

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

**SECOND APPEAL NO. 161 OF 2013
WITH
CIVIL APPLICATION NO. 502 OF 2013**

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| 1. Shri. Nanda @ Sadanand Dattu Barmukh |) |
| Age : 57 years, Occ : Agriculture |) |
| 2. Shri. Janardhan Dattu Barmukh |) |
| Age : 55 years, Occ : Agriculture |) |
| 3. Shri. Vasant Dattu Barmukh |) |
| Through his legal heirs |) |
| 3A. Smt. Shalan Vasant Barmukh |) |
| Age : 54 years, Occ: Household |) |
| 3B. Shri. Lavkesh Vasant Barmukh |) |
| Age : 26 years, Occ: Education |) |
| 4. Shri. Narayan Dattu Barmukh |) |
| Age : 51 years, Occ : Agriculture |) |
| All Resident of Chandkhed |) |
| Tal : Maval, Dist. Pune |) |

.. Appellants

V/s.

- | | |
|---|---|
| Shri. Chhotubhai Kasambhai Inamdar |) |
| Age : 72 years, Occ : Farmer, |) |
| R/o. Chandkhed, Tal.: Maval, Dist. Pune, |) |
| Through his Power of Attorney Holder |) |
| Shri. Ayyaz Chhotubhai Inamdar |) |
| Age : 49 Years, Occ : Farmer |) |
| R/o Chandkhed, Tal : Maval, Dist. Pune |) |

.. Respondents

Mr. S. V. Pitre for the appellants.

Mr. Y. S. Jahagirdar, Senior Counsel i/b Ajay Basudkar for the respondents.

CORAM : K. K. TATED, J.
DATED : 04/09/2015.

JUDGMENT:

. Heard learned Counsel for the appellants and learned Senior counsel for the respondents.

2 This Second Appeal is preferred by the plaintiffs challenging the decree dated 06.03.2013 passed by learned District Judge-5, Pune in Civil Appeal No. 520 of 2011 setting aside the decree dated 22.07.2011 passed by the Trial Court in Regular Civil Suit no. 168 of 2002.

3 For the sake of convenience, the nomenclature of the parties will be referred as stated in the plaint i.e. Appellants as plaintiffs and respondents as defendants.

4 The suit land admeasuring 4 Hectors and 69.4 R out of land Gat No. 437 situated within the limits of Village Chandkhed, Taluka Maval, District Pune was the subject matter of the suit. The said property was belonging to the father of plaintiff no.1 namely Dattu Narayan Barmukh. The suit land being a grass fallow land, the father of plaintiff no.1 and the plaintiffs agreed to sell the suit land to the defendant for Rs.6,000/- and accordingly, had executed registered Sale Deed on 21.02.1980 before the Sub-Registrar of Maval.

5 It is the case of the plaintiffs that as per the agreement dated 29.06.1986, the plaintiff no.1 and his father had repaid the amount of Rs.6000/- to the defendant who agreed to reconvey the suit land in favour of plaintiff no.1 and his father and also hand over the possession

of the suit land along with registered Sale Deed dated 21.02.1980 (Exh.28) to the father of plaintiff no.1. As the defendants failed to act as per Agreement dated 29.06.1986 for reconveyancing the suit land in favour of the plaintiff no.1 and his father, the plaintiff filed Regular Civil Suit no. 168 of 2002 for specific performance of contract, declaration and permanent injunction against the defendants. In the said suit, the Trial Court framed following issues :

ISSUES	FINDINGS
1) Does plaintiffs prove that, defendant got executed sale deed dated 21.02.1980 of suit property in lieu of repayment of arrears of Rs.6000/-	In the Affirmative.
2) Whether plaintiffs prove that on 29.06.1986 they repaid the amount of Rs.6000/- to defendant and on the same date, defendant got transferred possession of suit property to plaintiffs by deed dated 29.06.1986?	In the Affirmative.
3) Whether plaintiffs prove that defendant is liable to execute the sale deed of suit property on the strength of deed dated 29.06.1986?	In the Affirmative.
4) Whether plaintiffs prove that they are owner of suit property by way of adverse possession?	Redundant
5) Whether suit is within limitation?	In the Affirmative.
6) Whether defendant prove that plaintiff no.1 and father of plaintiff no.2 to 4 themselves	In the Negative.

executed sale deed of suit property dated 21.02.1980 in his favour, as he was tenant of father of plaintiffs?	
7) Whether plaintiff prove that defendant neglected to execute the sale deed of suit property even issuing notice dated 20.11.2002?	In the Affirmative.
8) Whether defendant obstructed peaceful possession of plaintiffs over suit property in November, 2002?	In the Affirmative.
9) Whether plaintiffs are entitled for Specific Performance of Contract?	In the Affirmative.
10) Whether plaintiffs entitled for permanent injunction, as sought?	In the Affirmative.
11) What order and decree?	As per final order.

6 The Trial Court by judgment and decree dated 22.07.2011, passed a decree directing the defendants to reconvey the suit property by executing the registered Sale Deed before the Sub-Registrar, Vadgaon, Mavel, Pune in favour of the plaintiffs.

7 Being aggrieved by the said decree passed by the Trial Court, the defendants preferred Civil Appeal No.520 of 2011. In the said Appeal, the Appellate Court framed the following points for consideration:

POINTS	FINDINGS
1) Whether the instrument dated 21.02.1980 styled as sale deed has been voluntarily executed by	Yes

plaintiff no.1 and his father Dattu Barmukh in respect of suit property for valid consideration?	
2) Whether there was written or oral agreement between plaintiff no.1, his father and defendant to reconvey the suit land on repayment of Rs.6000/- by plaintiff no.1 and his father to the defendant?	No.
3) Whether the agreement dated 29.06.1986 to reconvey the suit property by parting possession thereof has been voluntarily executed by the defendant for valid consideration?	No.
4) Whether the defendant has handed over original sale deed dated 21.02.1980 at Exh.28 to the plaintiff no.1 and his father on 29.06.1986 by agreeing to reconvey the suit property?	No.
5) Whether defendant has caused obstruction to the possession of the plaintiff over the suit land since Nov.2002?	No.
6) Whether defendant has caused obstruction to the possession of the plaintiff over the suit land since Nov. 2002?	No.
7) Whether the suit is barred by limitation?	No.
8) Whether the plaintiffs are entitled to a decree of specific performance of contract in terms of the agreement dated 29.06.1986?	No.
9) Whether plaintiffs are entitled	No.

to a decree of declaration and perpetual injunction?	
10) Whether the impugned Judgment and decree is legal and enforceable?	No.
11) What order?	Appeal is allowed with costs throughout.

8 The Appellate Court held that the plaintiffs by instrument dated 21.02.1980 i.e. Sale Deed sold the suit land to the defendants. The Appellate Court also held that the plaintiffs failed to prove the execution of subsequent alleged agreement dated 29.06.1986 by the defendants to reconvey the suit property in favour of the plaintiffs. The Appellate Court also held that the suit filed by the plaintiffs was barred by limitation. Hence, the plaintiffs preferred the present Second Appeal.

9 The learned counsel Mr. S. V. Pitre appearing on behalf of the plaintiffs submits that the impugned decree dated 06.03.2013 passed by the learned District Judge-5, Pune in Civil Appeal No. 520 of 2011 is against the justice, equity and conscience and same is liable to be set aside. He submits that the Appellate Court failed to consider the fact that the defendants by subsequent agreement dated 29.06.1986 agreed to reconvey the suit land in favour of the plaintiffs. He submits that even the Appellate Court failed to consider the fact that the plaintiffs repaid the sum of Rs.6000/- to the defendants for reconveyance of the suit land in their favour. He submits that the Appellate Court erred in coming to the conclusion that the suit filed by the plaintiffs was barred by law of limitation. He further submits that the Appellate Court erred

in coming to the conclusion that the notice issued by the plaintiffs to the defendants dated 28.11.2002 (Exh.29) was not duly served to the defendant.

10 The learned counsel for the plaintiffs submits that the Appellate Court erred in formulating the point for determination which was not a issue before the Trial Court i.e. about the limitation. He submits that the Apex Court in the matter of *Santosh Hajari V/s. Purshottam Tiwari, reported in (2001)3 SCC 179* held that while reversing the finding of fact, the Appellate Court must come into close quarters with the reasoning assigned by the Trial Court and then assign its own reasons for arriving at a different finding. He submits that in a matter in hand, the Appellate Court failed to consider the findings given by the Trial Court as well as evidence on record at the time of reversing the decree passed by the Trial Court. On the basis of this submission, the learned counsel for the plaintiffs submits that in the interest of justice, this Hon'ble Court be pleased to set aside the decree passed by the Appellate Court and maintain the decree passed by the Trial Court directing the defendants to execute the reconveyance in respect of the suit property in favour of the plaintiffs. He submits that if the Appeal is not allowed, irreparable loss and injury will be caused to the plaintiffs.

11 On the other hand, the learned Senior Counsel Mr. Y.S. Jahagirdar appearing on behalf of respondents/defendants vehemently opposed the present Second Appeal. He submits that the Appellate Court considered the each and every documents on record and pleadings of the parties and allowed the appeal by setting aside the

decree passed by the Trial Court. Hence, this Hon'ble Court should not entertain the present Second Appeal as there is no substantial question of law arises.

12 The learned Senior Counsel for the defendants submits that the father of the plaintiffs executed the Sale Deed dated 21.02.1980 in respect of the suit land for sum of Rs.6,000/-. He submits that bare reading of copy of Sale Deed shows that there is no provision for reconveyance of the suit land in favour of plaintiff no.1 and/or his father. He submits that the alleged agreement dated 29.06.1986 was produced by the plaintiff in the year 2002. He submits that the Sale deed dated 21.02.1980 is the Sale Deed and not Sale Deed with condition to repurchase. He submits that the plaintiff's father i.e. original executant was alive till 1986 and he had never taken any steps for reconveyance who was the best person to ascertain this. He submits that the plaintiffs though pleaded in the pleading that they had issued the notice dated 28.11.2002 to the defendants by R.P.A.D., but the same was not served on the defendants. Neither the plaintiffs proved the service of the said notice on the defendants nor placed on record any documentary evidence to that effect. He submits that plaintiff in his deposition also admitted that he does not have any knowledge whether the said notice dated 28.11.2002 was duly served on the defendants or not. He submits that the allegation of non receipt of notice was specifically raised by the defendants in their written statement. He submits that plaintiffs with a malafide intention created the story about the notice dated 28.11.2002 for filing of suit.

13 The learned Senior Counsel for the defendants submits that the Sale Deed dated 21.02.1980 was executed by the plaintiff's father. Admittedly, in the said Sale Deed, there is no clause for reconveyance of the suit land. He submits that as per clause 58(c) of the Transfer of Properties Act, mortgage transaction or Sale transaction with condition to repurchase must be part of the said document. He submits that these facts were not considered by the Trial Court properly. He submits that the Appellate Court considered the evidence on record and documents and rightly held that predecessor of the plaintiffs sold the suit land to the defendants by Sale Deed dated 21.02.1980 without any condition for repurchase.

14 The learned Senior Counsel for the defendants relies on the Judgment of the Apex Court in the matter of ***Vanchalabai Ragunath Ithape (dead) by Lrs. V/s. Shankarroa Baburao Bhilare (dead) by Lrs. Reported in 2013(6) Mh. L.J. 80.*** In that authority, the Apex Court held that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the resale. He relies on paragraph 14 of that judgment which reads thus:

“14) From the perusal of the aforesaid provisions especially, section 58(c), it is evidently clear that for the purpose of bringing a transaction within the meaning of mortgage by conditional sale' the first condition that the mortgage ostensibly sells the mortgage property on the condition that on such payment being made, the buyer shall transfer the property to the seller. Although there is presumption that the transaction is a mortgage by conditional sale in cases where the whole transaction is in one document, but merely because of a term incorporated in the same document it cannot always be accepted that the transaction agreed between the parties was a mortgage

transaction.”

15 The learned Senior Counsel for the defendant also relies on the Judgment of the Apex Court in the matter of **C. Cheriathan V/s. P. Narayanan reported in 2009(4) Mh. L. J. 732** in which the Apex Court held that the condition of repurchase should be embodied in the documents which effects or purports to effect the sale. Paragraph 8 reads thus:

“8. One of the ingredients for determining the true nature of transaction, therefore, is that the condition of repurchase should be embodied in the document which effects or purports to effect the sale. Indisputably, the said condition is satisfied in the present case.”

16 The learned Senior Counsel for the defendant submits that the Appellate Court also held that the suit filed by the plaintiffs was barred by limitation because the plaintiffs and their predecessor had knowledge about the Sale Deed executed by them on 21.02.1980 and they filed the suit on 28.12.2002 i.e. after more than 20 years. He submits that as per Article 54 of Limitation Act, suit for specific performance required to be filed within three years from the date when the cause occurred.

17 The learned Senior Counsel for the defendants submits that in the present Second Appeal, the plaintiffs failed to make out any case for substantial question of law. He submits that the Apex Court in the matter of **Pakeerappa Rai V/s. Seethamma Hengsu (Dead) by Lrs. & Ors. reported in (2001)9 SCC 521** held that erroneous finding of fact even if grave in nature, could not be interfered with the Second Appeal. Paragraph 2 of the said judgment, reads thus:

“2)Learned Counsel appearing on behalf of the appellant urged that the finding recorded by the first Appellate Court that auction purchaser was not a stranger to the suit is based on no evidence on record and inasmuch as the conclusion arrived at is erroneous and the High Court committed serious mistake of law in not interfering with the said finding. Plaintiff Seethamma in her evidence stated about the nearness of the auction purchaser with other defendants. It was brought on record that auction purchaser was near to the husband of Laxmi who was one of the defendants in O.S. No. 133/1963 which was tried along with the suit out of which the present appeal arises. The first Appellate Court, on the basis of the said evidence, came to the conclusion that the auction purchaser was not a stranger to the suit. Under such circumstances, it cannot be urged that the conclusion arrived at by the court below was erroneous. The position would be different if the High Court has the jurisdiction to reappraise the evidence. In such a situation the High Court might have come to a different conclusion. But the High Court in exercise of power under Section [100](#) CPC cannot interfere with the erroneous finding of fact howsoever the gross error seeming to be. We, therefore, do not find any merit in the contention of the learned Counsel for the appellant.”

18 On the basis of these submissions, the learned Senior Counsel for the defendants submits that there is no substance in the present Second Appeal and same is required to be dismissed summarily.

19 I heard both the sides at length. The learned Counsel for the appellants placed on record a copy of plaint, written statement, deposition of the parties, sale deed dated 21.02.1980, copy of agreement dated 29.06.1986 and other documents. It is to be noted that in the present proceeding, the plaintiffs filed Regular Civil Suit No. 168 of 2002 for Specific Performance of Agreement, declaration and permanent injunction against the defendants. Bare reading of the

registered Sale Deed dated 21.02.1980 shows that the plaintiff and his father sold the suit land to the defendants for an amount of Rs.6000/- without any condition for repurchase. Though the plaintiffs relied on the agreement dated 29.06.1986 by which the defendants agreed to reconvey the suit land in their favour, that agreement was not admitted by the defendants. Even the plaintiffs failed to prove the same by cogent evidence to show that the said agreement was duly signed by the defendants.

20 In order to consider as to whether the document is a document of mortgage by conditional sale, or is a sale with condition of repurchase, the distinction between two transactions must be borne in mind. In the former case, there is a relationship of debtors and creditors and the transfer is by way of security for repayment of debt, whereas in the later case, there is condition of reconveyance in the event the amount equivalent to the consideration is paid by the vendor to the purchaser. If the condition of repurchase is contained in a separate deed, the original sale deed can never be regarded as mortgage in view of the provisions of Section 58(c) of the Transfer of Property Act, 1882.

21 It is true that the condition of the repurchase is not contained in the document of transfer itself, but it is contained in a separate document. The document of transfer cannot be regarded as a mortgage by a conditional sale, in view of provisions of Section 58(c) of the Transfer of Property Act, where a condition is contained in a separate document. The deed of transfer would be regarded as an out-and-out sale and the condition contained in a separate document would only be

regarded as separate agreement for reconveyance. In that event, the conditions for reconveyance including condition of time would be required to be strictly complied. In case of Agreement for Sale of immovable property, time is generally not an essence of Contract. However, the Agreement to reconvey is essentially entered by the purchaser with the vendor in the nature of concession, wherein time would ordinarily be regarded as an essence of contract. In that event, the original vendor would be required to strictly comply with the conditions including the condition of time, contained in the agreement of reconveyance.

22 Admittedly, in the case in hand, there was no provision in the Sale deed dated 21.02.1980 to reconvey the property to the plaintiffs. There was an alleged separate agreement dated 29.06.1986. Therefore, in view of Section 58(c) of the Transfer of Property Act, in view of the Judgment of the Apex Court in the matter of Vanchalabai (supra) and in the matter of C. Cheriathan (Supra), it is crystal clear that on the basis of sale deed dated 21.02.1980 and the subsequent agreement dated 29.06.1986, the plaintiffs are not entitled for decree to direct the defendants to execute the reconveyance in respect of the suit land in their favour. These facts are properly considered by the Appellate Court, hence, I do not find any reason to interfere in the well reasoned order on this point.

23 The second submissions made by the learned Counsel appearing on behalf of plaintiffs about the limitation. He submits that the Appellate Court erred in coming to a conclusion that the suit filed by the plaintiffs was barred by the limitation. Admittedly, in the present

proceeding, the plaintiffs relied on the subsequent agreement for reconveyance dated 29.06.1986. This itself shows that plaintiffs had knowledge that the defendants were not ready and willing to reconvey the suit property therefore, the plaintiff should have filed the suit within three years from the said refusal by the defendants. The plaintiffs had filed the suit on 28.12.2002. Hence, the Appellate Court in paragraph 55 of the impugned decree rightly held that the suit filed by the plaintiffs was barred by limitation.

24 In any case, the plaintiffs failed to make out any substantial question of law in the present Second Appeal. The Apex Court in the matter of Pakeerappa Rai (Supra) held that erroneous finding of fact even if grave in nature could not be interfered with the Second Appeal.

25 Considering the submissions made by the learned Counsel for the Plaintiffs and the authorities relied by the respondents/defendants as stated herein above, I am of the opinion that the plaintiffs have failed to make out any substantial question of law in the present Second Appeal,

26 Hence, Second Appeal stands rejected.

27 In view of the rejection of the Second Appeal, nothing survives in the Civil Application. Hence, same is dismissed as infructuous.

(K.K.TATED, J.)