

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 332 OF 2011

1. Neelkanth s/o Baburao Ingole
[since deceased] Thr. L.Rs.

- 1-A. Prabhavati w/o Neelkanth Ingole
Age : 47 Yrs., Occ. Household
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

- 1-B. Renuka d/o Neelkanth Ingole
Age : 27 Yrs., Occ. Household
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

- 1-C. Kalyani d/o Neelkanth Ingole
Age : 22 Yrs., Occ. Household
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

- 1-D. Ajinkya s/o Neelkanth Ingole
Age : 20 Yrs., Occ. Agriculture,
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

- 1-E. Snehal d/o Neelkanth Ingole
Age : 19 Yrs., Occ. Agriculture,

R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

1-F. Pallavi d/o Neelkanth Ingole
Age : 28 Yrs., Occ. Household,
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

2. Prabhawati w/o Neelkanth Ingole
Age : 46 Yrs., Occ. Household,
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.

3. Renuka d/o Neelkanth Ingole
Age : 27 Yrs., Occ. Household **APPELLANTS/**
R/o : Tuljapur, Tq. : Tuljapur, **[ORI. DEFT. NOS.**
Dist.: Osmanabad. **3,4 & 9]**

V E R S U S

1. Bharati w/o Vijaykumar Ghodake
Age : 62 Yrs., Occ. Household,
R/o : 94/2, Dr. Ketkat road,
Near Ghodake Chowk, Erandwane, **RESPONDENT/**
Pune, Tq. & Dist.: Pune. **[ORI. PLAINTIFF]**

2. Neeranjana s/o Baburao Ingole
Age : 50 Yrs., Occ. : Business, .. **RESPONDENT/**
R/o : Tuljapur, Tq. : Tuljapur, **[ORI. DEFT. NO.1]**

Dist.: Osmanabad.

3. Shalini w/o Neeranjana Ingole
Age : 43 Yrs., Occ. : Household,
R/o : Tuljapur, Tq. : Tuljapur, .. **RESPONDENT/**
Dist.: Osmanabad. **[ORI. DEFT. NO.2]**
4. Nitin s/o Baburao Ingole
Age : 39 Yrs., Occ. : Business,
R/o : Tuljapur, Tq. : Tuljapur, .. **RESPONDENT/**
Dist.: Osmanabad. **[ORI. DEFT. NO.5]**
5. Rajeshri w/o Nitin Ingole
Age : 36 Yrs., Occ. : Household,
R/o : Tuljapur, Tq. : Tuljapur, .. **RESPONDENT/**
Dist.: Osmanabad. **[ORI. DEFT. NO.6]**
6. Jagdish s/o Neeranjana Ingole
Age : 24 Yrs., Occ. : Business,
R/o : Tuljapur, Tq. : Tuljapur,
Dist.: Osmanabad.
[Abated vide court's order **RESPONDENT/**
dated 07/09/2015]. **[ORI. DEFT. NO.7]**
7. Pallavi d/o Neelkanth Ingole
Age : 27 Yrs., Occ. Agriculture,
R/o : Tuljapur, Tq. : Tuljapur, .. **RESPONDENT/**
Dist.: Osmanabad. **[ORI. DEFT. NO. 8]**
[dismissed vide court's order

dated 07/09/2015].

8. Mahadev s/o Babu Chormale
Age : 50 Yrs., Occ. : Agril.,
R/o : Sindhphal, Tq. Tuljapur, .. **RESPONDENT/**
Dist.: Osmanabad. **[ORI. DEFT. NO. 10]**

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Mr. R.N.Dhorde, Sr.Counsel instructed by
Mr. V.R.Dhorde, Advocate for Appellants.
Mr. N.P.Patil (Jamalpurkar), Advocate for
R – 2 to 8.

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CORAM : T.V.NALAWADE, J.

DATE OF JUDGMENT : 16th OCTOBER, 2015

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JUDGMENT :

1. Appeal is filed against the Judgment and decree dated 23/02/2011 of R.C.A. No. 68/2007, which was pending in the court of the District Judge – 1, Osmanabad. The Appeal filed by present respondent/original plaintiff to challenge the Judgment and decree dated 05/03/2007 of R.C.S. No. 2/2003, which was pending in the court of the Civil Judge [Jr.Division], Tuljapur is decided in his favour. The Suit

was filed by present respondent No. 1 for relief of possession of agricultural land bearing S.No. 22 admeasuring 3 H. 11 R. situated at village Sindphal, taluka Tuljapur. Heard learned counsels for both sides.

2. This court [other Hon'ble Judge] has admitted the Appeal on 19/09/2011 on following substantial questions of law :

- [i] Is the respondent/plaintiff entitled to possession of the suit property when she admitted that she had given money to deceased Baburao and had agreed to re-convey the property to him on repayment of the amount ?
- [ii] Whether the respondent/plaintiff perfected her title due to the appellant/defendants' failure to repay the amount ?
- [iii] If the respondent/plaintiff could prove that she was put in possession and thereafter was dispossessed, whether she is entitled to possession of the suit property ?

3. It appears that this court [other Hon'ble

Judge] presumed that the money was given as loan. The burden to prove such nature, mortgage transaction, was on the defendant.

4. Present respondent No. 1/plaintiff is daughter of sister of defendant Nos. 1,3 and 5 and Baburao was her maternal uncle. Defendant No. 2 is the wife of defendant No. 1. Defendant No. 4 is the wife of defendant No. 3 and defendant No. 6 is the wife of defendant No. 5. Defendants No. 8 and 9 are issues of defendants No. 3 and 4 and it is contended that defendant No. 10 is helping the other defendants in cultivation of the land.

5. It is the case of the plaintiff that the suit property was owned by Baburao Ingole and he was the father of defendants No. 1,3 and 5. It is contended that Baburao had taken loan from Janata Bank, Tuljapur for construction and welding work of 'Ashirwad Lodge' and he was in need of money for making repayment of the loan. It is contended that Baburao sold the suit property under registered sale deed to plaintiff on

12/03/2001 for the consideration of ₹ 1,33,000/- [Rupees One Lakh Thirty Three Thousand]. It is contended that on the date of Suit, Baburao was sick, but the defendants were causing obstruction to the possession of plaintiff over the suit property. The Suit was filed on 01/01/2003. During the pendency of Suit, vendor Baburao died. It was contended during the pendency of Suit filed by the plaintiff, that defendants had taken possession forcibly during temporary absence of plaintiff. Relief of possession was then claimed when relief of injunction was claimed in the beginning.

6. Defendants No. 3,4 and 8 filed joint Written Statement. They admitted that Baburao had taken loan for construction of building for lodge and he was in need of money and for that he had taken amount ₹ 1,33,000/- from the plaintiff. However, they contended that the sale deed executed in favour of plaintiff was sham and bogus and possession of the property was not given to the plaintiff. It is contended that there was agreement of re-conveying the property within 3 years, if the consideration was returned by Baburao to the plaintiff.

It is contended that during the life time, Baburao returned the amount taken from plaintiff in instalments and he had returned the entire amount taken from the plaintiff and so the possession remained with Baburao.

7. The specific defence was taken that Prabhawati Ingole, daughter-in-law of Baburao, present appellant No. 2, was in possession of the property even during life time of Baburao and after the death of Baburao, she continued to cultivate the land for joint family. It is her case that she had applied to the revenue authority and accordingly her name was entered in cultivation column. By making such contentions, these defendants had prayed for dismissal of the Suit.

8. Issues were framed on the basis of aforesaid pleadings. The trial court had dismissed the Suit by holding that the possession was not given under the sale deed. The first appellate court held that under the sale deed, possession was given to the plaintiff and her name was also mutated in the revenue record. The first appellate court has observed that on the date of the Suit,

plaintiff was in possession and she lost the possession subsequently. On the basis of rival pleadings, and the evidence, first appellate court has held that the transaction between plaintiff and Baburao was out and out sale and so she has become the owner of the suit property.

9. Learned Senior Counsel for the appellant [original defendants No. 3 and 4] submitted that the courts below have committed error in construing the document in question and there is sufficient material on record to show that the transaction between plaintiff and Baburao was a mortgage transaction and it was not out and out sale. Learned Senior Counsel submitted that due to incorrect approach of the courts below and due to ignorance of the relevant material, there is perversity in the findings given by the courts below regarding the nature of document and there is perversity in the decision of the first appellate court in holding that the possession was given and the plaintiff became owner under the aforesaid deed.

10. Learned Senior counsel placed reliance on two reported cases, viz. AIR 2000 Supreme Court – 3009 [Santakumari & Ors. Vs. Lakshmi Amma Janaki Amma (D) by L.Rs. & Ors.] and AIR 1988 Supreme Court – 1074 [Smt. Indira Kaur & Ors. Vs. Shri. Sheo Lal Kapoor]. This Court has carefully gone through the facts of the reported cases. The first case was of State of Travancore, where Transfer of Property Act was not applicable at the relevant time and general principles of that Act, based on justice, equity and good conscience were applicable. In view of the facts of that case and as the provisions of the Transfer of Property Act were not applicable, the Apex Court held that separate agreement of re-conveyance could have been considered along with the document of sale and the interpretation of both such documents was necessary to ascertain the real intention.

11. In the second case cited supra, the Apex Court had decided the rights of the parties on the basis of the provisions of Contract Act and Specific Relief Act and it was held that there was no need to consider the

provision of Section 58 (c) of the Transfer of Property Act in view of the case of the plaintiff and the relief claimed by the plaintiff. Thus, these 2 cases were having back-ground of different facts and in the first case the provisions of Transfer of Property Act were not applicable.

12. Learned counsel for respondent/original plaintiff placed reliance on the land mark case of the Supreme Court reported in **AIR 1954 Supreme Court – 345 (1) [Chunchun Jha Vs. Ebadat Ali and another]**.

The Apex Court has laid down as follows with regard to the points involved in the present matter.

“ The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one and must be decided on its own facts. In such cases, the intention of the parties is the determining factor.

The rule of law on this subject is one dictated by commonsense; that prima facie an

absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In every such case, the question is, what upon a fair construction, is the meaning of the instruments ?

The converse also holds good and if, on the fact of it, an instrument clearly purports to be a mortgage it can not be turned into a sale by reference to a host of extraneous and irrelevant considerations. Difficulty only arises in the border line cases where there is ambiguity.

Under the Proviso to S. 58 (c) T.P. Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not

hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of repurchase is embodied in the document that effects or purposes to effect the sale, then it is a matter for construction which was meant. The legislature has made a clear cut classification and excluded transactions embodied in more than one document from that category of mortgages, therefore, it is reasonable to suppose that persons, who, after the amendment compose not to use two documents, do not intend the transaction to be a sale, unless they displace the presumption by clear and express words; and if the conditions of S. 58 (c) are fulfilled, then the deed should be construed as a mortgage ”.

13. In another case reported as 2011 (3) Mh.L.J. - 1 [Raj Kishore (dead) by L.Rs. Vs. Prem

Singh and others], the Apex Court has again made it clear that for making a transaction a mortgage u/s 58 (c) of Transfer of Property Act, it is necessary that the condition is embodied in the document that purports to effect the sale. The Apex Court has further laid down that where a party has entered into transaction of sale and also executed agreement, time stipulated for re-conveyance is the essence of contract in view of Section 55 of the Contract Act.

14. It is settled position of law that for taking the defence or putting a case that a particular transaction was not out and out sale, but it was a mortgage, conditions laid down in aforesaid provision i.e. Section 58 (c) of Transfer of Property Act need to be satisfied. When in the Written Statement itself, it was the contention of the defendant that there was separate agreement of re-conveyance, it was necessary for the defendants to show that their case falls u/s 58 (c) of Transfer of Property Act.

15. The issues framed in the trial court and the

points argued in the first appellate court show that due to contention of the plaintiff that it was a sham transaction, no issue about the nature of the transaction made in favour of the plaintiff by Baburao was framed. Due to the nature of defence taken, there was an issue against the plaintiff and she was expected to prove that she was the owner of the property. There was an issue against the defendants and they were expected to prove that the transaction made in favour of plaintiff was null and void. From the reasonings given by the courts below, it can be said that both the courts considered the rival contentions and the evidence given and they have held that it was not possible to make a case u/s 58 (c) of the Transfer of Property Act.

16. The execution of the sale deed is admitted by defendants and so the burden was on defendants to prove their case. It appears that on the basis of the sale deed, mutation was effected in the name of plaintiff in the revenue record. One 7/12 extract is produced to show that in the year 2003-04, name of Prabhawati Narayan Ingole was entered in crop cultivation column.

The evidence of Prabhawati shows that she had taken specific steps for entering her name in the crop cultivation column and due to that her name was entered in that column. The relevant record of the said proceeding was, however, not produced.

17. The first appellate court, which is the last fact finding court, has given finding on the basis of the aforesaid circumstances and contents of the sale deed that plaintiff had got possession of the suit property under sale deed and she was subsequently dis-posessed. Some record is produced to show that even subsequent to the date of sale, land revenue was paid by defendants but that record is of the year 2006, after filing of the Suit against them. In view of these circumstances, this court holds that it is not possible to re-consider the finding given on the contention of possession in this proceeding.

18. The record shows that when the defendants had come with the case that there was agreement of sale in favour of Baburao, they did not produce original

record. Necessary steps were taken by the plaintiff and she had given notice to produce and she had applied to the trial court for permission to lead the secondary evidence. Though a xerox copy of the so called agreement of re-conveyance bearing the date of the sale deed is produced, but it is not exhibited, plaintiff has given admission in her substantive evidence that she had agreed to sell property to Baburao if there was payment made within 3 years from the date of the sale. There is one more circumstance viz. giving of notice to the defendants informing them that if plaintiff's amount was returned, re-conveyance document can be executed. That was given within a period of 3 years from the date of sale deed.

19. There is one more circumstance, viz. Baburao did not take steps during his life time though he was alive on the date of the Suit, in the year 2003. Plaintiff examined herself and so there is substantive evidence in support of the nature of transaction from the plaintiff. Prabhawati has given evidence in rebuttal, but her evidence shows that she has no personal knowledge

regarding the transaction made by Baburao. It was the property owned by Baburao and in-action on the part of Baburao during his life time to get it back from the plaintiff, also needs to be kept in mind in such cases.

20. Learned counsel for respondent/plaintiff has cited some reported cases in support of his submission that in view of the limited scope of Second Appeal, aforesaid circumstance can not give rise to substantial question of law. He placed reliance on the Judgment reported in **2006 (3) Supreme Court – 631 [Gurdev Kaur & Ors. Vs. Kaki & Ors.]**. The Apex Court has made observations with regard to the scope at para Nos. 50 to 54, said observations are as follows :

“ 50. The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having a jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on

important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.

The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference under section 100 C.P.C. by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.

51. Now, after 1976 Amendment, the scope of Section 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering under Section 100 C.P.C. only in a case where substantial questions of law

are involved and those questions have been clearly formulated in the memorandum of Appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as “substantial question of law ” which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become “third trial on facts” or “one more dice in the gamble”. The effect of the amendment mainly, according to the amended section, was :

- (i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;*
- (ii) The substantial question of*

law to precisely state such question;

(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;

(iv) Another part of the Section is that the appeal shall be heard only on that question.

52. The fact that, in a series of cases, this Court was compelled to interfere was because the true legislative intendment and scope of Section 100 C.P.C. have neither been appreciated nor applied. A class of judges while administering law honestly believe that, if they are satisfied that, in any second appeal brought before them evidence has been grossly mis-appreciated either by the lower appellate court or by both the courts below, it is their duty to interfere, because they seem to feel that a decree following upon a gross mis-appreciation of evidence involves injustice and it is the duty of the High Court to redress such injustice. We would like to reiterate that the justice has to be

administered in accordance with law.

53. When Section 100m C.P.C. is critically examined then, according to the legislative mandate, the interference by the High Court is permissible only in cases involving substantial questions of law.

54. The Judicial Committee of the Privy Council as early as in 1890 stated that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however, gross or inexcusable the the error may seem to be and they added a note of warning that no Court in India has power to add to, or enlarge, the grounds specified in Section 100 ”.

21. The discussion made above shows that law is settled long back on the points argued by the learned Senior Counsel for the appellants. There is one circumstance, like, in the Appeal filed by 2 defendants, notice could not be served on one defendant, respondent No. 4 of the Appeal. This Court has already held in that

regard that due to specific defence taken by the present appellants that they are in possession, there was no need of other respondents and they have not challenged the decision of the courts below.

22. In the result, all the substantial questions of law are answered against the appellants. Consequently, present Second Appeal stands dismissed.

[T.V.NALAWADE, J.]