

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

**Second Appeal No.647 of 2014
With
Civil Application No. 10735 of 2014**

Pandit Mahadevrao Tandale
Deceased through his legal
representatives.

.. Appellant.

Versus

Baburao s/o. Khanderao Choudhari
And Others.

.. Respondents.

Shri. Santosh S. Jadhavar, Advocate, for appellant.

Shri. Milind Patil (Beedkar), Advocate, for respondent
No.1.

CORAM: T.V. NALAWADE, J.

DATE : 21st OCTOBER 2015

ORDER:

1) The appeal is filed against the judgment and decree of Regular Civil appeal No.26/2009 which was pending in the Court of the Ad-hoc District Judge-1, Beed. The First Appellate Court has given decree of redemption of mortgage and for possession of the mortgaged property to the original plaintiff, present respondent by setting

aside the judgment and decree of the trial Court given in Regular Civil Suit No.149/1999. The suit was pending in the Court of the Civil Judge Senior Division Beed. Heard both the sides.

2) The suit was filed in respect of land Gat No.281 admeasuring 4 acres situated at Jebapimpri, Tahsil and District Beed. It is the case of the plaintiff that the suit property is his ancestral and joint family property. It is contended that in the year 1996 he was in need of money for marriage of his daughter so he approached defendant Nos.1 and 2 who were residents of the same village in the past. It is contended that the defendant No.1 was in money lending business and he used to give loan to the villagers.

3) It is the case of the plaintiff that he approached defendant No.1 and he requested for giving loan of Rs.60,000/-. It is contended that the defendant No.1 agreed to give amount subject to condition that plaintiff was ready to execute sale deed in favour of the defendant. It is contended that another condition was put that the

plaintiff should pay interest at the rate of 4% per month. It is contended that as the plaintiff was in need of money he agreed to execute the sale deed. It is contended that on 1-6-1996 two documents were executed in favour of the defendants and in each document consideration of Rs.45,000/- was shown. It is contended that the amount was already given by the defendants but as per the promise, the documents were executed by the plaintiff in favour of the defendants. It is his case that amount of Rs.60,000/- only was given but the aforesaid consideration was mentioned in the two documents.

4) It is the case of the plaintiff that he had paid amount of Rs.50,000/- to defendant No.2 on 30-5-1998 in the presence of some witnesses but no receipt was passed by the defendants. It is contended that subsequently also for giving amount to the defendants, plaintiff executed some sale deeds and collected money and paid it to the defendants. It is contended that when plaintiff requested the defendants to reconvey the property on 5-8-1998 the defendants refused to do so. It is contended that the plaintiff then realised that behind his back the defendants

had got mutated their names in revenue record and for that the revenue authorities had joined hands with the defendants. It is contended that the plaintiff was in possession and his name was continued in crop cultivation column. It is contended that the lands are irrigated lands of good quality and the price per acre at the relevant time was more than Rs. one lakh and it was not out-and-out sale. The plaintiff prayed for relief of direction to the defendants to reconvey the property. By amending the prayer he also prayed for relief of possession.

5) The defendants filed written statement and they contested the matter. They denied that it was loan transaction. They contended that under two documents the land was sold and right was given to the plaintiff only to repurchase the property provided that the amount was repaid by the plaintiff in time fixed. It is contended that as the amount was not repaid, the defendants took steps for entering their names and their names were entered in the revenue record on the basis of sale deeds.

6) The land was sold by defendant Nos.1 and 2 to defendant Nos.3 and 4 and so they were made party. They contended that they had verified the record that the property was standing in the names of defendants Nos.1 and 2 and on the basis of the revenue record they purchased the property. They contended that within two years, the plaintiff did not make payment so he has no right to get the relief of re-conveyance.

7) On the basis of the aforesaid pleadings issues were framed. The trial Court on one hand held that the land was given by way of security to defendant Nos.1 and 2 and loan was taken but the trial Court held that condition of repurchase within two years was there and within two years plaintiff ought to have repaid the amount and for that contract, time was the essence of contract. The First Appellate Court on the basis of the contents of the document and other circumstances has held that it was mortgage by conditional sale and covered by section 58(c) of the Transfer of Property Act. Due to such finding, the judgment and decree of the trial Court is set aside by the First Appellate Court and the reliefs of both,

redemption and possession are given.

8) This Court has carefully gone through the two documents which are titled as मुदत खरेदी खत, conditional sale deeds. The contents of the documents show that on the same date i.e. 1-6-1994 the two documents were executed and registered. The first document bearing registration No.1340 shows that time of two years was given to the plaintiff, vendor, for returning the money and in case the amount was not returned the document was to be treated as the sale deed. The reasoning given in this document is that the money was given for marriage of daughter of the plaintiff and for making payment of private debts. In the second document one can see even with naked eye that initially there was mention that it was absolute sale but these words were then deleted and then the words similar to the first document bearing registration No.1340 were written in the second document also.

9) To prove the nature of transaction, the plaintiff has examined himself and he deposed that he had taken

loan from the defendants and by way of security these documents were executed. He examined witnesses who have signed on the documents and the execution of these documents is proved. On the other hand, defendant No.1 or defendant No.2 did not step in the witness box and it is defendant No.4, purchaser, who gave evidence. He is adjacent land holder and he has given evidence that he purchased this land from defendant Nos.1 and 2 for consideration of Rs.1.5 lakh. He has given evidence that on the basis of entry of the name of defendant Nos.1 and 2 made in the revenue record he took decision to purchase and so he is the bona fide purchaser. His evidence in the examination-in-chief however shows that he knew that in the document which was executed in favour of defendant No.1 and 2 there was condition that the plaintiff was entitled to get re-conveyance after making payment of the amount within two years from the date of the transaction.

10) The aforesaid evidence shows that defendant Nos.1 and 2 avoided to enter into witness box. The intention behind the transaction was to be proved and as no evidence was given in rebuttal by the defendants,

adverse inference can be drawn against the defendants Nos.1 and 2. Learned counsel for the respondent, plaintiff placed reliance on some reported cases like (1) **AIR 2008 SC 2510 (Vishwanath Dadoba Karale v. Parisa Shantappa Upadhye)**; and, (2) **2014 (5) ALL MR 632 (Shankar v. Haribhau)** (Aurangabad Bench). The Apex Court has discussed provision of section 58(c) of the Transfer of Property Act, 1882 and the requirements to prove mortgage by conditional sale. This Court in the other case has discussed the circumstances on the basis of which inference can be drawn about the nature of transaction that it was mortgage. Admittedly, condition of repurchase was incorporated in both the documents. There is circumstance that the initial mention that it was absolute sale was scratched and it was mentioned that plaintiff had the right to get re-conveyance. There is circumstance that on the basis of this document, mutation was not made in favour of defendant Nos.1 and 2 immediately and it was made for the first time in the year 1998. Thus the defendant Nos.1 and 2 were sure that title had not passed to them. The First Appellate Court has construed the documents and the trial Court has also construed the

documents in the same way. The trial Court committed error in holding that the suit was for specific performance of contract and time was the essence of the contract. As it was a mortgage transaction, there was no question of time fixed in the document. The suit was filed in 1999 when the transaction was of the year 1996. Thus no error can be found in the decision given by the First Appellate Court. Though construction of document involves question of law it needs to be shown that there is material to formulate substantial question of law. This Court holds that no substantial question of law as such is involved in the present matter.

11) In the result, the appeal stands dismissed. Civil application stands disposed of.

Sd/-
(T.V. NALAWADE, J.)

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