*, (1899) 27 Ind. Appl 58, had laid down that, as between the parties to the document, the intention to treat the transaction as an out and out sale or as a mortgage has to be found out on a consideration of the contents of document in the light of surrounding circumstances. The decision of this Court in *Bhaskar Waman Joshi v. Shrinarayan Rambilas Agarwal*, AIR (1960) SC 301: [1960] 2 SCR 117 and *P.L. Bapuswami v. N. Pattay Gounder*, AIR (1960) SC 902 : [1966] 2 SCR 918, are also to the same effect.

F 48. The contents of the document have already been considered above which indicate that defendant No. 2 had executed a mortgage by conditional sale in favour of defendant No. 1. He had promised to pay back Rs.1500 to him by a particular date failing which the document was to be treated as a sale deed. The intention of the parties is reflected in the contents of the document which is described as a mortgage by conditional sale. In the body of the document, the mortgage money has also been specified. Having regard to the circumstances of this case as also the fact that the condition of repurchase is contained in the same document by which the mortgage was created in favour of defendant No.1, the deed in question cannot but be treated as a mortgage by conditional sale. This is also the

finding of the courts below.”

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Applying the principles laid down above, the two documents read together would not constitute a ‘mortgage’ as the condition of re-purchase is not contained in the same documents by which the property was sold. Proviso to Clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a “mortgage by conditional sale.”

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The High Court, after recording a finding that the transaction cannot be treated as a “mortgage by conditional sale”, in view of the Proviso to Clause (c) of Section 58, proceeded to consider the circumstances of the case and came to the conclusion that although the transaction was not a “mortgage by conditional sale”, it would definitely be a usufructuary mortgage. The High Court was of the opinion that all the ingredients which go to constitute a usufructuary mortgage were present in the instant case inasmuch as the property was given away to the defendant for a price which was less than its original price or the market value on the date on which the sale was executed in favour of the defendant. The High Court also found that possession of the property in question was symbolically delivered to the defendant and the plaintiff also executed a rent note in favour of the defendant promising to pay rent in respect of the premises in question to the defendant every month.

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We are unable to accept the reasoning of the High Court. We have already seen above that the three documents read together do not constitute a mortgage or mortgage by conditional sale inasmuch as the condition to repurchase was not contained in the sale deed itself. If the documents cannot be treated as creating a mortgage on account of the prohibition contained in the Proviso to Clause (c) of Section 58, it is difficult to accept that these documents would create a mortgage of another kind. The basic fact which has been ignored by the High Court is that though in a usufructuary mortgage, the possession has necessarily to be delivered to the mortgagee, an agreement for reconveyance is not obtained from him. While recording a finding on the question of usufructuary mortgage, the High Court did not take into consideration the second document which represented an agreement between the parties that if the amount in question, namely, the price money for which the sale was executed by the plaintiff in favour of the defendant was returned within the time stipulated by that agreement, the defendant would reconvey the property to the plaintiff. An agreement of reconveyance does not normally constitute part of the transaction by which usufructuary mortgage is created.

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A Where the parties executed three documents almost contemporaneously, all the three documents have to be taken into consideration to find out the true nature of the transaction.

B Learned counsel for the plaintiff referred to the decision of this Court in *Smt. Indira Kaur and others v. Shri Sheo Lal Kapoor*, AIR (1988) SC 1074, and contended that in that case too, the property was sold and a separate agreement of reconveyance was executed by which the purchaser had promised to reconvey the property to the seller on return of the consideration money for which the sale deed was executed. The seller had also executed a rent note in favour of the purchaser and thus continued to occupy the property as tenant. The Court held, on consideration of all the circumstances, the transaction to be a mortgage and not an out and out sale in favour of the purchaser. It is contended that since in the instant case also the property was sold and a deed of reconveyance was executed by the defendant in favour of the plaintiff and possession was delivered to the defendant only symbolically inasmuch as the plaintiff had executed a rent note under which he had promised to pay rent every month to the defendant, the transaction should also be treated as mortgage. It is no doubt true that this Court in *Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor* (supra) had held, on considering the facts of that case, the transaction to be a mortgage. The Court had also relied upon its earlier decision in *Govind Prasad Chaturvedi v. Hari Dutt Shastri*, [1977] 2 SCR 877=AIR (1977) SC 1005, in which the facts were almost similar and in which too, it was held that the transaction was a mortgage. But the learned counsel did not notice the relevant observations which are reproduced below:-

F “These factors clearly spell out the real intention of the parties that it was a transaction of mortgage to secure the sum of Rs.7000 at approximately 13½% interest. *But then it is not necessary to examine this dimension of the matter inasmuch as the plaintiff has not prayed for redemption though in the plaint an averment has been made that the real intention of the parties was to create a mortgage.* As the plaintiff stands, and as the plaintiff himself has preferred to enforce the agreement for specific performance, *it is not necessary to examine the question as to whether or not the real nature of the transaction was mortgage though it was given an appearance of a transaction of a sale. For the same reason we need not examine the question as to whether or not S.58(c) of the Transfer of Property Act would have*

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disabled the plaintiff from claiming the relief of redemption on the basis that the real intention of the parties was to create a mortgage and not an absolute sale coupled with an agreement of reconveyance. This question will have to be dealt with at appropriate time having regard to the fact that there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption within the prescribed period of limitation. In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property. We need not however probe the matter any further for the purpose of disposing of the present appeal for the reasons stated earlier.”

[Emphasis supplied]

Thus, the Court did not consider the effect of the Proviso to Section 58(c) of the Transfer of Property Act and did not examine the matter from that angle as the plaintiff, in that case, had not prayed for redemption but had prayed for specific performance of the agreement of reconveyance. This decision is, therefore, of no use to the plaintiff.

Though we, on the facts of this case, cannot hold the transaction to constitute a mortgage with a condition of repurchase, we also cannot hold the transaction to be a usufructuary mortgage as held by the High Court which, in our opinion, was in error in recording that finding by excluding from its consideration the agreement of reconveyance.

But we also cannot lose sight of a number of relevant factors for doing complete justice between the parties. These factors are that though the property was purchased by the plaintiff for a sum of Rs.3000 in 1949, it was sold to the defendant for a smaller sum of Rs.1,000 on 28.12.1955. This indicates that the property was ostensibly transferred to the defendant not for its real value but for a price which was far less than the market value which must have considerably appreciated from 1949 when the property was purchased by the plaintiff till 1955 when it was sold by him to the defendant. The other circumstance was that the defendant executed a contemporaneous document in favour of the plaintiff, by which he agreed to reconvey the

A property to the plaintiff if the sum of Rs.1000 was returned to him within two years. That is to say, even though the defendant knew that within two years, the value of the property would further escalate, he agreed on a reconveyance for the original price of Rs.1,000 for which it was sold to him.

B It is in these circumstances that the observations of this Court in *Smt. Indira Kaur and others v. Shri Sheo Lal Kapoor* (supra), which are repeated below, become relevant :-

C “.....there is an increasing tendency in recent years to enter into such transactions in order to deprive the debtor of his right of redemption within the prescribed period of limitation. *In fact very often the mortgagee in place of getting a mortgage deed executed in lieu of a loan obtains an agreement to sell in his favour from the mortgagor so as to bring pressure on the mortgagor by seeking to enforce specific performance to enable the mortgagee to obtain possession of the property for an amount smaller than the real value of the property.....”*

D This might have happened in the instant case also and instead of executing a Mortgage deed in respect of the property in question, the plaintiff was persuaded to execute a sale deed in favour of the defendant who executed an agreement of reconveyance in favour of the plaintiff.

E In *U. Nilan v. Kannayyan (Dead) Through LRs.*, JT (1999) 7 SC 621 = [1999] 8 SCC 511, this Court observed as under :

F “Adversity of a person is not a boon for others. If a person in stringent financial conditions had taken the loan and placed his properties as security therefor, the situation cannot be exploited by the person who had advanced the loan. The Court seeks to protect the person affected by adverse circumstances from being a victim of exploitation. It is this philosophy which is followed by the Court in allowing that person to redeem his properties by making the deposit under Order 34 Rule 5 C.P.C.”

G Having regard to the circumstances of the case, parties were allowed time to negotiate a settlement, but they have failed to arrive at a compromise.

H Although the plaintiff offered a sum of Rs. 1 lakh to be paid within six months

to the defendant, the defendant made a counter offer of Rs.1.5 lakh, forgoing also the arrears of rent, to the plaintiff, but the plaintiff is not prepared to give up the title in the property as indicated by the letters written by the respective counsel to the Registrar of this Court, which were placed before us. This tussle, however, does indicate that the amount of Rs. 1,000 for which the property was sold by the plaintiff in favour of the defendant, does not represent the true market value of the property, neither on the date on which the sale deed was executed in favour of the defendant nor does it represent the true value of the property today. We, therefore, dispose of this appeal by providing that if the defendant pays a sum of Rs.2 lakhs [forgoing also the arrears of rent upto date] within three months from today, the judgment passed by the High Court shall stand set aside and those of the trial court and the lower appellate court shall stand restored. In case, however, the amount is not paid within the aforesaid period, the appeal shall stand dismissed with costs.

N.J.

Appeals disposed.

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