

DDR

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO. 563 OF 1996

Rajaram Nagu Walkunde (deceased by heirs)

1.Smt. Savitra Rajaram Walkunde & ors. ..Appellants

vs.

Shankar Bapu Ovhale

since deceased through Lrs.

1a. Ananda Shankar Ovhale & ors. ..Respondents

....

None for appellants.

Shri K.P. Shah i/b.Shri P.B. Shah for respondent Nos.4A to 4D

....

CORAM : M.S.KARNIK, J.

DATE : 18th JULY, 2019

ORAL JUDGMENT (PER M.S. KARNIK,J.) :-

None for the appellants.

2. Heard learned counsel for the respondents.

3. With the assistance of learned counsel for respondents I have gone through the record and proceedings and the findings recorded by the Courts below.

4. The facts of the case in brief are as under :

The appellants are the original defendants. The respondents are the original plaintiffs. The suit property consists of Gat No. 659 situated at Dhamner, Taluka Koregaon. The plaintiff had half share in the suit property. On 13th April, 1970 the plaintiff had mortgaged his half share for Rs.1,200/- to the defendant and accordingly executed a deed and handed over possession. It was agreed that on repayment of amount within 10 years the defendant would redeem the land. It is the case of the plaintiff that though the defendant was asked to accept the amount and reconvey the land, he did not respond and avoided to reconvey the land, hence by notice dated 28th February, 1983 issued by R.P.A.D, the plaintiff called upon the defendant to remain present in the Sub-Registrar's Office on 10th March, 1983 to accept the amount and to execute the deed. As defendant failed to remain present, the suit is filed.

5. It was the defence of the defendant that the Deed in question was one of an absolute sale. The defendant pleaded

that the price of the land mentioned in deed and the clauses therein indicates that it is an out and out sale. The trial Court framed the following issues :

- (1) Does the Plaintiff prove that the transaction dated 13th April 1970 is in the nature of mortgage ?
- (2) Do the Defendants prove that the said transaction was an absolute sale ?
- (3) Whether the deed dated 13th April 1970 is void in view of the contentions raised by the Defendant in paragraph Nos.2 and 5 of written statement at Exhibit 15 ?
- (4) Whether the Plaintiff is entitled for reconveyance of the suit property ?
- (5) Whether the Plaintiff is entitled for possession of the suit property ?
- (6) What order and decree ?

6. The trial Court decreed the suit and directed the plaintiff to deposit Rs.1,200/- (Rupees One Thousand Two Hundred only) in the Court on or before 31st January 1989. The defendants were directed to execute reconveyance of the suit property in favour of the plaintiff by accepting the mortgage amount of Rs.1,200/- and to deliver the possession of the suit property to the plaintiff.

7. The defendant therefore challenged the judgment and decree of the trial Court before the First Appellate Court by way of Regular Appeal No.498 of 1988. The Appellate Court framed the following points for determination :

- (1) Whether the transaction dated 13th April 1979 is conditional mortgage or sale with condition to repurchase ?
- (2) What order and costs ?

The Appellate Court for the reasons mentioned in the judgment and order dismissed the Appeal.

8. This Court admitted this Second Appeal on the following substantial questions of law :

- (a) Whether the Courts below were correct in holding that the document dated 13th April 1970 is a mortgage by Conditional Sale when there exists no relationship of debtor and creditor between the parties ?
- (b) Whether the Courts below were correct in holding that the document dated 13th April 1970 is mortgage by Conditional Sale when admittedly no right was conferred upon the mortgagee to foreclose the redemption after expiry of period of 10 years ?

9. From the record it appears that controversy centres on the interpretation of the document dated 13th April 1970. According to appellants, there exists no relationship of debtor and creditor between the parties. The appellants' case is that the Courts below have erred in holding that the document dated 13th April 1970 is a mortgage by conditional sale. As per the case made out by the appellants, the document dated 13th April 1970 cannot be a mortgage by a conditional sale as no rights were conferred upon the mortgagee to foreclose the redemption after expiry of period of 10 years. It further appears to be the case of the appellants that the option to repurchase within 10 years is not exercised by the respondents. According to the appellants, as the document does not provide for corresponding right to the mortgagee to foreclose the right of redemption. In the Courts below much emphasis was placed by the appellants as regards the nature of the transaction to indicate that there is no debt and relationship between the parties is not that of a debtor and creditor.

10. Learned counsel for the respondents on the other hand invited my attention to the findings recorded by the Courts below. The Courts below have taken into consideration the various clauses of Exhibit 43.

11. I have gone through the document Exhibit 43. Though the appellants contended that there is no relationship between the appellants and the respondents as debtor and creditor, however, the defendants have not led any evidence to establish this plea and even from the document it does not appear that the relationship between the parties is as claimed by appellants. The Appellate Court has relied upon the decision of the Apex Court in the case of **Tamboli Ramanlal Motilal v/s. Ghanchi Chimanlal Keshavalal** reported in **A.I.R.1992 Page 1236** wherein the Apex Court has 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.” The Apex Court has further observed that “it is a

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.”

12. On the basis of the materials on record, the Appellate Court found that there is no evidence to show the relation of the plaintiff and the defendant was that of debtor and creditor. Having gone through the orders passed by the Courts below, the nature of the document is elaborately considered and on the basis of the various clauses mentioned in the document the Courts below have come to the conclusion that the transaction was mortgage with conditional sale and not sale with condition to repurchase as sought to be made out by the appellants. I am in agreement with the reasons and view taken by the Courts below. Second Appeal is therefore dismissed with no order as to costs.

(M.S.KARNIK, J.)