

JPP

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

SECOND APPEAL NO. 587 OF 1993

Mr. Shivaji Dagadu Mahangade,
aged about 52 year, agriculturist,
Residing at Parkhandi, Taluka Wai,
District – Satara.

... Appellant.
(Orig.Defendant)

V/s.

Aba Gopala Shinde, since deceased by
his heirs and legal representatives

1. Smt. Kamal w/o. Ankush Shinde,
aged about 55 years.
2. Sou. Sunita Sunil Pol
aged 23 years.
3. Ramdas Aba Shinde
aged about 35 years.
4. Smt. Shakuntala Baburao Pol
aged about 52 years.
5. Smt. Chhabu Bajarang Jadhav
aged about 42 years.
6. Smt. Shubhadra Yeshwant Pawar
aged about 44 years.

Nos. 1, 2 and 4 residing at Parkhande,
Taluka Wai, District Satara.

Nos. 3 and 5 residing at Dhavadi
(Pirachiwadi), Taluka Wai,
District Satara.

No. 6 residing at Bandal Chawl,
4th floor Dattaguru Lane, Afuwala Lane,
Sarweshwar Temple, Mumbai – 400 070.

No.7 residing at Parkhandi (Satelwadi),
Taluka – Wai, District – Satara.

... Respondents.

Mr. Surel Shah for the Appellant.
Mr. Mohan Dhamal for the Respondents.

CORAM : N.M. Jamdar, J.

22 April, 2016.

ORAL JUDGMENT :-

This Second Appeal is filed by the Original Defendant challenging the judgment and decree passed by the Civil Judge, Junior Division, Wai and the dismissal of the Appeal filed by the Appellant by the District Judge, Satara. The Civil Judge decreed the suit holding that the Respondent – Plaintiff was entitled to redemption of mortgage, reconveyance and possession of the suit property on his depositing the mortgage money of Rs.19,850/-. This judgment and decree has been confirmed by the District Judge.

2. The suit land is an agricultural land admeasuring 4 acres 3 gunthas bearing Gut No. 90 situated at Village Parkhandi, Taluka Wai, District Satara. The genesis of the dispute is a document dated 1 March 1972. The Respondent filed a Suit bearing No. 254 of 1983 contending that by a mortgage dated 1 March 1972, an amount of Rs. 19,850/- was received as a loan from the Appellant and since the relation between the parties were good, the Appellant was put in possession. In this mortgage deed it was agreed that, upon repayment of the loan amount, the Appellant would hand over the possession of the property. If the Respondent failed to pay the amount, within period of 10 years, then the document dated 1 March 1972 was to be considered a sale deed. It was the case of the Respondent that the Respondent on many occasions went to the Appellant to accept the amount as repayment and to re-convey the property but the Appellant avoided to do so. On these averments the Respondent filed the suit for redemption and re-conveyance.

3. A written statement was filed by the Appellant contending that by the document dated 1 March 1972, the Respondent had agreed to sell the land to the Appellant. The document was a conditional sale deed and the sale was absolute after the period of 10 years if no repayment was made. Only within the period of 10 years the Respondent had a right to re-purchase the land, which option was never exercised. It was contended that the Respondent had earlier filed a Suit bearing No. 275 of 1976 reforming the same document, which was dismissed. It was contended that the deed of 1 March 1972 is not a document of mortgage but is of sale.

4. The Civil Judge, Wai, framed issues as to whether the Respondent proved that the document dated 1 March 1972 was a mortgage deed and whether he was entitled for redemption and possession, and answered those issues in affirmative. The Civil Judge held that since the Deed was a mortgage deed and no ownership rights were transferred to the Appellant, the Respondent was entitled for redemption of mortgage upon his depositing the mortgage amount. Accordingly, by the judgment and decree dated 31 August 1991, the Civil Judge decreed the Suit. The Civil Judge however recorded a finding of fact that the amount was not repaid by the Respondent during the period of 10 years nor did he make a genuine attempt to do so. Appeal No. 422 of 1991 was filed by the Appellant in District Court, Satara. The District Judge confirmed the conclusions reached by the Civil Judge. The District Judge held that the document dated 1 March 1972 was a mortgage deed. The District Judge held that the Appellant did not take any steps to get the specific performance of the document and therefore, his case of an conditional sale could be accepted. The Appeal was dismissed by the District Judge on 23 September 1993.

5. The Second Appeal was admitted on 16 December 1993 after framing the following questions of law :-

“ 1. The lower Courts ought to have held that the document (Ex.37) dated 1/3/1972 was a sale with condition to repurchase and not a mortgage by conditional sale.

2. The lower Courts ought to have held that the Plaintiff was bound to file a suit for reconveyance.

3. The lower Courts ought to have held that the Plaintiff's suit for redemption of mortgage was not maintainable.

6. Mr. Surel Shah, learned Advocate for the Appellant submitted : As per the test laid down in the decision in the case of *Vanchalabai Raghunath Ithape v/s. Shankarrao Baburao Bhilar*¹ and the decision in the case of *Nana Tukaram Jaikar v/s. Sonabai Madhav Saindate*² all the ingredients of a sale with a condition to repurchase have been fulfilled, in respect of the Deed in question. There was no relationship of debtor and creditor, and no charge was kept for the loan. The Deed envisaged an absolute transfer. After period of ten years, it was to become an absolute sale. The parameters which were laid down in the above two decisions apply to the factual possession at hand. Merely because the condition for repurchase is not contained in a separate document, it will not be of much importance. Both the Courts have not considered the document dated 1 March 1972 in its proper perspective and have failed to apply the tests which are necessary to distinguish a mortgage by way of conditional sale from a sale with condition of repurchase. In the earlier Suit filed by the Respondent for injunction, the Respondent specifically pleaded that the deed was a conditional sale. Furthermore, the present Suit is barred under Order II Rule 2 of the Civil Procedure Code. Only after the dismissal of the Suit for injunction, the present Suit for mortgage has been filed. Both the Courts were not right in placing the entire burden on the Appellant and the Respondent cannot

1(2013) 4 BCR 491

2(1982) Mh.L.J. 538

benefit from the case of the Appellant. Both the Courts have rendered a clear finding of fact that the Respondent did not make a genuine attempt to pay the amount within period of ten years and therefore, by virtue of the clauses contained in the deed, the sale has become absolute. The admission of the Appellant cannot be used against the Appellant since he was never confronted with the same.

7. Mr. Mohan Dhamal, the learned Advocate for the Respondent submitted : Perusal of the Deed clearly shows that it is a mortgage by way of condition of repurchase. It is specified in the Deed that the Respondent was indebted to a bank, because of which the Deed was being executed. The yield received from the land was to be taken by the Appellant and therefore, this could be treated as in lieu of the interest. The land was fertile with a well in it and is of much higher value, as per admissions of the Appellant than the one mentioned in the Deed. The Respondent made all the efforts to pay the amount to the Appellant but on some pretext or the other the Appellant avoided to accept the amount. The Respondent even sold the bullocks to raise the amount. As regard the case of the Respondent in the earlier Suit, that the Suit was for injunction and therefore, question of the Deed being a mortgage or sale did not arise therein. The Appellant in Suit No. 346 of 1984 filed by the Appellant for compensation, had given admissions that the Deed was mortgage. No error was committed by both the Courts in coming to the conclusion that the Deed was a mortgage by way of conditional sale. Pursuant to the decree passed by the Civil Judge, the amount has already been deposited. The Second Appeal deserves to be dismissed.

8. The dispute between the parties centers around the Deed dated 1 March 1972. According to the Appellant, the Deed is a Sale with a Condition to Repurchase. According to the Respondent it is a Mortgage by way of Conditional Sale. The vexed issue as to whether a Deed is a Mortgage by way of Conditional Sale or a Sale with a Condition of Repurchase, comes up before the Court for consideration regularly.

9. Section 58(a) and 58(c) of the Transfer of Property Act deal with Mortgages. Section 58(a) defines a Mortgage as a transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan and also existing or a future debt, or the performance of an engagement which may give rise to a pecuniary liability. Section 58(c) defines a Mortgage by way of Conditional Sale to cover a situation where a mortgagor ostensibly sells the mortgaged property on the condition that on default of payment of the mortgaged money on a certain date the sale shall become absolute, or on the condition that on such payment being made, the sale will become void and that the buyer shall transfer property back. In the case of *Nana Tukaram Jaikar v/s. Sonabai Madhav Saindate*³, the learned Single Judge of this Court had an occasion to undertake the task of interpreting a deed to ascertain as to whether the document in question was a mortgage by a conditional sale or a sale with condition of repurchase. The learned Single Judge referred to the decisions of the Apex Court in the case of *Chunchun Jha v/s. Ebadat Ali*⁴ and *Bhaskar Waman Joshi v/s.*

³ (1982) Mh.L.J. 538

⁴ AIR 1954 SC 345

*Shrinarayan Rambilas Agarwal*⁵, and held that conveyance with nothing to show a debtor creditor relationship does not cease to be an absolute conveyance and become mortgage by mere stipulation of repurchase. In the case of one *Vanchalabai Raghunath Ithape v/s. Shankarrao Baburao Bhilare*⁶, the Apex Court took a review of the earlier decisions on the subject and laid down guidelines for interpreting a deed to ascertain its character as to mortgage or a sale. In the present case however the crux is what is the effect of non payment of the amount by the Respondent within ten years as the deed admittedly stipulates that after ten years, and upon non-repayment the sale will be absolute.

10. The Deed was executed on 1 March 1972. It refers to a property situated at Village Parkhandi, Taluka Wai, District Satara. The Deed is between Shivaji Dagadu Mahangade and Aba Gopala Shinde, both are agriculturists. It is stated therein that one month before the Deed, the Respondent had taken loan of Rs.9,000/- from a Co-operative Bank and for that purpose Aba Shinde (Respondent) has taken Rs.10,000/- from Shivaji Mahangade (Appellant). The Deed thereafter states that to repay the amount with conditional sale is executed of the ancestral property and the possession with all the annexures is handed over to the Appellant. It is stated there the property will be used for a period of 10 years and before 10 years the Respondent will hand over Rs. 10,000/- and after receipt of this amount, the property will be handed over to Respondent. If Respondent fails to pay the amount within period of 10 years, then the deed will not be considered as a conditional sale

⁵AIR 1960 SC 301

⁶(2013) 4 BCR 491

deed but a final sale deed and thereafter, Respondent will have no interest left himself or anybody claiming through him. It was specified that this will be a document of mortgage. Thus, the document shows some ingredients of sale and some of mortgage. It is precisely because this language of the deed that dispute has arisen between the parties.

11. The Civil Judge held that the language of the Deed makes it crystal clear that it was mortgage. The Civil Judge laid much emphasis on the statement made at the bottom of the deed to hold that it is a mortgage. The Civil Judge then considered whether the Respondent paid the mortgage money within 10 years. The Civil Judge observed that the Respondent gave no particulars as to when he went with the money and how much money he had raised and kept ready. The Civil Judge considered the evidence of the Respondent in detail and in fact held that in absence of repayment, in view of the condition of Deed, the sale had become absolute. But the Civil Court ignored that conclusion and directed the Appellant to hand over the possession. As regard the admission of the Respondent in the earlier suit, the Civil Judge held that, no doubt the Respondent had changed his stand but it had to be seen whether the ownership was transferred. The argument of the Appellant based on Order II Rule 2 of the Code was rejected.

12. The judgment of the Civil Judge contains self-contradictory reasoning at various places. The Civil Judge in fact held that for non-payment by the Respondent in time as per the Deed, the sale had become absolute in favour of the Appellant. The District Judge held that the

Appellant was in possession of the property and also confirmed the finding that the Respondent did not pay the amount in time. The District Court held that the earlier Suit filed by the Respondent – Plaintiff was only for perpetual injunction and therefore, the dismissal of the Suit will not come in way of the Respondent. The First Appellate Court also held that the document was a stop gap arrangement.

13. If the Deed is read as it is, it clearly provides that if the Respondent failed to pay the amount within period of 10 years then the Respondent would lose the rights to the property and the Appellant will become owner thereof. There cannot be a dispute regarding this position as it is the clear recital in the deed. Both the Courts have rendered a factual finding that the Respondent – Plaintiff did not make any attempt to pay the amount within period of 10 years. When the Civil Judge recorded this finding, the Respondent did not file any cross-objection. Same is the position in this Second Appeal. The District Judge has also confirmed that the Respondent did not pay the amount within period of 10 years. The learned Counsel for the Respondent contended that the Respondent had gone with the amount but he was turned away by the Appellant. This version has not been accepted by both the Courts and this factual finding has become final. Both the Court after rendering this factual finding failed to give effect to the sequitor. The sequitor being that the sale had become absolute. Nothing stopped the Respondent to send the money by money order if the Appellant was not accepting the amount. Both the parties consciously signed the deed, which contained a clear stipulation that if amount is not paid within ten years, the deed was

to be treated as a sale deed, and the Respondent was fully aware of the same. In fact the Trial Court at one place came to the conclusion that the sale had become absolute but again deviated therefrom to hold that mortgage had to be redeemed. This error has been repeated by the District Judge. Therefore, even if the Deed is termed in either forms, the consequence of non-payment within 10 years cannot be lost sight of.

14. Apart from this position, both the Courts have not considered the conduct of the Respondent and the interpretation placed by him. The Respondent had filed a Suit earlier for injunction bearing No. 275 of 1976. The copy of the Judgment in the Civil Suit No. 275 of 1976 is part of the record. In this Suit it was the case of the Respondent therein that the Deed was a conditional sale deed. It was the case of the Appellant that it was an out and out sale deed. The contest between the parties was only as to whether it is a conditional sale deed or an out and out sale deed. Even the issue that was framed was whether the Deed was a hollow document. The Respondent therefore went to Court with a clear case that there was a conditional sale deed. There was no argument at all that the deed was a mortgage. The Court came to the conclusion that no fraud was proved by the Respondent while executing the conditional sale deed and the Deed was valid. By a detailed discussion on rival contention the learned Civil Judge dismissed the Suit by the judgment and order dated 30 July 1983. Thereafter, the present Suit was filed. The District Judge has noted that there is a change in stand by the Respondent. Though the present suit cannot be said to be not maintainable but the clear-cut stand of the Respondent as far as an interpretation of the deed is

concerned, was clinching. The Respondent was confronted with the admission in the evidence and the Respondent had to accept the said position. It is laid down by Apex Court in the case of *Union of India v/s. Ibrahim Uddin and Anr.* reported in [2012(5) All MR 462] that admission is a best piece of substantive evidence but an opportunity has to be given to the person under cross-examination to tender his explanation. This course of action was followed. As far as the so called admission of the Appellant is concerned, no such course of action was followed and therefore, it cannot be held against him. The argument that the earlier Suit was only for injunction cannot be accepted.

15. The District Court also committed an error in placing the burden on the Appellant who was the defendant in the Suit. It is settled law that the initial burden always lies on the Plaintiff and because the Appellant did not file the Suit for specific performance, the case of the Respondent – Plaintiff is not strengthened. As regards the other arguments regarding the price of land, etc. are considered, they lose significance in view of the non-payment.

16. Going by the plain language of the Deed, if the amount was not repaid by the Respondent within the stipulated period, the deed was to be considered as an absolute sale deed and Appellant was to become owner of the property. Both the Courts have rendered the finding of fact that the amount was not paid within period of 10 years. In spite of this finding of fact, both the Courts have directed the Appellant to hand over possession to the Respondent on the basis that the mortgage had to be

redeemed which is clearly erroneous.

17. In the circumstances, the judgment and order dated 23 September 1993 passed by the Additional District Judge, Satara in Regular Civil Suit No. 422 of 1991 and the judgment and order dated 31 August 1991 passed by the Civil Judge, Junior Division Wai, District Satara in Regular Civil Suit No. 254 of 1983 are required to be quashed and set aside and are accordingly set aside. The Appeal is allowed in above terms. No order as to cost.

(N.M. Jamdar, J.)