

Arjun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.770 OF 2017
WITH
CIVIL APPLICATION NO.1510 OF 2017
IN
SECOND APPEAL NO.770 OF 2017**

Shri. Dadaso Bhagwan Devkate & Anr. ...Appellants/
Applicants

V/s.

Shri. Gendappa Ramchandra Ghadge ...Respondents
(Since deceased through LR's.)
1-A. Smt. Vimal Gendappa Ghadge & Ors.

Mr. Manoj A. Patil a/w Y. B. Lengare & Aditya Gaikwad i/b
Suman Y. Lengare, for the Appellants/Applicants.

Mr. P. G. Jagdale, for the Respondents.

**CORAM : MADHAV J. JAMDAR, J.
DATED : JUNE 6, 2023**

P.C.:

1. Heard Mr. Patil, learned counsel appearing for the Appellants and Mr. Jagdale, learned counsel appearing for the Respondents.

2. The Appellants who are the original Defendants filed present Second Appeal challenging the legality and validity of the Judgment and Decree dated 1st April, 2010 passed by

the learned Joint Civil Judge, Senior Division, Sangli in Special Civil Suit No.211 of 2003 as well as the Judgment and Decree dated 22nd February, 2017 passed by the learned Principal District Judge, Sangli in Regular Civil Appeal No.425 of 2012.

3. The said Special Civil Suit No.211 of 2003 was *inter alia* filed seeking specific performance of agreement dated 3rd August, 2001 and thereby seeking that re-conveyance deed be directed to be executed by the Appellants in favour of the Respondents. The learned Trial Court decreed the said suit. The present Appellants i.e. original Defendants challenged the same by way of Regular Civil Appeal No.425 of 2012 before the learned First Appellate Court. The learned First Appellate Court dismissed the said Appeal.

4. It is the contention of Mr. Patil, learned counsel appearing for the Appellants-original Defendants that, following substantial questions of law arise in this Second Appeal :

- i) Whether in the facts and circumstances of this case, it can be said that the Plaintiff is ready and willing to perform his part of the contract?
- ii) Whether the suit filed by the Plaintiff is maintainable in view of the factual position that

Rs.4,00,000/- was not paid within two years and in the suit notice dated 17th July, 2003, contention is raised that the Defendant No.1 is only entitled to Rs.85,000/- along with interest at the rate of 9%?

Mr. Patil, learned counsel has relied on certain decisions of this Court as well as of the Supreme Court.

5. On the other hand Mr. Jagdale, learned counsel appearing for the Respondents pointed out the document on record and contended that the document in question is a sale deed with an option to re-purchase and the Plaintiff has taken action within time. He submitted that, the evidence on record clearly shows that the Plaintiff is ready and willing to perform his part of the contract. He, therefore, prayed that, the Second Appeal be dismissed.

6. Before considering the rival submissions, it is necessary to set out certain factual aspects :

- i) By sale deed dated 3rd August, 2001, the suit property was sold by the Respondent i.e. Plaintiff in favour of both the Defendants. The total consideration mentioned in the registered sale deed dated 3rd August, 2001 is Rs.85,000/-. The said registered sale deed is at Exhibit-58.
- ii) It is also admitted position that, on that very day i.e. on 3rd August, 2001 after the execution of sale deed, both the

paragraph No.4 of the said notice, the Plaintiff has mentioned about the said sale deed dated 3rd August, 2001 (Exhibit-58) as well as about the said document dated 3rd August, 2001(Exhibit-59) and also mentioned about the said amount of Rs.4,00,000/-. The relevant clauses of said notice are clause Nos.3, 4 and 7 which are reproduced hereinbelow :

“३) उभयपक्षी ठरलेल्या व्यवहाराप्रमाणे सदर जमिनीचे रजिस्टर्ड (नोंद) खुषखरेदीपत्र आपणा उभयतांना आमचे अशिलांनी करून व लिहून दिले. त्या खरेदीपत्राच्या दिनांक ३/८/२००१ रोजी झालेल्या नोंदीच्या वेळी आपण आमचे अशिलांना रोख रूपये ८५,०००/- (रूपये पंच्याऐंशी हजार मात्र) दिले होते. सदर नोंद खरेदीपत्रात जरी सदर जमिनीचा कब्जा आपणास दिल्याचे कथन केले असले तरी प्रत्यक्षात सदर जमिनीचा प्रत्यक्ष कब्जा आपणास दिलेला नव्हता आणि उभयपक्षी ठरल्या व्यवहाराप्रमाणे तसा तो देण्याचेही आमचे अशिलांना कारण नव्हते.

४) जेव्हा सदर खरेदीपत्र दिनांक ३/८/२००१ रोजी नोंद करून आमचे अशिलांनी दिले, त्यानंतर लगेच आपण उभयतांनी आमचे अशिलास असे स्टॅम्पवर रितसर लिहून दिले की त्या दिवसापासून (दिनांक ३/८/२००१ पासून), दोन वर्षांचे आत आमचे अशिलांनी पठाणी व बेकायदेशीर दराने म्हणजे दरमहा दर शेकडा ३ टक्के दराने हाणारे व्याजासह एकूण रूपये ४,००,०००/- (रूपये चार लाख) आमचे अशिलांनी आपणास परत करावेत आणि तसे त्यांनी परत केल्यानंतर सदर जमिनीचे खरेदीपत्र परत आपण आमचे अशिलांचे नावे करून देण्यास तयार आहात वगैरे.

७) अशा परिस्थितीत अशी नोटीस देण्यात येते की, (अ) सदर आपणाकडून कर्ज उसनवार घेतलेली रक्कम रूपये ८५,०००/- आमचे अशिलांकडून एकरकमी रोखीने आपण परत घेवून सदर जमिनीचे उलटून परत खुषखरेदीपत्र आपण उभयतांनी आमचे अशिलांना रितसर लिहून नोंद करून द्यावे, (ब) सदर जमिनीचे असे उलटून परत खुषखरेदीपत्र आपण लिहून देण्यासाठी येणारा मुद्रांक, लिखाई, नोंदणी फी वगैरे सर्व खर्च करण्यास आमचे अशिलांची तयारी आहे आणि शिवाय सदर रूपये ८५,०००/- वरील गेल्या दोन वर्षांचे होणारे रितसर व्याज द.सा.द.शे ९ टक्के प्रमाणे आपणास देण्यास आमचे अशिल तयार आहेत. करिता त्यासाठी मा. दुय्यम निबंधक आटपाडी यांचे कचेरीत आमचे अशिलांनी कोणत्या दिवशी व तारखेस सकाळी ११ वाजता हजर राहावयाचे त्याची लेखी नोटीस आमचे अशिलास आगाऊ देवून तशी त्याचे कडून लेखी

पोच घेण्याची पूर्तता आपण करावी.”

(Emphasis added)

A combined reading of the said paragraph Nos.3 and 4 clearly show that, what is mentioned in the notice is that, the amount mentioned in the sale deed is Rs.85,000/- as well as along with interest it comes to Rs.4,00,000/-. However, it is mentioned that, the said amount of Rs.4,00,000/- is arrived at by taking into consideration an exorbitant interest. After that, reading of paragraph No.7 of the said notice shows that the Plaintiff has shown readiness to pay an amount of Rs.85,000/- along with interest at the rate of 9%.

(iv) Although, the Defendants have received notice dated 17th July, 2003, the Defendants failed to reply to the said notice.

(v) As the said document dated 3rd August, 2001 (Exhibit-59), by which, the Plaintiff agreed to pay an amount of Rs.4,00,000/- to the Defendants within 2 years, which period was to expire on 2nd August, 2003 and the aforesaid notice was given on 17th July, 2003. It is significant to note that, the present suit is filed on 4th August, 2003 and, it is specifically mentioned in the plaint that, as the Court was closed owing to a holiday on 2nd August, and 3rd August, 2003, the said suit was filed on 4th August, 2003. In the plaint it has been

specifically stated that, the Defendants have received notice dated 17th July, 2003 and no reply was sent by them.

(vi) It is further significant to note that in the plaint, although, reference is made to the sale deed dated 3rd August, 2001 as well as further document dated 3rd August, 2001 and the said amount of Rs.4,00,000/-, a contention is raised to the effect that the Defendants are only entitled to Rs.85,000/- along with interest. However, it is further stated that the Plaintiff is also ready and willing to pay the said amount of Rs.4,00,000/-.

7. Before considering the various submissions on which Mr. Patil, learned counsel for the Appellants has relied upon, it is necessary to consider the distinguishing features between a mortgage by conditional sale and a sale with an option to repurchase and then the nature of the suit transaction. The said distinguishing features are enumerated in *Mulla's Transfer of Property Act (11th Edition.)* and the same are reproduced and affirmed by the Supreme Court in the decision of *Patel Ravjibhai Bhulabhai V. Rahemanbhai M. Shaikh*¹. The relevant paragraph No.8 of the said decision is reproduced hereinbelow :

1 (2016) 12 SCC 216

“8. Distinguishing features between “mortgage by conditional sale” and “sale with an option to repurchase” are enumerated in *Mulla’s Transfer of Property Act (11th Edn.)* as under :

“(i) In a mortgage with conditional sale, the relation of a debtor and a creditor subsists while in a sale with an option of re-purchase, there is no such relationship and the parties stand on an equal footing.

(ii) A mortgage by conditional sale is effected by a single document, while a sale with an option of repurchase is generally effected with the help of two independent documents.

(iii) In a mortgage with conditional sale the debt subsists as it is a borrowing arrangement, while in a sale with an option of repurchase, there is no debt but a consideration for sale.

(iv) In a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property.

(v) In a mortgage with conditional sale, since this is a mortgage transaction, the right of redemption subsists in favour of the mortgagor despite the expiry of the time stipulated in the contract for its payment. The mortgagor has the option to redeem the mortgage and take back the property on the payment of the mortgage money, after the specified time, but in a sale with an option of repurchase, the original seller must repurchase the property within the stipulated time period. If he commits a default the option of repurchase is lost.”

(Emphasis added)

8. A perusal of the contents of the said sale deed dated 3rd August, 2001 (Exhibit-58) and the said document dated 3rd August, 2001 (Exhibit-59) respectively clearly shows that by the sale deed dated 3rd August, 2001, the suit property has been sold to the Defendants whereas by the said document dated 3rd August, 2001, the Plaintiff has agreed to repurchase the property at the price fixed at Rs.4,00,000/- and further agreed to pay the same within two years. Therefore, it is clear that the relationship between the parties is not that of debtor and creditor and the parties stand on an equal footing. Thus, as per the first parameter the nature of the transaction is of “Sale with an option to repurchase”.

9. The second parameter regarding distinguishing features between mortgage by conditional sale and sale with an option to repurchase is that a mortgage by conditional sale is effected by a single document while a sale with an option of re-purchase is generally effected with the help of two independent documents. The said parameter is squarely applicable to the present case. There are two separate documents – a sale deed dated 3rd August, 2001 which is at

Exhibit-58 by which the Plaintiff has sold the suit property to the Defendants and a subsequent document of same date i.e. dated 3rd August, 2001 which is at Exhibit-59 whereby the Plaintiff agreed to re-purchase the suit property for a consideration of Rs.4,00,000/-.

10. In the present case, documents on record clearly show that there is no debt and debt does not subsists. In this case, document at Exhibit-59 clearly shows that consideration for repurchase of said land is Rs.40,000/-. Therefore, the third parameter is also fulfilled

11. The fourth parameter set out hereinabove is that in a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property. As regards the consideration of the property is concerned, the sale deed mentions the consideration as Rs.85,000/- whereas the document of re-purchase mentions the consideration as Rs.4,00,000/-. However, the same is explained by the Plaintiff by stating that, an exorbitant interest has been charged by the Defendants.

12. The fifth parameter specifies that in a sale with an option of re-purchase, the original seller must re-purchase the property within the stipulated period and in case, if he commits a default, the option of re-purchase is lost. In the present case, re-purchase had to be done within two years from 3rd August, 2001. The Plaintiff issued suit notice on 17th July, 2003. It is true that in the said notice, the Plaintiff has mentioned that he is ready to pay Rs.85,000/- with 9% interest. However, a perusal of the entire notice clearly shows that, the Plaintiff has mentioned that, consideration of Rs.4,00,000/- was arrived at by taking into consideration the said amount of Rs.85,000/- as well as a very huge and exorbitant interest. It is also further significant to note that, the suit was immediately filed on 4th August, 2003 and, in the plaint itself, it is specifically mentioned that on both 2nd and 3rd August, 2003 the Court was closed due to holiday and, therefore, the suit was filed on 4th August, 2003. In the plaint, the Plaintiff has specifically stated that, he is ready and willing to pay Rs.85,000/- with interest as well as alternatively the Plaintiff has stated that he is also ready and willing to pay said amount of Rs.4,00,000/-. It is clear that,

therefore, even the fifth parameter is also fulfilled.

13. Thus, above discussion makes it is clear that, the transaction is of sale with an option to re-purchase. It is very clear that, the sale deed dated 3rd August, 2001 at Exhibit-58 and document dated 3rd August, 2001 at Exhibit-59 clearly show that the document is of sale with an option of re-purchase.

14. In view of the above factual aspects and the nature of documents, it is necessary to consider the substantial questions of law raised by Mr. Patil, learned counsel appearing for the Appellants.

15. Mr. Patil, learned counsel submitted that, the Plaintiff has failed to prove his readiness and willingness. A bare perusal of the plaint clearly shows that, the Plaintiff has stated that he is ready and willing to pay said amount of Rs.85,000/- with interest as well as alternatively said amount of Rs.4,00,000/-. The Plaintiff has laid evidence regarding these aspects. It is significant to note that, the Defendant No.1 in the cross-examination has admitted that financial position of the Plaintiff's family is sound and they are in a position to pay an amount of Rs.4,00,000/- at any

time.

16. It is also significant to note that, the learned Trial Court as well as the learned First Appellate Court by taking into consideration the evidence on record, recorded concurrent finding of fact that the Plaintiff was ready and willing to perform his part of the contract. Mr. Patil, learned counsel appearing for the Appellants has failed to point out that the said concurrent finding has been recorded without considering any evidence on record.

17. In view of the evidence on record, it has to be held that, there is no substance in the first substantial question of law raised by Mr. Patil, learned counsel of the Appellants.

18. As far as the second substantial question of law raised by Mr. Patil, learned counsel that the suit itself, is not maintainable as the same has not been filed within two years and the same is also not maintainable in view of the contents of the said notice dated 17th July, 2003 is concerned, I have already considered the said aspect extensively. If, the suit notice is read as a whole, then, it is clear that the Plaintiff has mentioned about the said amount of Rs.85,000/- as well as about the said amount of Rs.4,00,000/- and further stated

that, the said amount of Rs.4,00,000/- has been arrived at by charging an exorbitant interest on the said amount of Rs.85,000/-. In the plaint, it has been stated that the suit was filed on 4th August, 2003 (as on both 2nd and 3rd August, 2003 Court was having holiday) and the Plaintiff has specifically stated that the Plaintiff is ready and willing to pay said amount of Rs.85,000/- with interest of 9 % p.a., as it is the contention of the Plaintiff that said consideration of Rs.4,00,000/- has been arrived at by charging an exorbitant interest on said amount of Rs.85,000/- and alternatively, it is specifically stated in the plaint that the Plaintiff is ready and willing to pay said amount of Rs.4,00,000/-. It is further significant to note that the said agreement of repurchase is dated 3rd August, 2001 by which Plaintiff agreed to repurchase the suit property within a period of 2 years for consideration of Rs.4,00,000/- only. The suit is filed on 4th August, 2003 (as on both 2nd and 3rd August, 2003 Court was having holiday) and the Plaintiff has specifically inter alia mentioned about the readiness and willingness to pay said amount of Rs.4,00,000/-. Thus, it is clear that such readiness and willingness was shown before completion of two years. In

any case, the agreement is dated 3rd August, 2001 and the suit was filed on 4th August, 2003. Therefore, there is no substance in the second substantial question of law raised by Mr. Patil, learned counsel that the suit itself is not maintainable.

19. Mr. Patil, learned counsel has relied on the decision of this Court in the matter of *Nanda @ Sadanand Dattu Barmukh & Ors. V. Chhotubhai Kasambhai Inamdar*². In that decision, the sale deed was dated 21st February, 1980. The subsequent agreement of repurchase is dated 29th June, 1986 i.e. after a period of six years and the suit for specific performance has been filed in 2002. Therefore, the said decision will not apply to the facts of the present case. On the basis of the said facts, a learned Single Judge of this Court has held that, the Plaintiffs are not entitled to the relief of specific performance.

20. Mr. Patil, learned counsel has relied on the decision of the Supreme Court in the matter of *C. Cheriathan V. P. Narayanan Embranthiri*³. As far as the said decision is concerned, the facts are noted in paragraph No.3 which

2 2016 (3) Mh.L.J. 610 : 2015 SCC Online Bom 8372

3 (2009) 2 SCC 673

reads as under :-

“The respondent herein was the owner of the land in question. He took the said land on lease with one Cheriathan jointly from one Gopalan Nair by reason of a deed of conveyance dated 21-12-1967. They made improvements. They constructed buildings thereupon. Half of the said leasehold rights was sought to be conveyed in favour of the appellant by reason of the said deed. Indisputably, the first respondent executed a deed of assignment in favour of V. Devaki Amma in respect of his half-share for a consideration to repurchase the same by a document dated 27-10-1969. She, by a deed of assignment dated 2-3-1976, transferred her right, title and interest being half of the property to the appellant and, thus, according to him, he became the full owner thereof.”

Thus, it is very clear that, the facts of the said case are totally different from the present case. Therefore, the said decision will not apply to the facts of the present case.

21. Mr. Patil, learned counsel has also relied on the decision of the Supreme Court in the matter of *Vanchalabai Raghunath Ithape V. Shankarrao Baburao Bhilare*⁴. In that decision, the Plaintiff's case is that a deed (Ext. 31) was executed by the original Plaintiff on 12-07-1967 for a consideration of Rs.3000, by which the suit land along with 4

4 (2013) 7 SCC 173

annas share in the mango trees was transferred to Defendant No.1 and possession of the same was handed over, with a specific stipulation to the effect that the land was sold on the condition that after receiving Rs.3000 in lump sum within 5 years before the end of any Falgun month by the Defendant, the land was to be returned to the Plaintiff. In the said decision, after considering the law on the mortgage by conditional sale, the Supreme Court has held that, the alleged sale document was executed in the year 1967 transferring the suit property by way of sale subject to one stipulation/condition that on receiving the sale amount of Rs.3000 within five years the land was to be returned to the Plaintiff vendor. It is also not in dispute that after transfer of the land Respondent No.1-Defendant came in possession and used and enjoyed the suit property as an absolute owner. It was only after 11 years that the Appellant-Plaintiff filed the suit alleging that the suit property was mortgaged in favour of the Defendant-Respondent No.1 therein with a condition to reconvey the land. Therefore, it is clear that, the said decision is also not applicable to the present case.

22. Mr. Patil, learned counsel has also relied on the decision

of this Court in the matter of *Chandrabai V. Sitaram*⁵. In that decision, on the basis of interpretation of the document, learned Trial Court has held that, the transaction in question is not a sale with condition of repurchase but it was an out and out sale. The learned Appellate Court reversed the decree of the learned Trial Court and held that transaction was a sale with a condition of repurchase. Learned Single Judge by considering the document in question, set aside the decree of the learned First Appellate Court and restored the decree of the learned Trial Court. Therefore, the said decision also will not apply to the facts of this case.

23. For the above reasons, there is no substance in the substantial questions of law raised by Mr. Patil, learned counsel appearing for the Appellants. Therefore, the Second Appeal is dismissed, however, with no order as to costs.

24. In view of dismissal of the Second Appeal, nothing survives in the Civil Application and the same is also dismissed.

25. At this stage, Mr. Patil states that, there is ad-interim relief which is in operation till date and the same be continued for suitable period. Accordingly, the said an ad-

5 2020 (2) Mh.L.J. 539 : 2020 SCC Online Bom 13

interim relief is continued till 31st December, 2023.

[MADHAV J. JAMDAR, J.]