

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

SECOND APPEAL NO.120 OF 2015

Shri. Ramchandra Pandurang Wavre. ...Appellant.

vs.

Shri. Shankar Bala Kumbhar. ...Respondent.

Mr. Nagesh Y. Chavan, Advocate for the Appellant.

CORAM : K.K.TATED,J.

DATE : 15TH SEPTEMBER, 2015.

PC.

Heard learned counsel Mr. Chavan for the appellant.

2) The second appeal is preferred by defendant No.1 challenging the concurrent findings of facts recorded by both the courts below.

3) In the present proceedings the respondent plaintiff filed Regular Civil Suit No.85 of 2000 in the Court of Joint Civil Judge, J.D. Tasgaon for redemption of mortgage deed dated 31.5.1994. One Mr. Kisan Tukaram Wavare (defendant No.2 later on deleted as dead) executed mortgage deed dated 31.5.1994 in respect of his half share of land bearing Gut No.126 admeasuring 54 for sum of Rs.5000/-.That mortgage deed was for 5 years. In between, defendant No.2 original owner of the suit property sold the same to the plaintiff by sale deed dated 15.2.1996 for a sum of Rs.65,000/-. In that sale deed it was specifically stated that the suit property already mortgaged with defendant No.1 for Rs.5000/- for a period of 5 years. Hence, the plaintiff instead of paying the entire consideration of Rs.65,000/- to the

owner kept Rs.5000/- with him for redemption of mortgage deed. Thereafter the plaintiff filed suit bearing Regular Civil Suit No.85 of 2000 for redemption of the mortgage deed. That suit was decreed by the Trial Court on 13.10.2007. The Trial Court in Para 15 of the impugned judgment and decree recorded that neither defendant No.1 entered into witness box nor place on record the original copy of the mortgage deed dated 31.5.1994. Para-15 reads thus:-

“Deed at Exh.64 shows that it is “Mudat Kharedi Patra” it contains recital that, suit property was given to Defendant No.1 by Defendant No.2 for Rs.5000/- for the period of 5 years, it is also mentioned in it thereafter said period Defendant No.2 is at liberty to get relieve that property by paying Rs.5000/- to Defendant No.1. The said situation shows that the transaction was not out and out sale. Further at Exh.62 there is sale deed in favour of plaintiff wherein it is specifically mentioned that amount of Rs.5,000/- out of sale consideration is kept with plaintiff and plaintiff shall pay that amount to Defendant No.1 and get relieved that property from Defendant No.1.”

4) Being aggrieved by the decree passed by the Trial Court defendant No.1 preferred Regular Civil Appeal No.29 of 2008 before the District Court, Sangli. The Appellate Court by decree dated 14.8.2014 dismissed the appeal preferred by defendant No.1. Hence, the present second appeal.

5) Learned counsel Mr.Chavan appearing for appellant/defendant No.1 submits that both the courts below erred in coming to the conclusion that the transaction dated 31.5.1994 executed by the Mr. Kisan Tukaram Wavre (defendant No.2) in favour of defendant No.1 was mortgaged deed by conditional sale and not out and out sale. He further submits that the Appellate Court failed to

appreciate that during the pendency of Regular Civil Suit No.85/2000 the original defendant No.2 i.e. the owner of the suit property was expired and his legal heirs were not brought on record. He further submits that both the courts have not considered the provisions of Consolidation Act at the time of deciding the matter. Hence, the defendant No.1 has good chances of success in the present matter. He submits that that the impugned judgment and decree passed by both the courts is required to be set aside.

6) Before considering the facts of the present matter, it is to be noted that our High Court in the matter of **Chhatrasal A. Telrandhe vs. Prabhakar M. Telrandhe 2010(1) B.C.R. 168** held that if concurrent finding of facts recorded by both the courts below, should not be entertained unless and until substantial question of law involved in the second appeal. Para 12 of the said judgment reads as under:-

“The High Court cannot be justified in interfering with the pure questions of facts in second appeal. Unless substantial questions of law are raised, there would no justification in interfering with the findings of facts. Thee High Court cannot substitute its own finding on re-appreciation of evidence merely on the ground that another view is possible even if the 1st Appellate Court commits error in recording finding of fact, because there cannot be third trial of facts or one more dice in the gamble, as observed by the Apex Court in (Koppisetty Venkatratnam vs. Pamarti Venkayamma) reported in 2009 DGLS (soft) 269:2009(4)S.C.C.244. The Apex Court has referred to relevant portion from Fifty fourth Report of the Law Commission of India submitted in 1973 and Paragraph 70 reproduced therein, reads thus:-

“70. Now , after the 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 :...”

7) Apex Court in the matter of **Gian Kaur vs. Raghubir Singh (2011) 4 SCC 567** held that High Court's interference on erroneous appreciation of admitted facts and question of law in second appeal with concurrent findings of courts below is unsustainable. Para 13 of the judgment reads thus:-

“For the reasons aforesaid, this Court holds that the suit is not hit by Section 34 of the Specific Relief Act. The decision in Ram Saran was rendered on totally different facts and cannot be applied to the present case. We are, therefore, constrained to observe that the High Court reversed the concurrent finding of the courts below on an erroneous appreciation of the admitted facts of the case and also the legal question relating to Section 34 of the Specific Relief Act. We, therefore, allow the appeal, set aside the order of the High Court and restore that of the first appellate court. There shall be no order as to costs.”

8) In the case in hand admittedly the defendant No.1-Appellant/original defendant no.1 failed to enter into witness box. On his behalf his power of attorney holder given evidence. Not only that the defendant No.1 failed to produce the original mortgaged deed dated 31.5.1994 on record. Photo copy was produced by the plaintiff and same is admitted by defendant No.1. The mortgaged deed dated 31.5.1994 shows that the owner mortgaged the suit property with defendant No.1 for sum of Rs.5000/- on condition that on return of the said amount, defendant No.1 to re-conveyance the property in his favour. In between the original owner sold the said property to the plaintiff for sum of Rs.65,000/- by sale deed dated 15.2.1996. In the sale deed it was specifically stated that the suit property was mortgaged with defendant No.1 for sum of Rs.5000/- for 5 years and for that purpose the plaintiff kept Rs.5000/- with him out of the sale proceeds for redemption of the mortgaged deed. Those facts are considered by both the courts in detailed.

9) In view of the concurrent findings of facts recorded by both the courts below, I do not find any substantial question of law involved in the present second appeal.

10) Hence, second appeal stands rejected.

(K.K.TATED,J.)

CERTIFICATE

**Certified to be true and correct copy of the original
signed Judgment/Order.**