IN THEE HI GH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 741 OF 1992

Ramchandra Mallappa Kurane .....Appellant
: V/S :
Goudappa Bangonda Biradar .....Respondent

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Mr. Rahul Kate a/w. Ms. A. Tejaswini Kadam, Advocate for the appellant.

Mr. T.S. Ingale i/by. Mr. Naresh Y. Chavan, Advocate for the respondent.

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Coram :- Smt. R.P. SondurBaldota, J.

23rd January, 2015.

P.C. :-

1). This Second Appeal is directed against the order dated 18th August, 1992 passed by the District Court in the appeal from the judgment and decree of the trial Court dismissing the respondent's suit for redemption of mortgage. By the impugned order, the District Court has set aside the order of dismissal of the suit and decreed the suit with a direction for recovery of possession on deposit of mortgage money.

2). The facts alleged by the respondent in his plaint, stated in brief are as follows :-

. He is the owner of land at Survey no.189/1 situated at village -Mendhegiri, Taluka-Jath, District-Sangli having purchased the same on 2nd December, 1950 for consideration of Rs.1,000/-. In the year 1969, he was in need of money for the marriage of his daughter and took loan of Rs.1,000/- from the appellant. Though, at the relevant time, the price of the suit land was about Rs.4,000/- to Rs.5,000/- he executed agreement dated 18th April, 1969 for mortgage of the suit land with conditional sale for the sum of Rs.2,000/-. On execution of the deed of mortgage, possession of the suit property was given to the appellant. In the year 1973, the respondent approached the appellant with a sum of Rs.2,000/- and a request for redemption of mortgage. When the appellant refused to redeem the mortgage, the respondent issued notice dated 23rd December, 1973 demanding redemption of mortgage and delivery of possession, but the appellant did not heed to the notice. Thereupon, he filed a suit for redemption.

3). The appellant in his written statement denied the transaction of mortgage and claimed that it was a transaction of sale with a condition of repurchase.

4). The parties examined themselves in support of their respective cases. The respondent additionally examined one of the attesting witnesses to the agreement. The trial Court held that, since the agreement of repurchase is embodied in the same agreement, there can be no mortgage. It also disbelieved the claim of the respondent that, the price of the land mentioned in the document was below the true value on the ground that the respondent had failed to bring the relevant facts of the quality of the land, the existence of the trees etc. on record. Resultantly, the trial Court held that, the respondent had failed to establish that the transaction between the parties was of mortgage by conditional sale. Therefore, the respondent was not entitled to repurchase the suit land.

5). The Appellate Court considered the document between the parties and their deposition for finding out the intention of the parties. It noted that, the contents of the document fulfilled the definition of mortgage by conditional sale at Section 58(c) of the Transfer of Property Act. It found that, possession of the property was delivered to the appellant for enjoyment of land in lieu of interest as there was stipulation to reconvey the land on repayment of the mortgage money. The second finding is that, the consideration mentioned in the document was much below the true value of the land. The respondent's claim in the pleadings of the value of the land at the relevant time being Rs.4,000/- to Rs.5,000/- was denied by the appellant with a further claim in the written statement that, in fact there were purchasers of the land who were willing to pay only Rs.1,000/- to Rs.1,500/-. But the appeal Court noted that, the evidence of the respondent and his witness on the higher value of the land has gone unchallenged and unrebutted. Further, the defence of the value being Rs.1,000/- or Rs.1,500/-, was not substantiated by any evidence. The respondent, on the other hand, in addition to the deposition of himself and his witness, had produced sale instances of the surrounding land at the relevant time. The contemporaneous sale transaction showed the value of the land of similar type and size as of Rs.7,000/-. The appellate Court further held that, the evidence led by the respondent established that, he had infact approached the appellant with amount of Rs.2,000/- for the purpose of redemption of mortgage. Initially, the appellant agreed to accept the money and redeem the land but later started demanding more money. Thus, the evidence before the Court indicated that, the transaction between the parties was of mortgage by conditional sale as contended by the respondent and not of sale with condition to repurchase. With these findings, the appellate Court set aside the decree of dismissal of the suit by the trial Court and decreed the suit in favour of the respondent.

6). The substantial questions of law for consideration in this Second Appeal framed at the time of its admission are in terms of grounds no.2 and 3 of the memo of appeal. The same read as follows :-

> "2. Whether the document executed between the Respondent-plaintiff and Appellant-defendant on 18th April, 1969 is out and out sale or is mortgage by conditional sale and if it is a mortgage by conditional sale the Respondent-plaintiff is entitled redemption of the mortgage or not ?
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> 3. Whether on the plain reading of the document it can be said that the document executed between the Plaintiff-respondent and the Appellant-defendant on 18th April, 1969 is out and out sale and whether the interpretation made by the learned Appellate Court of the document in question is correct ?"

7). The essential question therefore that arises for consideration in the Second Appeal is, whether the transaction reflected in the agreement dated 18th April, 1969 is the transaction of mortgage by conditional sale or is the transaction of sale with condition to purchase. The decision of the Apex Court in **Vanchalabai Raghunath Ithape (Dead) by LR V/s. Shankarrao Baburao Bhilare (Dead) by Lrs and Others. reported in (2013) 7 SCC page 173** relied upon by Mr. Patil, learned Advocate appearing for the appellant, rests on the footing that for determining whether the transaction is of mortgage by conditional sale or sale with option to repurchase, the matter to be considered primarily is the intention of the parties, which can be gathered from several attending circumstances in addition to the document executed for the transaction. The agreement herein specifically mentions that sum of Rs.1,000/- was received from the appellant by the respondent for the marriage expenses of his daughter. The remaining amount of Rs.1,000/- was to be paid and was paid at the time of registration of the deed. The possession of the property had been handed over on the same day as execution of the document. The agreement contains clause for return of possession of the property on payment of Rs.2,000/- within a period of 2 years. Thus, the sale-deed itself discloses transaction of loan between the parties.

8). The respondent in his evidence clearly stated that, he had taken loan from the appellant and the loan was taken for the marriage expenses of his daughter. This statement in evidence is supported by the evidence of the witness examined by the respondent. The witness is not just the resident of the same village but was a member of the Gram Panchayat and he had in the past tried to persuade the appellant in reconveying the land and return the documents on the receipt of Rs.2,000/-. It was his further evidence that, the appellant had at that time demanded more money from the respondent. Though, the appellant in his evidence makes no reference to the transaction of loan, considering the above aspects, it must be held that the respondent had established the transaction of loan. The second circumstance considered by the appeal Court is that, at the time of executing the document dated 18th April, 1969, the price of the suit property was much higher than the price reflected in the document. As per the plaint, the price at the relevant time was of about Rs.4,000/- to Rs.5,000/-. In the evidence, the respondent stated that the price was about Rs.7,000/- to Rs.8,000/-. He also produced a sale instance dated 11th November, 1970 wherein the same nature of land situated in the vicinity was sold for Rs.7,000/-. The area of the land was also identical.

9). Mr. Kate, the learned Advocate appearing for the appellant submits that, the District Court could not have taken into consideration the sale instances produced by the respondent because the document of sale instance was not even proved by the respondent. The document had been simply tendered before the Court after the entire evidence was over. This is borne out from the record. However, there is nothing to indicate that the appellant had taken any objection to either production of the document by the respondent or reading of the same in evidence by the Court. Therefore, there is no infirmity in the District Court considering the document for the purpose of comparing the consideration for the suit land.

10). The evidence of the respondent and his witness completely bears out the case of the respondent of transaction of loan and of mortgage. As against that, the evidence of the appellant is extremely short and cryptic. Unfortunately, the trial Court had completely rejected the evidence of witness of the respondent stating that he being a friend of the respondent, is an interested witness and hence should not be believed. There is nothing on record to indicate that the witness is biased. In fact as noted by the Appellate Court, the witness was an appropriate witness, he being the resident of the same village. The appellate Court corrected the mistake by considering his evidence and also by noting that he was the Sarpanch for three years from the year 1984 onwards. This would mean that, he was a respectable person. This witness has clearly stated the efforts taken by him in persuading the appellant to redeem the land and return its possession to the respondent. Thus, taking all the attending circumstances into consideration, the transaction between the parties is held to be a mortgage by conditional sale. Therefore, there is no infirmity with the impugned order. The substantial questions of law are answered accordingly. Hence, the Second Appeal is dismissed.

(SMT. R.P. SONDURBALDOTA, J)