IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 309 OF 2015
WITH
CIVIL APPLICATION NO. 703 OF 2015

Ananda Yashwant Gowade ... Appellant
V/s.
Akubai Hindurao Khot
(Since deceased) Through LRs.
Sou. Housabai Mansing Khot & Ors. ... Respondents

- Mr.Satyajeet A. Rajeshirke for the Appellant.
- Mr.Dilip Shinde a/w. Mr.Vikas M. Mali for Respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 16th JULY, 2018.

P.C. :

1] Heard learned counsel for the Appellant and learned counsel for Respondent No.2.

2] Considering the scope of the controversy involved in the Second Appeal, the Appeal is heard finally at the stage of admission itself.

3] This Appeal is directed against the judgment and decree dated 29/12/2014 passed by the District Judge-2, Islampur, in Regular Civil Appeal No.3 of 2009, which was preferred against the judgment and decree dated 6/11/2008 passed by the 4th Joint Civil Judge, Junior Division, Islampur, in Regular Civil Suit No.311 of 2002.

4] The said suit was filed by Respondent Nos.1 and 2-original Plaintiffs for redemption of mortgage and for re-conveyance of the possession of the suit land, bearing Gat No.846 (New No.209), situate at village Farnewadi (Shigaon), Tq. Walva, District Sangli.

5] As per the case of Respondent Nos.1 and 2, their predecessor and the predecessor of original Defendant No.2 and 4 had mortgaged the suit property with Appellant by way of conditional sale for 10 years for the amount of Rs.9000/- by executing a deed dated 17/4/1984. As per the terms and conditions of the said mortgage deed, the amount was to be repaid within a period of 10 years to get the property redeemed. It is the contention of Respondent Nos.1 and 2 that they requested the Appellant to accept the said amount and re-convey the property. However, the Appellant avoided to do so. In April 2002, there was express denial on the part of the Appellant to re-convey the property and hence, Respondent Nos.1 and 2 were constrained to file the suit for redemption of mortgage.

6] The Appellant, herein, resisted the suit contending *inter-alia* that the transaction was not in the nature of mortgage but it was an 'out and out sale with option of repurchase'. It was further submitted that the document was executed for the amount of Rs.9000/-, which was the market price of the suit property at the relevant time and the Appellant was put in possession of the said property. As the document was to be redeemed within 10 years and Respondent Nos.1 and 2 have failed to do so, the Appellant had become the owner of the said property and hence, Respondent Nos.1 and 2 are not entitled for redemption of the mortgage.

7] In support of their case, Respondent No.2 examined herself. At that time, the Appellant remained absent and there was no written statement also filed on record. Thereafter, the Appellant filed the written statement and then the Respondents-Plaintiffs laid the evidence of Power of Attorney. The Appellant has not entered into witness box nor led any evidence on record.

8] Hence, on appreciation of the evidence, the trial Court was pleased to held that the terms and conditions of the document Exhibit-66 clearly make out that it is a transaction of the mortgage by conditional sale. However, the trial Court found that as the Respondent-Plaintiff No.2 has not offered herself for cross-examination but she has laid the evidence of her Power of Attorney, who was not having any personal knowledge of the transaction, the suit cannot be decreed. On this sole ground, the trial Court dismissed the suit.

9] When the Respondent No.2-Plaintiff approached the District Court against the said judgment and decree of the trial Court, the First Appellate Court held that, once the document on the basis of the averments and recitals made therein is clearly held to be the document of a mortgage, then, even if the Respondent No.2-Plaintiff has not offered herself for cross-examination, she becomes entitled to get redeemed the suit land. The Appellate Court also found that the suit for redemption of the mortgage being filed within limitation, even if the evidence of the Power of Attorney examined by the Respondent-Plaintiff is excluded from consideration, as the Appellant has also not laid any evidence on record, it does not make any difference to the outcome of the case. Accordingly, the Appellate Court decreed the suit.

10] While challenging this finding of the fact as recorded by the trial Court and the Appellate Court, the submission of learned counsel for the Appellant is two fold. In the first place, it is submitted that the Appellate Court has not framed the relevant issue about the nature of the transaction, as to, whether it was a mortgage by conditional sale or whether it was a sale with an option to repurchase? Secondly, it is submitted that the Appellate Court has committed an error in relying upon the evidence of the Power of Attorney; especially when the Power of Attorney was not having any personal knowledge of the transaction. Hence, in view of the settled legal position, as laid down by the Hon'ble Apex Court in the case of *Janaki Vashdeo Bhojwani and Anr. V/s. Indusind Bank Ltd. and Ors.*[1], according to learned counsel for the Appellant, this appeal needs to be admitted on these two substantial questions of law.

11] Per contra, learned counsel for Respondent No.2 has supported the judgment of the Appellate Court. As regards the nature of the transaction, it is submitted that in the concurrent finding of the fact, recorded by both the Courts below, this Court should not interfere therein. There is also no substantial question of law raised as regards the nature of the transaction.

12] About the reliance placed by the Appellate Court on the evidence of the Power of Attorney, it is submitted that the First Appellate Court has rightly placed reliance thereon, as there was already the evidence of the Respondent-Plaintiff No.2 which has remained unchallenged on record and therefore, it was rightly held that even if the evidence of Power of Attorney is excluded from consideration, it was going to make no change in the result of the suit.

1 2005(1) Mah.L.J. 1171

13] Thus, in this Second Appeal, only two questions are raised for consideration. It is apparent that they also cannot be called as substantial questions of law as such, as they only pertain to appreciation of evidence. First question pertains to the nature of the transaction, as to, whether both the Courts have committed an error in holding it to be a mortgage by conditional sale. Which according to the Appellant, is a sale with an option to repurchase. Second question is, whether the First Appellate Court has committed an error in relying upon the evidence of the Power of Attorney, examined by the Respondent?

14] As regards the first question of law, framed or raised for determination of this Court, the very nature of the document, the recitals and averments made therein are more than sufficient to show that it is a mortgage by conditional sale. The very title of the document Exhibit-66 is "Mudat Kharedi Patra". The Appellate Court has also considered the recitals therein, which prove that by this deed the suit land was mortgaged, the possession of the suit land was given to the Appellant by way of mortgagee only for the period of 10 years. It was decided that during this period of 10 years, the Respondent/Plaintiff will repay the amount of Rs.9000/- and redeem the said property from the mortgage. However, if the Respondent failed to do so, then the

Appellant was to continue his possession and cultivation thereon.

15] Thus, in the document, there is not a single averment justifying or supporting the inference of the sale. Conversely, it is made clear that the transaction is only in the nature of mortgage by conditional sale. The property was not at all sold by way the said document to the Appellant. The right of the Respondent/Plaintiff to redeem the property was expressly reserved. It is no where stated that after the expiry of 10 years, if the Respondent/Plaintiff failed to repay the amount, in that case, the Appellant will become the owner of the said property. It is also no where stated that the amount agreed was the purchase price but it was specifically stated to be the consideration (भरणा) towards the mortgage. Therefore, the recitals in the document make the intention of the parties very clear and they being the *sine-qua-non* for deciding the nature of the document, it has to be held that both the Courts below have rightly held this transaction to be a transaction of mortgage by conditional sale and not a sale with an option of repurchase.

16] Both the Courts have also considered the legal position in its proper perspective and thereafter, arrived at this finding; especially having regard to the fact that the evidence of the

Respondent/Plaintiff has remained unchallenged, as there was clear endorsement of “no cross” and the said order was not set-aside. Apart from that, the Appellant himself has also not entered into the witness box to prove that the nature of transaction was not 'mortgage by conditional sale', but it was an 'out and out sale'. The intention of the parties can be gathered not only from the averments and recitals of the document but also from the evidence of the parties. Here, in the case, the Appellant has not led any evidence to prove the attending circumstances or to prove what was the intention of the parties. In such situation, considering the recitals in the document, coupled with the evidence of the Respondent/Plaintiff, which has remained unchallenged and sans any contrary evidence on record brought by the Appellant, it has to be held that, both the Courts below have rightly held that this transaction is a mortgage by conditional sale and not sale with an option of repurchase.

17] It may be true that the Appellate Court has not framed specific issue or point for its determination about the nature of transaction. However, perusal of the judgment of the Appellate Court is sufficient to show that the Appellate Court has considered in detail in para Nos.13, 14 and 15 about the nature of the transaction and how it is a mortgage by conditional sale and not a sale with an option to repurchase. Therefore, mere non framing of the point to that effect does not affect the legality of the findings arrived thereon, as while discussing the point, as to, “whether the Plaintiffs can redeem the mortgage?”, the Appellate Court has considered the nature of the said transaction. Therefore, this is not a material irregularity or much less irregularity so as to remand the matter to the First Appellate Court.

18] As regards the contention that the First Appellate Court has committed an error in relying upon the evidence of the Power of Attorney of the Respondent, the Appellate Court has given detailed reasons therefor in para Nos.11 and 12 of its judgment. The Appellate Court has in that respect also considered the judgment of this Court in the case of *Janaki Vashdeo Bhojwani (supra)* on which the trial Court has placed reliance. The First Appellate Court has also considered that even if, the evidence of this Power of Attorney of the Respondent is excluded from consideration in that case also the original evidence of the Respondent-Plaintiff No.2 has remained unshattered on record.

19] Apart from that, in my considered opinion, even if the entire evidence of the original Plaintiff/Respondent and her Power of Attorney is excluded from consideration, even then the recitals in the document are more than sufficient to prove the nature of the transaction.

20] Thus, once the transaction is held to be that of a mortgage, then as the suit is filed within 30 years from the date when the cause of action arose, the suit has to be decreed.

21] The impugned judgment and decree of the Appellate Court does not call for any interference in the Second Appeal. The Second Appeal hence being without merits, stands dismissed.

22] In view of dismissal of the Second Appeal, nothing survives in the Civil Application and therefore, it also stands disposed of.

[DR.SHALINI PHANSALKAR-JOSHI, J.]