

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 407 OF 2014
ALONGWITH
CIVIL APPLICATION NO. 140 OF 2018

1. Bhagubai Nana Dhondge, Age : 80 yrs
Deceased, through her legal heirs

1A Chandrakant Shivaji Dhondge,
Age : 25, Occupation-Tea Shop

1B Suryakant Shivaji Dhondge,
Age : 26, Occupation-Tea Shop

1C Laxmikant Shivaji Dhondge,
Age : 24 yrs, Occupation-Tea Shop

1D Shrimati Vimal Shivaji Dhondge,
Age : 55 yrs, Occupation-Household,
All residing at 1-A to 1-E, Vita,
Bhaman Galli, Taluka-Khanapur,
Dist : Sangli.

.....Appellants
(Orig. Plaintiffs)

V/s.

1. Shantabai w/o. Dasharath Suryawanshi
Age : 63 years,

2. Hemant Dasharath Suryawanshi,
Age : 44 years,

3. Ranga Dasharath Suryawanshi,
Age : 22 years

4. Dinkar Dasharath Suryawanshi,
Age : 20 years,

5. Kamal a/w. Tanaji Achare, Age 42 years
 6. Uma w/o. Sambhaji Bhosale, Age 36 years
 7. Bebi Mahadeo Nikam, Age 34 years
 8. Suman Prakash Shinde, Age : 38 years,
 9. Sanjivani Annasaheb Yadav,
Age : 30 years, Occupation-Household
All agriculturists, residents of Vite,
Taluka-Khanapur, District-Sangli,
Now Nos.5 & 6 residents of Walva,
Taluka-Walva, District- Sangli, No.7
resident of Yelavi, Taluka-Tasgaon
District- Sangli.
 10. Sujata Uttam Nalavade,
Age : 28 years, Occupation-Household,
C/o. N.T. Uttamrao, Katipuram,
Dist. Malapuram, Kerala State.
 11. Shahabai Anna Pol, Age : 65 years,
Resident of Vita, Taluka-Khanapur,
District- Sangli.
(SA stand abated as against R. No.11
vide Reg. Judl (II) order dt. 18/12/12.
 12. Baban Rajaram Suryawanshi, Age 55
Residing at Balawadi (Bhalavani)
Taluka- Khanapur, Dist. Sangli.
 13. Sau. Yesabai Maruti Phalke,
Age : 50 yrs, Kundal, near Petrol Pump,
Kundal, Taluka- Tasgaon, Dist. Sangli
-Respondents
(Respondent
Nos.1 to 8 Orig.
Defendants.)
&

Respondent Nos.9-12
Orig. Plaintiffs.

* * * *

Mr. Sandesh D. Patil, Advocate for the appellants.

Mr. Girish Paryani, Advocate for the respondents.

CORAM : SANDEEP K. SHINDE, J.

Resd. Judgment on : 6th March, 2019.

Pronounced Judgment on : 20th March, 2019.

JUDGMENT :

1. Construction and interpretation of documents dated 4th February, 1970 and re-conveyance dated 25th January, 1971 under which claim to property is made, is the substantial question of law.

2. The appellant's-plaintiff's suit for declaration and one-fourth share in the suit property and its separate possession was decreed by the learned Civil Judge Junior Division, Vita on 29th April, 1994. This decree was challenged by the defendant (brother of the plaintiff) in

Regular Civil Appeal No. 370 of 1994. This Appeal was allowed and the decree passed by the trial Court was set aside by judgment and order dated 7th July, 2007 by the District Judge-II, Sangli. It is against the decree passed in Regular Civil Appeal No. 370 of 1994, the plaintiff has preferred this Second Appeal.

3. With the consent of the parties, the Appeal is taken up for final hearing at the admission stage. I will refer the parties as per their status in the suit.

4. The parties to the Appeal have filed the paper-book and it is taken on record.

5. The suit property is agricultural land bearing Gat No.41/1-A and 41/1-b admeasuring 1 hectares and 51 Ares plus 19 Ares, a well and a house property bearing House No. 1747 within the municipal limits of Vita, which is more particularly described in plaint, para-1, which shall be referred to as “the suit property”.

6. Plaintiff-Bhagubai, is a daughter of Gangubai. Gangubai died in 1972 and is survived by two sons and two daughters. Amongst daughters, Bhagubai is the plaintiff who filed, suit for partition against Rajaram her brother, legal representatives of another brother Dashrath, and sister Shahabai. Deceased, Gangubai was residing with her son, Dashrath at the time of her death. It is not in dispute that, the suit property was received by Gangubai from her father under a settlement deed as her lifetime estate vide settlement deed dated 7th May, 1927. As the husband of Gangubai predeceased her, she was the full owner thereof after the Succession Act, 1956 came into operation. Plaintiff-Bhagubai, somehow came to know about the transfer of suit property effected by Gangubai on 6th May, 1970 in favour of the deceased, Dashrath. She alleged that, such transfer being void, ab-initio was not binding on her share. It is her case that, Gangubai died intestate and plaintiff being her daughter, she inherits and succeeds the suit property. The plaintiff alleged, that her brother, Dashrath and sister, Shahabai in collusion with each other

got the sale-deed dated 6th May, 1970 executed in favour of Dashrath, and attempted to deprive her share in the suit property. On the backdrop of aforesaid facts, the suit was filed for declaration, partition and separate possession of the suit property.

7. Legal representatives of Dashrath denied plaintiff's right, and contended that, on 6th May, 1970 deceased, Gangubai executed a registered sale-deed in respect of the suit property in favour of their father for consideration of Rs.700/- and further contended that the suit property being exclusive property of Gangubai, she had every right sell it. It is the defendant's case that, by virtue of the sale-deed, Dashrath acquired title of the suit property and thus plaintiff had no right to claim share therein.

8. Shahabai, sister of the plaintiff reiterated the defence of Dashrath and would state that, deceased-Gangubai was the full owner and was having absolute power to dispose her own property which she did by executing registered sale-deed in favour of Dashrath to which she was

the attesting witness. However, Rajaram another brother of the plaintiff supported the plaintiff's claim, for partition.

9. The Appellate Court held that, the suit property was not a co-parcenary property but separate property of Gangubai and she had every right to dispose of at her will.

10. Before advertng to the substantial question of law, it may be stated that, Gangubai in her lifetime, vide registered document dated 4th February, 1970 handed over possession of half share in the suit property no.41/1A to one Bhiku Narayan Gaikwad, however, had reserved a right to claim and obtain its possession within two years. On 25th January, 1971 Bhiku Narayan Gaikwad handed over possession back to Gangubai vide registered document titled as "Re-conveyance -Rs.900/-" dated 25th January, 1971.

. The question is, whether the document dated 4th February, 1970 executed by Gangubai in favour of Bhiku Gaikwad was a mortgage with a conditional sale or a sale with an option of re-purchase. I will answer this question later. However, it is the plaintiff's case that, vide Deed dated 4th February, 1970 Gangubai sold the property to Bhiku

Narayan Gaikwad, with an option to repurchase it and thus as on date she ceased to be the owner of the suit land. Resultantly though, the sale-deed was executed by Gangubai on 6th May, 1970, Dashrath did not acquire rights in the suit property. It is the plaintiff's case that, on re-conveyance by Bhiku on 25th January, 1971, Gangubai became the owner of the suit property and thereafter died in 1972. Thus, in the intervening period, from 4th February, 1970 till 25th January, 1971 Gangubai had no title in respect of the suit property. Therefore, the sale-deed dated 6th May, 1970 executed by Gangubai in favour of Dashrath, was of no consequence and Dashrath did not acquire right and title in the suit property. It is her case that, Gangubai died intestate in 1972 and plaintiff being her daughter, she is entitled to succeed to the suit property being the class one heir of Gangubai.

10. The learned Counsel, thus submits that, the document dated 4th February, 1970 was not a mortgage with a conditional sale but a sale with an option to repurchase and therefore the document executed by Gangubai in favour

of defendant no.1, Dashrath has not transferred any propriety rights in the subject property in favour of Dashrath.

11. In my view, at the first place, the appellant-plaintiff being not party to the contract/document dated 4th February, 1970 or 25th January, 1971 he had no locus to claim any rights under these two documents. At the highest, Bhiku Narayan Gaikwad to whom the property was handed over by Gangubai on 4th February, 1970 had right to contend that the document dated 4th February, 1970 was, not a mortgage with a conditional sale but a sale with an option to re-purchase. However, Bhiku Narayan Gaikwad executed a registered re-conveyance in favour of Gangubai on 25th January, 1971. This re-conveyance stipulates that, the subject property was a mortgage by Gangubai for Rs.900/- and since Gangubai redeemed the mortgage, he executed the re-conveyance and handed over the possession of the suit land to Gangubai. Therefore, upon reading both the documents together, I hold that, on 4th February, 1970 Gangubai had executed a mortgage with a

conditional sale in favour of Bhiku Narayan Gaikwad.

12. It is settled law that, Section 58(c) contains the definition of a mortgage by conditional sale. It is with the greatest difficulty in many cases that such mortgages can be distinguished, from sale with a condition for repurchase. As cl (c) of s 58 indicates, the real point of difference between the two kinds of transactions is that, in the case of a mortgage by conditional sale, the sale is only ostensible, whereas, in the case of an out and out sale, it is real. The ostensible or real nature of transaction can, however, be only determined by finding out the intention of the parties.

13. Thus, the intention of the parties is to be gathered for deciding the character of the document. In the case in hand, the document of re-conveyance dated 25th January, 1971 executed by Bhiku Narayan Gaikwad establishes the fact that, Gangubai had mortgaged the subject property against the mortgage money of Rs.900/-. Therefore, till 25th January, 2017 the debt was subsisting and on the payment of the mortgage money, Gangubai

redeemed the mortgage. A mortgage by conditional sale is essentially a mortgage and therefore it is necessary that relation of debtor and creditors would exist between the parties. In this class of mortgage, the mortgager ostensibly sells the mortgage property. The word “ostensible” means that there appears to be a sale but is not really a sale. If the parties have interpreted it to be a sale, then of course it cannot be a mortgage. A mortgage by conditional sale is an ostensible sale i.e. it is excluded in the form of a sale with a condition attached to it.

. In the case in hand, though the document dated 4th February, 2017 is titled otherwise, but its recitals clearly indicates the intention that it was a mortgage by conditional sale, in as much as, Gangubai had reserved the right to redeem the mortgage. The expression “सोडविलेस” thus speaks of intention of the parties that it was not a outright sale but sale with an option to repurchase.

14. That for the reasons aforesaid, on 6th May, 2017 the date on which Gangubai sold the suit property to her son for the consideration of Rs.700/- by registered sale-

deed was a valid sale and by virtue of it, defendant no.1 became the owner of it.

15. In the facts aforesaid, I hold that, on 4th February, 1970 Gangubai had executed a mortgage by conditional sale. The question is answered accordingly. Thus, the findings recorded by the trial Court, as well as, by the Appellate Court is consistent with the evidence on record. The subject documents were correctly interpreted and therefore the Appeal fails and dismissed.

16. With dismissal of Appeal, Civil Application No. 140 of 2018 does not survive. The same stands disposed of.

(SANDEEP K. SHINDE, J)