IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.306 OF 1994

Pandurang Maruti Dombale …Appellant
(Original Appellant)

vs.

Bapurao Piraji Owal & Ors. …Respondents

….

Mr. Mahesh Rawool, i/b. Prafulla Shah, for the Appellant.

Mr. Madhav Jamdar, a/w. Mr. Sushil Inamdar, i/b. K.B. Sonwalkar, for Respondent Nos. 1. 2. 3A to 3D, 3F and 3G.

…....

CORAM : S.C. GUPTE, J.

DATED : 25 JANUARY 2017

(ORAL JUDGMENT) :

. This Second Appeal challenges a judgment and order of Additional District Judge at Satara in Regular Civil Appeal No.291 of 1988. By the impugned judgment and order, the learned District Judge allowed the appeal of Respondent Nos. 1 to 3 (Original Defendants) from a judgment and decree passed in the suit filed by the Appellant in the Court of Civil Judge, Junior Division at Phaltan.

2. The suit was for recovery of possession of the suit property and profits on the basis of a contract of conditional sale dated 22 November 1972. The Appellant's case is that the predecessor-in-interest of Defendant Nos. 1 and 2 and their mother- Defendant No.3, one Piraji Krishna Owal, was the owner of the suit property. He took an amount of

Rs. 2,500/- from the Appellant and executed a registered conditional sale in his favour. Though the document of conditional sale recited that the possession was given to the Appellant on the date of execution, it is an admitted position that the possession was not so delivered. It is the Appellant's case that the amount of Rs.2,500/- was not repaid by Piraji within the stipulated period of five years and that the conditional sale in favour of the Appellant has become absolute. The Appellant had, accordingly, in his suit prayed for possession of the property. The plaint shows that it is the Plaintiff's (Appellant's) own case that the amount received by the Appellant towards this conditional sale was mortgage money and that this mortgage money was not received back by the Appellant within the stipulated period of five years. The plaint *inter alia* contains a prayer for foreclosure, i.e. a declaration that in case the Defendants were unable to pay the mortgage money, their right of redemption may be treated as forfeited. There is no manner of doubt that this suit, therefore, is based on a mortgage by conditional sale and prays for a decree of foreclosure. The Defendants, whilst opposing the suit, have filed a counter-claim for redemption of mortgage, and deposited the mortgage money in Court.

3. The Trial Court came to a conclusion that the oral and documentary evidence on record did not show that the document in question was a simple mortgage; that the document made an actual transfer of interest in favour of the Plaintiff; that it was a conditional sale; and that the condition in the document for handing over the possession of the suit property by the vendor to the purchaser was breached in that the Defendants and their predecessor had “not taken

care in handing over the possession of the suit property to the Appellant". The Trial Court, in the premises, came to the conclusion that the Appellant, who holds title to the suit property, could recover possession of the same from the Defendants, who are in unauthorised occupation thereof. The judgment of the Trial Court shows that the distinction between an outright sale with an agreement of re-conveyance and a mortgage by conditional sale was lost on the Trial Court. It appears to have merely compared two transactions, namely, simple mortgage and outright sale, though it accepted the sale to be a conditional sale.

4. When the matter went in appeal before the District Court, the Court noted that the Trial Court, despite framing an issue concerning redemption of mortgage, came to a conclusion that the Defendants were not entitled to claim redemption, purportedly on the ground of their failure to prove readiness and willing to perform their part of the contract, presumably by repaying the mortgage money to the Appellant. The first Appellate Court found this conclusion to be rather strange in that the Trial Court had apparently treated the suit as if it were for specific performance of a contract for sale, when in effect it was a suit for foreclosure in respect of a mortgage. The first Appellate Court came to the conclusion that the decree of foreclosure could only be passed if the Defendant could not ask for redemption but that since, in the instant case, the Defendants had filed a counter-claim claiming redemption and also deposited the mortgage amount in the Court, it was necessary for the Trial Court to pass a decree of redemption rather than for foreclosure.

5. The impugned judgment and order of the first Appellate Court is clearly unexceptionable. The whole case of the Appellant before the courts below was of mortgage by conditional sale and failure of the mortgagor to repay the mortgage money, entitling the former to a decree of foreclosure. Learned Counsel for the Appellant submits that if one has regard to the deed itself, it is apparent that it is an out and out sale and not a document of mortgage. Learned Counsel relies on the judgment of our Court in the case of **Sanjay Punamchand Pipada vs. Rahata Vividh Karyakari Society Ltd.**[1] and submits that in view of Section 8 of the Transfer of Property Act, where a document has to be construed, the intention must be gathered, in the first place, from the document itself; if the words expressed are clear, effect must be given to them; It is permissible to look at other factors including surrounding circumstances only if there is any ambiguity in the language employed. I am afraid it is not open to the Appellant to advance this contention in the face of a specific pleading in his suit that the amount received towards conditional sale was mortgage money and that in view of non-repayment of the mortgage money within the stipulated period, he was entitled to a decree of foreclosure. The deed in the present case clearly lends itself to this interpretation, which is but a common case of the parties.

6. It is important to remember that mortgage is a transfer of interest in specific immovable property towards "security for repayment of a debt". The interest itself may be different in different forms of mortgage. In a simple mortgage, what is transferred is a power of sale, whilst in a usufructuary mortgage it is the right of the mortgagor to the

1 2014(7) LJSOFT 36

enjoyment of the usufruct. In a mortgage by conditional sale or an English mortgage what is transferred is the right of ownership subject to a condition that on default of payment on a certain date the sale shall become absolute, or that on such payment being made the sale shall become void, or that on such payment being made the buyer shall transfer the property to the seller. Whatever be the form of mortgage, the transfer is of "some" interest only and not of the "whole" interest of the mortgagor. Unlike in the case of a sale in payment of a debt which extinguishes the debt, the debt always subsists in a mortgage. When a mortgagor mortgages his immovable property, he does not cease to be its owner; the equity of redemption still vests in him. This equity is lost unto him only when there is a final decree of foreclosure or sale in favour of the mortgagee. This has always been our law and a mortgage by conditional sale is no exception to it.

7. The statutory provisions, which are reflected in Sections 58, 60 and 67 of the Transfer of Property Act and Order XXXIV of the Code of Civil Procedure make this position clear. Clause (a) of Section 58 of the Transfer of Property Act defines a mortgage as "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." Clause (c), which deals with mortgage by conditional sale, provides as follows :-

> "(c) **Mortgage by conditional sale**.----Where the mortgagor ostensibly sells the mortgaged property-

> on a condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
>
> on a condition that on such payment being made the sale shall become void, or
>
> on a 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."

Section 60 of the Transfer of Property Act provides for the mortgagor's right to redeem. At any time after the principal money has become due, the mortgagor has a right, on payment or tender of the mortgage money, at a proper time and place, to require the mortgagee to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in possession or power of the mortgagee and at the cost of the mortgagor either to re-transfer the mortgaged property to him or to his nominee and to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished. Section 67 deals with the mortgagee's right to foreclosure or sale. In the absence of a contract to the contrary, the mortgagee has, at any time, after the mortgage-money has become due to him and "before a decree has been made for the redemption of the mortgaged property" or before the mortgage- money has been paid or deposited as provided in Section 67, a right to obtain from the court a decree that the mortgagor shall be absolutely debarred of his right to redeem the property or a decree that the property be sold. It is pertinent to note that the right to seek foreclosure is not available to any mortgagee other than a mortgagee by conditional sale or a mortgage under an anomalous mortgage by the terms of which he is entitled to foreclose. So also, the right to seek sale is not available to a usufructuary mortgagee or a mortgagee by conditional sale. What the scheme of this Section indicates is that the only remedy of a mortgagee by conditional sale is to apply for foreclosure and not for a decree of sale. Order XXXIV Rule 2 of the Code of Civil Procedure proceeds for a preliminary decree in a foreclosure suit. By this preliminary decree, the Court orders an account to be taken of what is due to the plaintiff on the date of such decree towards principal, interest, costs, etc. and declares the amounts so due at that date and directs that if the defendant pays into court the amounts so declared as due on or before such date as the court may fix within six months of the court confirming and countersigning the account, the plaintiff shall deliver up to the defendant, or to such person as the defendant may appoint, all documents relating to the mortgage of the property and re-transfer, if so required, the property to the defendant at his cost free from the mortgage (sub-rule (1) of Rule 2). Rule 3 of Order XXXIV provides for a final decree in a foreclosure suit. The rule provides that if, before a final decree debarring the defendant from all the right to redeem the mortgage has been passed, the defendant makes payment into the court of all amounts due to him under sub-rule (1) of Rule 2, the court shall, on application made by the defendant, pass a final decree ordering the plaintiff to deliver up the documents referred to the preliminary decree and, if necessary, to re-transfer the mortgaged property as directed in the decree. Only if such payment is not made by the defendant that the court shall, on the application of the plaintiff, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property. This scheme makes it clear that at all events, and in case of all mortgages, where a foreclosure decree can be passed, the mortgagor retains his right of redemption until a final decree of foreclosure is passed. As the law stands, there cannot, thus, be any exception to the impugned judgment and order of the first Appellate Court.

8. Learned Counsel for the Appellant relied on the judgment of the Supreme Court in the case of **Vanchalabai Raghunath Ithape vs. Shankarrao Baburao Bhilare**[2]. In the case before the Supreme Court, the plaintiff had filed a suit claiming redemption and re-conveyance of the suit property after accepting the amount of mortgage money. The defendant contested the suit by contending that the transaction in question was not a mortgage but an outright sale. The court actually went through the terms and conditions in the document and came to a conclusion that the transaction in question was an absolute sale with an agreement of repurchase. The court held that for the purpose of bringing a transaction within the meaning of mortgage by conditional sale, the first condition was of an ostensible sale of the mortgaged property on a condition that the buyer shall transfer the property to the seller on payment of a certain sum. The Court held that though there was a presumption that the transaction was a mortgage by conditional sale when the whole transaction was contained in our document, merely because of a term incorporated in the same document, the transaction between the parties need not always be termed as a mortgage. In the

2 2013 (12) (JSOFT (SC) 500

particular case before it, the court found the document to be a document of absolute sale with a contract to repurchase rather than a mortgage by conditional sale. The plaintiff's suit, in the premises, was dismissed. This judgment has no bearing on the facts of our case, where the Plaintiff Appellant went to the Court with a specific case, as noted by me above, that the document executed was in the nature of mortgage by conditional sale.

9. It is lastly contended by learned Counsel for the Appellant that the Appellant must be paid not only the principal amount of mortgage money, but also interest upto the date of payment of mortgage amount by the Respondents into the Court. Counsel relies on Section 84 of the Transfer of Property Act to claim such interest. Under Section 83 of the Transfer of Property Act, at any time after the principal money payable in respect of any mortgage has become due but before a suit for redemption is barred, the mortgagor can deposit in Court the amount remaining due on the mortgage. Section 84 provides that when the mortgagor so deposits the amount under Section 83, interest on the principal money shall cease from the date of such deposit. Section 84, in other words, provides for cessation of interest and not payment of interest. Payment of interest on the principal money due upto the date of the suit is a matter of contract, whilst interest pendente lite is a matter of law under Section 34 of the Code of Civil Procedure. In the case of a suit for redemption, sale or foreclosure, the Court awards interest under Rule 11 of Order XXXIV of the Code of Civil Procedure. In the present case, there is admittedly no contractual interest payable. There is no prayer for any pendente lite interest in the suit. None is awarded by the

Court below and there is no ground raised in the Second Appeal questioning the omission to award interest. No substantial question of law, accordingly, can be said to arise out of this appeal.

10. In the premises, there is no merit in the appeal. The appeal is, accordingly, dismissed. No order as to costs.

(S.C. GUPTE, J.)