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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.798 OF 2015
WITH
CIVIL APPLICATION NO.1684 OF 2015
IN
SECOND APPEAL NO.798 OF 2015.

Sarjerao Patil ... Appellant.

V/s.

Ganpati Dnyanu Patil and others ... Respondents

Mr. Yuvraj P. Narvankar, for the appellant.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J

DATE : 27th JUNE, 2018.

P.C.

1] Heard finally learned counsel for the appellant at the stage of admission itself.

2] This appeal is directed against the judgment and decree dated 23.7.2014, passed by the Ad-Hoc District Judge, Kolhapur, thereby dismissing Regular Civil Appeal No.191 of 2009 and confirming the judgment and decree dated 18.7.2017, passed in R.C.S.No.81 of 2005.

3] The said suit was filed by the respondent herein for redemption of mortgage. The document in question is titled as "Mortgage by Conditional Sale" and registered on 20th May, 1997. As per respondent, it was a mortgage as the title of the document itself suggests, whereas according to the appellant, it was an out and out sale, with option of repurchase. Therefore, the necessary question which was raised before the trial Court and the Appellate Court was about the nature of the document itself.

4] Both the trial Court and the Appellate Court had come to the conclusion, on the basis of evidence adduced before it, including the recitals in the document itself that, it was a mortgage by conditional sale and not an out and out sale, with option of repurchase.

5] While challenging this concurrent finding of fact, in the Second Appeal, according to learned counsel for the appellant, the nature of document itself is a substantial question of law and it should be framed accordingly. To advance his submission, he has relied upon the judgment of the **Umar Chand Bubal -vs- Amba Prasad [(2004) 13 SCC 718].**

6] No doubt it is true that the nature of document, at times may become a substantial question of law. However, in the facts of the present case, the evidence on record is so clinching and unequivocal and hence there is concurrent finding of fact recorded by both the Courts below, holding that the document in question is clearly a mortgage by conditional sale. It is not only because, the document is titled as "mortgage by conditional sale", but, as observed by the trial Court, it is on the basis of the intention of the parties, which is of very much significance to ascertain the real nature of the transaction and which can be gathered from the recitals in the document.

7] It is pertinent to note that the amount of Rs.40,000/-for which the document was executed was not paid at the time of the execution of the this document, but as stated therein, this amount was already paid towards educational expenses of plaintiff No.2. The word used in the document is "consideration" towards receipt of this amount and not "price" which would have been the case if, the document was intended by the parties to be an out and out sale with option of repurchase.

8] Even further recitals in the document make it clear that if the respondent repays this amount of Rs.40,000/- within two years from the date of the execution of the document, then he was entitled to get the suit property re-conveyed in his name. Only on his failure to do so, within the stipulated period, he was to execute the sale deed on the required stamp, as per the market price of the suit property. It is further stated in the document that only after expiry of stipulated period, the appellant could be entitled to manage the suit property as owner.

9] Therefore, the recitals in the document make it clear that the property was not sold to the appellant, but it was mortgaged with him with an option of repurchase. If respondent failed to pay amount within the stipulated period, then only, the sale deed was to be executed. Therefore, it was not at all a sale with an option to repurchase, but it was a mortgage by conditional sale, the consideration of which was already availed and towards repayment thereof, the property was mortgaged by this document. It is pertinent to note that the ownership of the property was also not transferred to the appellant by execution of this document, but it was to be transferred subsequently after the expiry of period of two years on execution of the sale deed on proper stamp paper, that too as per the market price prevailing at that time. This clause also, thus, clearly indicates that the amount of Rs.40,000/- was not the "price" for sale but only the "consideration". The real price was to be decided subsequently at the time of the execution of the sale deed as per the market rate.

10] The trial Court has considered all these averments and recitals in the document, in paragraph Nos.15, 16 and 18 of its judgment and thereafter it has rightly held that the document in question cannot be called as sale with option to repurchase. The trial Court and the Appellate Court have also considered the relevant case laws and and arrived at finding that it was a mortgage by conditional sale.

11] The submission of learned counsel for the appellant, however, is that the appellant has raised four contentions which are not considered by the Courts below. The first contention was that the market price of the suit property at the relevant time was Rs.30,525/- which is as per Government chart of the property, of the relevant period (Exh.39); whereas document is executed for Rs.40,000/- thereby clearly indicating that it was not at all a mortgage by conditional sale, but it was an out and out sale.

12] However, in my considered opinion, this aspect has also been considered by the trial Court, in paragraph No.18 of the judgment by categorically holding that the word used in the document is “consideration” and not the “price”. Moreover, as stated above, the price of the suit property was to be fixed subsequently at the time of the execution of this sale deed. Hence merely because at the time execution of this document, Government market price was the same, like the consideration mentioned in the document, the document does not become sale with option of repurchase. The recitals’ in the document are of *sine qua non*, to decide its real nature and not such extraneous factors.

13] The second contention raised is that in the record of right, the name of the appellant was entered as "owner" and he has also incurred substantial amount for constructing small pools as the quality of the suit land was not good at the time of transaction. In my considered opinion, the trial Court has rightly considered this argument and held that mere entry in the revenue record and delay in filing of the suit cannot be a ground to contend that the document is out and out sale with option to repurchase.

14] As a matter of fact, the question whether the transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is vexed one and must be decided on its own facts. In such cases the intention of the parties is the determining factor. Both the Courts below have in this case, not only considered the nomenclature of the document but also recitals therein, as the intention of the parties can be very much gathered from those recitals. It is held by the Apex Court in the case of **Chunchun Jha -vs- Ebadat Ali and anr [AIR 1954 345],** that:-

> "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 repurchase. In every such case the question is, what upon a fair construction is the meaning of the instrument?"
>
> "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".

15] Learned counsel for the appellant has also relied upon the judgment of the Apex Court in the case of **Vanchalbai Raghunath Ithape (dead) by L.R. -vs- Shankarrao Baburao Bhilare (dead) by L.R. [(2013) 7 SCC 173];** wherein, after considering the definition of "mortgage by conditional sale" as given in Section 58 of the Transfer of the Property Act, in paragraph No.13, it has been held by the Hon'ble Supreme Court that :-

> "13. From a 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 is that the mortgagor ostensibly sells the mortgaged property on the condition that on such payment being made, the buyer shall transfer the property to the seller. Although there is a 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".

16] In paragraph No.17 of the above judgment, the Hon'ble Apex Court has, by making reference of its earlier decision in the case of ***Tamboli Ramanlal Motilal -vs- Ghanchi Chimanlal Keshavlal [1993) Supp(1) SCC 295,],*** reproduced paragraph 16 of the said judgment, which is as follows :-

> *"16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex. 26 dated December 11, 1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinction 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] The Apex Court has, thus, observed that, having regard to the nice distinction between the 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.

18] Here in the case the terms of the document are self eloquent to prove, as held by both Courts below, that it is a document of mortgage by conditional sale and by no stretch of imagination it can be called as sale with an option of repurchase, that too on the basis of some other factors like entry of the appellant's name in the revenue record or the delay in filing of the suit.

19] Both the Courts have also considered that relations between the parties were not such as one would extend this concession of repurchase. The recitals in the document are more than sufficient to show that plaintiff was in need of money. Hence he has already availed an amount of Rs.40,000/- for educational expenses of plaintiff No.2. This document was executed as security by way of mortgage for repayment of that amount. On the basis of this document, the appellant has not at all become the owner of the suit land. The ownership was to be conferred on him after two years, on failure of the respondent to repay the said amount. Therefore, if on the basis of this document, the appellant has not even received either title or ownership of the suit property, it can hardly be called as a document of sale with option to repurchase.

20] As a result, it has to be held that as both the Courts below have properly appreciated the evidence on record, in the light of legal position discussed above, no case is made out for interference in the Second Appeal. No substantial question of law is raised.

21] The appeal, therefore, stands dismissed.

22] In view of dismissal of appeal, Civil Application No.1684 of 2015, does not survive and the same is disposed of accordingly.

[DR.SHALINI PHANSALKAR-JOSHI, J.]