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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 305 OF 2012
WITH
CIVIL APPLICATION NO. 569 OF 2012

Vyankat Ramrao Bhosale … Appellant
Vs.
Kondabai Ganpat Nhavi @ Waghmare
(deceased) through her legal heirs
Bhagwan Ganpat Nhavi @ Waghmare
(deceased) through her legal heirs
Rekha Bhagwan Nhavi @ Waghmare and others … Respondents

Mr.P.G.Karande, Advocate for Appellant
Mr.Anand S.Kulkarni, Advocate for Respondents No. 4, 6 & 8.

CORAM : R. G. KETKAR, J.
DATE : 09th APRIL, 2015

P.C. :

. Heard Mr.P.G.Karande, learned Counsel for the appellant and Mr.Anand S.Kulkarni, learned Counsel for the respondents No. 4, 6 & 8 at length.

2. By this appeal under section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the original plaintiff has challenged the judgment and decree dated 24/11/2011 passed by the learned District Judge-2, Solapur in Civil Appeal No. 288 of 2007. By that order, the learned District Judge partly allowed the appeal preferred by the original defendants No. 1 to 7 and quashed and set aside the judgment and decree dated 30/09/2000 passed by the learned Civil Judge, Senior Division, Solapur in Special Civil Suit

No. 223 of 1993. The learned District Judge partly decreed the suit and perpetually restrained the defendants No. 1 to 8 from causing obstruction and interference in possession of plaintiff over eastern side 3 rooms without following due process of law. The suit of the plaintiff for declaration of ownership of house bearing C.T.S. No. 337/A, Municipal House No. 323 (for short suit property) on the basis of conditional sale deed dated 09/12/1988 and for recovery of possession of portion (one room and open space on the western side of the suit property) which is in possession of the defendants No. 1 to 7 and for perpetual injunction restraining the defendants from alienating the western portion of the suit house was dismissed. The parties shall hereinafter be referred to as per their status before the trial Court.

3. In support of this appeal, Mr.Karande submitted that by document dated 09/12/1988, defendants No. 1 to 7 sold the suit property to the plaintiff. By that document, plaintiff had purchased the suit property for a total consideration of Rs.51,000/-. The said document is a conditional sale with a right to re-purchase. The said document did not create relationship of debtor and creditor. There was no clause for payment of any interest. The transaction is an out and out sale whereby defendants No. 1 to 7 transferred all their right, title and interest in the suit property in favour of the plaintiff reserving the right to re-purchase. He submitted that the said

document has to be read as a whole. In particular, he gave emphasis on concluding portion of the document dated 09/12/1988, whereunder it is recited that if within 2 years, the amount is not repaid by the defendants No.1 to 7, the transaction shall be treated as sale and that heirs and legal representatives of defendants No.1 to 7 will have no right, title and interest over the suit property. The plaintiff will be entitled to enjoy suit property and deal with it as per his wishes. He submitted that all these things clearly indicate that it is a conditional sale with a right to re-purchase. He submitted that within 2 years, defendants No. 1 to 7 did not exercise right to re-purchase the suit property. He submitted that the learned trial Judge decreed the suit and held that document in question is not a mortgage by conditional sale but is the sale with an agreement to re-purchase the suit property. As against this, the learned District Judge without properly considering the intention of the parties as also attendant circumstances, wrongly held that document in question is mortgage by conditional sale and not conditional sale with a right to re-purchase. He submitted that grounds No. (a), (b), (d) and (e) raise substantial questions of law and therefore, appeal requires consideration. In support of his submissions, he relied upon following decisions.

i) Tamboli Ramanlal Motilal Vs. Ghanchi Chimanlal Keshavlal, AIR 1992 Supreme Court 1236.

ii) Nana Tukaram Jaikar Vs. Sonabai, 1982(1) Bom. C.R. 811.

iii) Chunchun Jha Vs. Ebadat Ali, AIR 1954 Supreme Court 345.

4. On the other hand, Mr.Kulkarni has taken me through the pleadings of the parties as also oral evidence. He is also taken me through paragraphs 21 to 26 of the impugned order. He submitted that the learned District Judge rightly applied test laid down by the Apex Court in the case of **Chunchun Jha** *(supra)* and after ascertaining the intention of the parties as also recitals of the document dated 09/12/1988 at Exhibit 83 came to the conclusion that the transaction in question is mortgage by conditional sale as per section 58(c) of the Transfer of Property Act, 1882 (for short 'Act'). He therefore, submitted that no case is made out for invoking powers under section 100 of C.P.C.

5. I have considered the rival submissions made by the learned Counsel for the parties. I have also perused the material on record. A short question that arises in this appeal is as regards the nature of the transaction embodied in the document dated 09/12/1988 at Exhibit 83. The plaintiff claims that the said document is a conditional sale with a right to re-purchase. As against this, defendants No. 1 to 7 contend that it is a mortgage by conditional sale. In order to consider this, it is necessary to consider the principles laid down by the Apex Court in the case of **Chunchun Jha** *(supra)*. In that case, it is held that the question whether a given

transaction is a mortgage by conditional sale or a sale outright with a condition to repurchase is a vexed one and must be decided on its own facts. In such cases, the intention of the parties is 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 re-purchase. In every case, the question is, what upon a fair construction, is the meaning of the instruments. The converse also holds good and if, on the face of it, an instrument clearly purports to be a mortgage it cannot 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 provisions of section 58(c) of the 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 purports 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 the category of mortgages, therefore it is reasonable to suppose that persons who, after the amendment, propose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words; and if the conditions of section 58(c) are fulfilled, the deed should be construed as a mortgage.

6. Applying the test laid down by the Apex Court in the case of **Chunchun Jha** *(supra)*, it is necessary to consider recital in the document. The document is styled as (मुदत खरेदीखत) (conditional sale). It recited that executor namely defendant No.1 was in need of amount to repay her debts and for the maintenance of her children, she has obtained Rs.51,000/- (मुददल) and executed conditional sale deed of suit property and delivered possession. It further recited that she will pay amount of Rs.51,000/- within 2 years and re-purchase the house. If she failed to repay the amount, the conditional sale would become out and out sale and plaintiff would be entitled to enjoy the house by inheritance as absolute owner thereof.

7. Section 58 of the Act defines the expression “mortgage” as under :

> A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or

future debt, or the performance of an engagement which may give rise to a pecuniary liability.

8. Section 58(c) defines the expression “Mortgage by conditional sale” as under :

> Mortgage by conditional sale.—Where, the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: [Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

9. The learned District Judge while holding that document at Exhibit 83 is a mortgage by conditional sale as defined in section 58(c) of the Act took into account circumstances and observed in paragraph 26 as under :

> “.....(a) Firstly, on the top of the document Exh.83 the parties have referred the document as “conditional sale deed”
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> (b) Secondly, while referring the price of the suit house the parties have not mentioned word as 'price' of the suit house but they choose to write word 'Muddal'.
>
> In my view the Marathi language word “Muddal” means “Principal amount”. The meaning of “Principal amount” has been provided in Law of Lexicon (By Venkataramaiya's Second Edition) as under : The words “principal amount” as used in this sub clause mean the principal money secured by the deed of mortgage and interest which has accrued due before the suit cannot be regard as part of principal amount.
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> After going through the definitions of word “Muddal” (Principal) it appears to me that the plaintiff and defendant No.1 were intended to draft a document of mortgage and not of sale. Had the plaintiff really intended to purchase the suit house in 1988, then he definitely would have referred price of the suit house and would not have referred the same as Principal amount “Muddal.”

> (c) Thirdly, though the plaintiff has purchased whole area of the suit house, he obtained possession of eastern side portion only. Remaining western side portion i.e. one room and open space remained in possession of defendant No.1.
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> In my view a prudent purchaser would not keep part of property with his vendor though he has paid whole consideration of the property. It appears to me that as the deed Exh.83 was mortgage by conditional sale and therefore, only the plaintiff on 09-12-1988 and thereafter has not insisted defendant No.1 to deliver possession of the suit house till filing of suit.
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> (d) Fourthly, though the plaintiff has got executed a registered document of suit house in his favour till filing of suit in the year 1993 he has not got mutated the suit house in his name from the competent authority. This fact goes to show that the plaintiff himself never treated him as owner of the suit house on the contrary his demeanour shows that he is in possession of the suit house only as creditor, and possession of the suit house with him as security of the amount advanced by him to defendants No. 1 to 7.
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> (e) Fifthly, pleading, evidence and admissions of plaintiff speaks in volume that he never treated himself as owner of the suit house. In his plaint plaintiff in the alternative prayers for refund of Rs.56,000/- with interest @ 18% p.a. In evidence he depose that he is ready to accept back Rs.56,000/- with interest from 1988. All these circumstance goes to show that the relations in between plaintiff and defendant No.1 are as creditor and debtor.....”

10. Perusal of the document dated 09/12/1988 shows that while referring the consideration of the suit house, the parties did not mention the word “price” but chose to write the word “Muddal”. The Marathi word “Muddal” when translated in English means “principal amount”. In my opinion, the parties intended to create relationship of debtor and creditor. Mr.Karande submitted that the deed is silent as regards payment of interest. I do not find any merit in his submission as admittedly plaintiff was put in possession of 3 rooms of eastern side of the suit house and was enjoying the same.

Though the plaintiff claims to have purchased the entire suit property, he obtained possession of 3 rooms of eastern side. One room and open space on the western side continued to remain in possession of defendant No.1. Though the plaintiff claims to have purchased the suit house in the year 1988, till filing of the suit in the year 1993, his name was not mutated in respect of suit house in the record of the Competent Authority. During the cross examination, plaintiff expressed his willingness to accept Rs.56,000/- together with interest from 1988. These circumstances clearly militate against the plaintiff's case that it is a conditional sale with a right to re-purchase.

11. After considering the material on record, I do not find that the learned District Judge committed any error in holding that transaction in question is a mortgage by conditional sale. In my opinion, the learned District Judge was justified in allowing the appeal as indicated earlier. In view thereof, no question of law, much less any substantial question of law arises in this appeal. Hence, appeal fails and the same is dismissed.

12. In view of dismissal of the appeal, Civil Application No. 569 of 2012 does not survive and the same is disposed of accordingly.

13. At this stage, Mr.Karande orally applies for continuation of ad-interim order dated 03/04/2012 for a period of 8 weeks from

today. Mr.Kulkarni opposes this prayer.

14. Having regard to the fact that the ad-interim order is operating from 03/04/2012 as also having due regard to the fact that appellant intends to challenge this order before the higher Court, I find that the request made by Mr.Karande is reasonable. Hence, notwithstanding dismissal of this Second Appeal, this order shall remain stayed for the period of 8 weeks from today. Order accordingly.

(R. G. KETKAR, J.)