Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL No. 187 OF 1996

Dattu Sulatana Patil ... Appellant
Vs.
Dhanaji Tatoba Chavan (Decd)
through LRs Housabai D. Chavan & Ors. ... Respondents

Mr. Pradeep J. Thorat, Advocate for the appellant.
Mr. P.B. Shah a/w. Akshay Chikale, Advocate for the respondent.

CORAM : **MRS.MRIDULA BHATKAR, J.**
RESERVED ON : 24th April, 2018.
PRONOUNCED ON : 4th May, 2018.

ORDER:

This Second Appeal is directed against the judgment and order dated 21st June, 1995 passed by the Second Additional District Judge, Sangli in Regular Civil Appeal No. 487 of 1993 thereby setting aside the judgment and order dated 21st August, 1993 passed by the learned Civil Judge Junior Division, Miraj in Regular Civil Suit No. 142 of 1989 for redemption of mortgage and possession of property. The suit property is Gat no. 402 admeasuring 3 acres and 11 gunthas situated at Village Dhavali. According to the plaintiff/appellant, he has mortgaged one half portion of the land west-side to respondent no. 1 for Rs.5,000/- by executing Deed of Mortgage dated 7th April, 1961. In the said mortgage, period of 7 years was mentioned for repayment of money of Rs.5,000/- and for redemption of land, failing which the respondents/defendants would become the absolute owner of the said land and land is deemed to be transferred in his name. It is an admitted case that the plaintiff/appellant could not repay the mortgage money and could not redeem the land. Thereafter the plaintiff/appellant filed the suit for redemption and possession of the suit land. The defendants/respondents were issued notices. They filed written statement and contested the suit. It was stated that the period for repayment was only 7 years but as payment were not made and as agreed between the parties, the respondents became the absolute owner of the property and thus, it is out and out sale and the plaintiff has no right of redemption. The trial Court framed issues mainly on the point of entitlement of redemption of the mortgage. The parties entered the witness box, tendered evidence and the trial Court after considering the evidence and pleadings of both the parties, decreed the suit and directed the defendants to deliver the original documents of mortgage and executed Deed of Reconveyance in favour of the plaintiff about the suit land. The said judgment and decree dated 21st August, 1993 was challenged by the respondent before the Additional District Judge, Sangli by Regular Civil Appeal No. 487 of

1993. The First Appellate Court considered the distinction between mortgage by conditional sale and sale with option to repurchase the suit land and held that the parties were bound by the terms of the documents, i.e., Exhibit 33 Deed of Mortgage dated 7th April, 1969 and period of repayment was only upto 1998 and the right of redemption did not exist when the suit was filed and therefore, the First Appellate Court set aside the order of the trial Court. Hence, this Second Appeal.

2. The learned counsel for the appellant has formulated substantial question of law as under:

(i) Whether the First Appellate Court has erroneously held that Exhibit 33 Deed of Mortgage is not a mortgage by conditional sale but a sale with option to repurchase the suit land?

3. The learned counsel for the appellant has submitted that the Appellate Court ought to have read the contents of the documents. It was a mortgage by conditional sale whether the possession was given, however, the there are specific mention of redemption though the money was not paid by the appellants within the stipulated

period. He has filed Application no. 29 of 1988 in the Court asking for redemption and payment of money. However, it was withdrawn unconditionally. The First Appellate Court has wrongly held that after lapse of four years or after the completion of 7 years, the appellant/plaintiff lost his right of redemption on 6th April, 1996 and it cannot be exercised further. The learned counsel has submitted that the First Appellate Court ought to have considered that once mortgage is always mortgage and right of redemption as per limitation Act continues for a period of 30 years. In support of his"parat" ("परत") submissions, the learned counsel relied on the following decisions:

(i) Judgment of Supreme Court in the case of **Srinivasaiah vs. H.R. Channabasappa (Dead) by his LRs & Ors.**[1]

(ii) Judgment of Supreme Court in the case of **Vithal Tukaram Kadam & Anr. vs. Vamanrao Sawalaram Bhosale & Ors.**[2]

(iii) Judgment of Supreme Court in the case of **Namdev Shripati Nale vs. Bapu Ganapati Jagtap & Anr.**[3]

(iv) Judgment of Single Judge of this Court in the case of **Shivram Bhika Bodkhe & Ors. vs. Sadashiv Laxman**

1 (2017) 12 SCC 821
2 2017(6) Bom. C.R. 474
3 (1997) 5 SCC 185

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(v) Judgment of Single Judge of Orissa High Court in the case of **Haramani Dei vs. Bauri Bewa**[5] on the point that the pleadings are binding on the parties.

(vi) Judgment of Single Judge of this Court in the case of **Sou. Mangal Popatrao Sodmise vs. Sou. Abdagiri Vishvanath Narale through POA holder Lahu Vishvanath Narale**[6] on the point of language used in the Deed of Mortgage/mortgage by conditional sale.

4. The learned counsel Mr. Shah defended the judgment of the First Appellate Court by which the judgment and decree passed by the trial Court is set aside. He has submitted that much importance cannot be attached to the nomenclature alone and real intentions are required to be gathered. As per the conditions mentioned in document, i.e., Exhibit 33, initial period of 4 years is mentioned for the repayment, however, liberty to pay the amount and get the land redeemed was available to the plaintiffs only for a period of 7 years and it is specifically mentioned and agreed by both the parties that after 7 years, the amount is not paid, then the said document is to be

4 2007(4) Bom. C.R. 861
5 1970 0 AIR (Ori) 203
6 Second Appeal No. 369 of 2013 dated 7th March, 2017

considered as the sale deed and the respondent is absolute owner of the suit land. Neither the plaintiff nor his legal heirs will have any right. He submitted that no steps were taken by the appellant/plaintiff to repay the money till 1988 and Miscellaneous Application no. 29 of 1988 which was filed by the plaintiff for possession and redemption of suit land was withdrawn unconditionally. He pointed out that the entire land was in possession of the respondent. There is a demand of land revenue, so it is a perpetual sale with possession. In support of his submissions, the learned counsel relied on following decisions:

(i) Judgment of the Supreme Court in the case of **Tamboli Ramanlal Motilal (Dead) by LRs. vs. Ghanchi Chimanlal Keshavlal (Dead) by LRs.**[7]

5. In a case of mortgage for redemption, the period is always 30 years. The transferer, i.e., mortgagee has right of redemption and similarly the mortgager, if it is redemmed, can go for foreclosure of mortgage.

6. In the following cases, the Hon'ble Supreme Court and various High Courts dealt with Section 58(c) of the Transfer of Property Act where transaction is mortgaged by conditional sale or sale with

7 1993 Supp (1) SCC 295

option to repurchase, i.e., out and out sale -

In the case of **Tamboli Ramanlal Motilal (Dead)** *(supra)*, it was held that nomenclature of the document is not decisive but the real intention of the parties is to be gathered. The relationship of the debtor and creditor should exist to hold the documents as a mortgage by conditional sale or not. In the said case, in the deed, the period of redemption was 5 years from the date of transaction. In the said document, the latter clause was in case the executant fails to repay, neither he nor his heirs or legal representatives will have any right to take back the said properties. A view was taken that the right of transferee to foreclose the mortgage is not spoken to and right of redemption of transferee and right of foreclosure of transferee are co-extensive and in absence of such a right of the mortgagee, it is only a conditional sale out and out and not a mortgage.

In the case of **Vithal Tukaram Kadam & Anr.** *(supra)*, the Supreme Court has held that “An ostensible sale with transfer of possession and ownership, but containing a clause for reconveyance in accordance with section 58(c) of the Act, will clothe the agreement as a mortgage by conditional sale". It is further held that "The significance of the words "repay", "return" and "subject to this condition" cannot be overlooked. They are not commensurate with a deed of absolute sale."

In the case of **Chunchun Jha vs. Ebadat Ali**[8] the Supreme Court has dealt with this question in the year 1954 and has held that "two documents are seldom expressed in identical terms and each must be decided on its own facts. But certain broad principles remain. The first is that the intention of the parties is the determining factor. But there is nothing special about that in this class of cases and here, as in every other cases where a document has to be construed, the intention must be gathered, in the first place, from the document itself. …...

The real question in such a case is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is ambiguity in the language employed, then it is permissible to look to the surrounding circumstances to determine what was intended. In the said case, the Hon'ble Supreme Court also highlighted that there should be relationship between the debtor and creditor to exist

8 AIR 1954 SC 345

between the parties , so it all depends on the fair construction of the documents.

In the case of **Srinivasaiah** *(supra)*, after examining the impugned documents, five reasons were given:

"First, it is not in dispute that the plaintiff was the o"parat" ("परत")wner of the suit land. Second, the parties concluded the transaction in question by executing one document (Ext. P-1). Third, the document (Ext. P-1) is styled as a "Deed of conditional sale". Fourth, it contains a condition that Defendant 1 will be allowed to remain in possession of the suit property for 5 years and enjoy the fruits of the land and that during this period, the plaintiff will be entitled to get the suit property reconveyed in his name on paying Rs.1500/- by getting the sale deed executed in his name and obtain possession of the suit land from Defendant 1. Fifth, the plaintiff offered to pay Rs.1500/- to Defendant 1 with a request to resale the land to him."

In the case of **Mangal Popatrao Sodmise** *(supra)*, the Single Judge of this Court has interpreted the words routinely used when the Deed of Mortgage by conditional sale is executed by the parties in vernacular language, i.e., in Marathi. The Single Judge of this Court has discussed earlier law from the case of **Chunchun Jha** to the case of **Srinivasaiah**. The specific words colloquially used in a transaction of mortgage by conditional sale to describe the transaction are "मदुत खरेदी" and "मुदत खरेदीखत" and the terms "सोडवून घेउ" or "सोडवून घेईन" are used to designate redemption of mortgage. The Court has said that the construction of a document is a mixed question of law and fact. It is essentially to be decided by considering the words employed by the parties, though it is permissible to take into account surrounding circumstances in case the words used are not sufficiently clear to designate their effect.

7. From the ratio laid down in the cases above, it can be culled out that the intention of the parties while executing the documents is the most important factor and so also the words used in that particular deed and the conduct of the parties are also further decisive factors to hold whether it is a mortgage by conditional sale or it is a sale out and out. In the present case, a document (Exhibit 33) is in Marathi language and it is mentioned as "मुदत खरेदीखत" where it is mentioned that "मुदत खरेदी पत्र". It means it is conditional sale for Rs.5000/- and the amount is to be paid within 7 years from the date of execution. So, the amount of Rs.5,000/- was paid. The possession was handed over on the same day. It appears that initially principal amount ("मुद्दल") is to be paid within 4 years and thereafter within 3 years it can be redeemed on any day of Chaitra Padva , i.e., first year of Hindu Calendra. The venacular

word “parat” (“परत”) is mentioned, i.e., repaid and if not paid within 7 years, then the said document is to be treated as sale deed and thereafter the owner will lose the right in the property and will have no claim in future. The words and terms which are used routinely while preparing Deed of Mortgage by conditional sale are found present in Exhibit 33. It also discloses that it was not just a conditional sale out and out but there was a relationship as a debtor and creditor. Moreover, in the written statement, the defendant has admitted that the property was mortgaged by Dattu Patil with Dhanaji Chavan. Shivaji Dhanaji Chavan, son of original mortgager, has step in the witness box and he has stated in his examination-in-chief that the plaintiff mortgaged the property in favour of his father. Dattu, the original mortgagee, has given evidence and he has stated that he has approached the defendants/children of Dhanaji and requested them to redeem the property, but they refused and at that time Dhanaji was not alive. He also filed Miscellaneous Application No. 29 of 1988 and has deposited the amount in the Court. He has produced the receipt, which is marked Exhibit 37. This clearly shows that when Datty and Dhanaji, father of the present respondents executed the Deed, then intended the mortgage of the suit property. It is also to be noted that the property is in Northern side and it was undivided share owned by Dattu and his other co-sharer. The learned trial Judge has correctly interpreted the document. However, after going through the reasoning of the first Appellate Court, it is found that the Appellate Court has appreciated the document on a wrong footing and has erroneously considered that the limitation was only 7 years and gave wrong finding that it is not mortgage by conditional sale. The finding of the first Appellate Court is illegal and the limitation for mortgage is 30 years. The suit is filed within limitation and therefore, the substantial question of law is answered in affirmative. Hence, I pass the following order:

ORDER

(i) Second Appeal is allowed;

(ii) The judgment and order dated 21st June, 1995 passed by the Second Additional District Judge, Sangli in Regular Civil Appeal No. 487 of 1993 is hereby set aside;

(iii) The judgment and order dated 21st August, 1993 passed by the learned Civil Judge Junior Division, Miraj in Regular Civil Suit No. 142 of 1989 is restored and confirmed;

(iv) Decree to be drawn accordingly.

8. The learned counsel for the respondents submitted that the

order passed by this Court be stayed for six weeks, as the respondents want to challenge this order before the Hon'ble Supreme Court.

9. The learned counsel for the appellant opposed this prayer.

10. In view of the prayer made by the learned counsel for the respondents, the order is stayed for six weeks.

(MRIDULA BHATKAR, J.)