IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 538 of 2015

1. Indubai W/o Mahadu Badgujar,
age 72 years occupation agriculture
R/o Pimparkhed Taluka Bhadgaon Dist. Jalgaon.

2. Sanjay S/o Mahadu Badgujar,
age 47 years occupation & R/o as above.

3. Nandkishor S/o Mahadu Badgujar,
age 42 years occupation & R/o as above. … **APPELLANTS.**
(Original Defendants No. 1, 3 & 4)

VERSUS

1. Gangaram S/o Shankar Mali,
age 52 years occupation agriculture
R/o Pimparkhed Taluka Bhadgaon Dist. Jalgaon
(Original plaintiff)
2. Rajendra S/o Mahadu Badgujar,
age 47 years occupation & R/o as above.
(Original Defendant No.2)
...RESPONDENTS

Mr S.S. Choudhary, Advocate for appellants
Mr A.S. Bajaj, Advocate for respondent No.1

CORAM : NITIN W. SAMBRE, J.

DATE : 17th July 2017

ORAL ORDER :

This appeal is by original defendants.

2. Respondent No.1/plaintiff filed Regular Civil Suit No. 7 of 2008 in the Court of Civil Judge (Junior Division), Erandol, District Jalgaon, on February 8, 2008 against present appellants for declaration and perpetual injunction. It was the claim in the suit that agricultural property, mentioned in the plaint, was owned by husband of defendant No.1 and father of defendants No.2 to 4, Madhav Shankar Badgujar, which, upon death of original owner, stood mutated in the names of appellants/defendants.

3. It is claimed that on December 28, 1989, after accepting amount of Rs. 8000/-, registered deed of conditional sale was executed and possession thereof was handed-over to respondent No.1/plaintiff, resulting into effecting mutation entry in favour of the plaintiff.

4. Though the said document is titled as deed of mortgage by conditional sale, it is case of the plaintiff that it was purely a conveyance of conditional sale. The condition incorporated in the said deed Exh. 52, contains recital that the defendants/owners shall repay amount of Rs. 8000/- within five years and the land will be reconveyed to the defendants by bearing 50% expenses, each, by plaintiff and defendants.

5. Based on the aforesaid factual matrix, since within five years

from the date of execution of deed viz. December 28, 1989, amount of Rs. 8000/- was not paid to the plaintiff, the plaintiff becomes absolute owner of the property. As such, the suit was brought into action on February 2, 2008.

6. The defendants/appellants by filing written statement Exh. 16 admitted execution of document Exh. 52, however, denied the suit claim.

7. The appellants/defendants tried to establish that the original executor of the deed Exh. 52 died within a year of execution of Exh. 52 i.e. on March 29, 1990.

8. It is further claimed that on March 13, 1993, defendants/appellants, particularly, appellant No.1 repaid amount of Rs. 8000/- to the plaintiff, in cash, when an assurance was given to reconvey the said land after few days, but the same was not honoured by the respondent/plaintiff. It is further claimed that the respected personalities of the village also tried to intervene in the matter. It is further claimed that after she came to know about the mutation in the 7/12 extract, she filed application to Tahsildar for correction and, as such, sought dismissal of the suit.

9. The Trial Court framed issues at Exh. 31, which includes the ownership of the original plaintiff /respondent herein, which was partly

answered in favour of the respondent. So far as declaration that the plaintiff is owner of the suit property is concerned, the same was observed to be not proved and, as such, the prayer of the respondent for injunction was also rejected. The Trial Court framed an issue whether defendants proved that suit of the plaintiff was false one, and answered in favour of the defendants. While doing so, suit came to be dismissed on September 30, 2009, by the Judgment and decree passed by the Civil Judge (Junior Division), Erandol.

10. The respondent/plaintiff feeling aggrieved, preferred Regular Civil Appeal No.200 of 2009 on October 12, 2009, which came to be allowed by the Principal District Judge, Jalgaon,on November 15, 2014, declaring the plaintiff/respondent as owner of the suit property and clamped the injunction against appellants/defendants by restraining them from obstructing the possession of the plaintiff over the suit property.

11. As such, this Second Appeal by the original defendants.

12. Learned Counsel Shri Choudhary, appearing for the appellants/original defendants, urged that once the Trial Court having appreciated evidence brought on record, has noticed that the present respondent/plaintiff had failed to demonstrate his ownership over the suit

property and also the claim for grant of injunction, the lower Appellate Court has committed an error by reversing the said Judgment, merely because a separate view is possible. Shri Choudhary then would urge that the document Exh. 52 is titled as Mortgage by Conditional Sale and, as such, therefrom it could be easily inferred that it was a mortgage and there was no intention of original owner to create any ownership interest in favour of the respondent/plaintiff. According to him, the Trial Court rightly invoked the provision of Section 58(C) of the Transfer of Property Act to negate the claim of the plaintiff and, as such, according to him, the appeal needs consideration.

13. According to him, the question of law, that is involved in the appeal is, whether the lower Appellate Court has committed an error in recording finding that Exh. 52 is a deed of Conditional Sale and not a Mortgage by Conditional Sale.

14. Per contra, Shri Bajaj, learned Counsel for the respondent/original plaintiff would produce copy of Exh. 52 before this Court, which is not disputed by the learned Counsel for the appellants. He would take me through the recitals of said document so as to make out a point that the deed in question was a Conditional Sale and not Mortgage by Conditional Sale. He would rely upon the recitals in the

deed Exh. 52 acknowledging receipt of consideration of Rs. 8000/- and the condition on which said document was executed viz. the owner to refund amount of Rs. 8000/- to respondent/plaintiff within five years and the plaintiff to reconvey the property after bearing 50% expenses. According to him, the execution of the document Exh. 52 is not in dispute and what is disputed is that the it was a Mortgage and not Conditional Sale.

15. According to him, in such an eventuality, the contents of the document are required to be appreciated and not the title. This is what is exactly done by the Appellate Court, is the submission of the respondent, who sought dismissal of the suit.

16. Considered rival submissions. It is not in dispute that the execution of the document Exh. 52 by the parties to the proceedings through their predecessor-in-title viz. through the ancestor of the defendants. The document Exh. 52 is titled as Mortgage by Conditional Sale executed on 28th December 1989, which is a registered document. The said document reflects in the recitals that the conditional sale is executed by way of mortgage and the possession is handed-over as the defendant has received Rs. 8000/-. Further, recital specifically of the condition of the said deed is, within five years, Rs. 8000/- will be repaid to the plaintiff and the plaintiff and defendants after bearing 50%

expenses, each, towards shall reconvey the property to the defendants.

17. The execution of the document as stated here-in-before is not in dispute. However, what is case of the defendants/appellants is that defendants/appellants have repaid the amount to the plaintiff, particularly, by defendant No.1 on March 13, 1993, however, it is plaintiff who refused to reconvey the property in favour of the defendants.

18. If the aforesaid evidence of the defendants is accepted, particularly, execution of the document, when the document is not in dispute, what is claimed by the defendants is payment of amount in cash, way back in 1993, and since then till filing of the suit by the plaintiff/respondent, the defendant has not taken any steps either by issuing any notice or by filing suit for Redemption of Mortgage. If it is case of the defendants in defence that it was Mortgage by Conditional Sale and defendant No.1 has repaid amount to the plaintiff on March 13, 1993 in cash, there is no reason for the defendants to wait for till filing of the suit by the plaintiff so as to get property reconveyed, at least there was no legal impediment as such.

19. In the aforesaid background, if we go on observing the conduct of the defendants who claim to be the owner of the property and possessor thereof, in view of repayment of loan amount of Rs. 8000/- in

1993, the defendants/appellants, in my opinion, have failed to establish payment of the amount, and as a consequence, recovery of possession of the property.

20. Though in the evidence of the defendant, it has come on record that by virtue of Exh. 52, possession was handed-over to the plaintiff/respondent, however, in her cross-examination, she has admitted that in the 7/12 extract in other rights column, the name of the plaintiff is mentioned. A note must also be taken of the fact that the revenue entries in the 7/12 extracts are only required to be read for the fiscal purposes and cannot be considered as a final document to rely upon for inferring possession of the defendants. The defendant, rather, has not explained as to how defendant came in possession, as alleged, as she herself has come out with the case that no document was executed reconveying the property in favour of the plaintiff.

21. Though the document exh. 52 does not speak of any specific recitals conferring rights in favour of the plaintiff to become owner of the absolute property, however, the fact remains that the defendant has not established repayment of amount of Rs. 8000/- on 13th March 1993 and receipt of the possession.

22. In the wake of above, the finding recorded by the learned lower Appellate Court is required to be revisited.

23. Respondent has relied upon judgment of the Apex Court in the matter of **Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. and another, reported in AIR 1992 Supreme Court 1236,** particularly paragraphs No. 12, 13, 14 , 16, 18 and 19, which read thus:

> "12. The learned counsel for the respondents would urge that there is nothing to indicate by reading a document that there is any relationship of the debtor and the creditor. What the executant of the document did was in discharge of the prior debts he sold the property for a sum of Rs.5,000/-. The fact that there was a previous relationship of the debtor and the creditor will have no bearing in construing the document.
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> *13. The attendant circumstances could be looked into only to gather the intention. Such an intention, if explicitly expressed in the document itself, there is no scope for looking at the attendant circumstances. If, therefore, there is no relationship of the debtor and the creditor, the question of it being a mortgage by conditional sale does not arise.*
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> *14. On the date of the execution the title is transferred. The option for repurchase is to be exercised within a period of five years. Upon such payment there will be reconveyance in favour of the executant of the document. But strangely, there is no corresponding right for the mortgagee to foreclose the right of redemption. These were the points held in favour of this respondent, and each*

one of the reasons is valid.

15. …...

16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex.26 dated 11.12.1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter.

17. …..

18. The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right. (Emphasis supplied)

It is this distinguishing point which has to be borne in mind *because an argument was levelled that in Chunchun Jha's case (**AIR 1954 SC 345**) also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference.*

19. The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised. While the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the documents were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well settled in law that the right of redemption and foreclosure are coextensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale."

24. In the aforesaid background, if the contents of Exh. 52 are assessed, the said document fixed of Title of Mortgage by Conditional Sale. It also in the recitals speaks of words "Mortgage by Conditional Sale", however, it contains another recital that the property can be enjoyed by the plaintiff as a owner. It further speaks that upon paying amount of Rs. 8000/-, within five years, the same will be reconveyed.

25. In the wake of recitals in Exh. 52 as are discussed here-in-

above , this Court is prompted to take a view, particularly, when there is a recital that plaintiff should enjoy property as its owner, and further in the background of the fact that repayment of amount of Rs. 8000/- by defendant No.1, as alleged, to be repaid on March 13, 1993, is not proved, the lower Appellate Court has rightly decreed the suit of the plaintiff.

26. In the aforesaid background, having regard to the scheme of Section 58, it will be appropriate, in my opinion, to observe that the view taken by the Appellate Court is a possible view. No fault can be noticed with the findings recorded. As such, the appeal fails and stands dismissed.

(NITIN W. SAMBRE, J.)

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