

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****SECOND APPEAL NO. 340 OF 2020**

Abhijeet Narayan Jamdade & Ors.

..Appellants

V/s.

Suryakant Nathu Pharande

..Respondent

Mr. Pradeep J. Thorat, Advocate for the Appellants.

CORAM: NITIN W. SAMBRE, J.

DATE : FEBRUARY 10, 2020.

PC.:-

. This second appeal is by the original defendant in Regular Civil Suit No.9 of 2012 which was initiated by the Respondent/Plaintiff for redemption and recovery of possession.

2. Exh.38 and 39 are the mortgage by conditional sale wherein it is claimed by the plaintiff that the land in question came to be mortgaged for a sum of Rs.13,000/- which will be repaid in between period of 7 to 10 years from the date of execution of mortgage, and as such reverse sale deed will be executed.

3. The Trial Court vide its judgment and decree dated February 15, 2016, decreed the suit which was confirmed in Regular Civil Appeal No.225 of 2017 preferred at the behest of the appellant as such this second appeal.

4. Mr. Thorat, learned counsel for the appellants would urge that the documents at Exh.38 and 39 are the documents which are to be inferred as an absolute sale deed transferring title in favour of the appellant. So as to substantiate his claim he would draw support from the very recitals of Exh.38 and 39. Relying on the judgment of the Hon'ble Apex Court in the matter of **Vanchalabai Raghunath Ithape Vs. Shankarrao Baburao Bhilare** reported in **(2013) 7 Supreme Court Cases 173**, Mr.Thorat would urge that the intention of the parties could be gathered from the language used in the deed. As such according to him, since the respondent has failed to repay the amount of loan of Rs.13,000/- within a period of 7 to 10 years from the date of execution of mortgage, the appellant becomes absolute owner and that being so the courts below have committed an error of law in decreeing the suit. Learned counsel would also urge that the two cause of actions were sought to be agitated in a single suit and that being so the suit was not maintainable. In addition, the submissions are apart from the mortgager the other necessary parties to the suit, six sisters who have succeeded to the interest of mother after her death were not impleaded in the suit in question. That being so the judgment and decree passed by both the courts below are not sustainable.

5. With the assistance of learned counsel, I have perused the judgment delivered by both the courts below and also appreciated the recitals of documents at Exh.38 and 39. The documents Exh.38 and 39 in categorical terms provide for the acceptance of an amount of Rs.13,000/- and execution of mortgage by conditional sale passing over possession in favour of the appellant, repayment of amount of Rs.13,000/- within a period of 7 to 10 years and getting the suit property released from the clutches of mortgage.

6. In the light of rival claims before the Trial Court, the issues were framed at Exh.32 which reads thus ;

1. Whether Suit is bad for non-joinder of necessary party ?
2. Whether the suit is maintainable in this form ?
3. What is the nature of the transaction between the Plaintiff and Defendants with respect of the suit property ?
4. Is the Plaintiff entitled to get the suit property redeem ?
5. Is the Plaintiff entitled to get the possession of the suit property ?
6. Whether suit is in limitation ?
7. Whether the Plaintiff is entitled for past mense profit as claim ? If yes ? At what rate ?
8. What Decree and Order ?

7. Apart from the Respondent/Plaintiff examining himself at Exh.37, he has examined other witnesses Ajit Jaikar (PW. 2) at Exh.59, Krushnakant Nevase (PW. 3) at Exh.62, Yashwant Shinde (PW. 4) at Exh.64 whereas the Appellants/Defendants examined Power of Attorney holder of Defendant Nos.1 and 2 namely Shankar Jamdade at Exh.74.

8. It has come in the evidence of plaintiff and his witnesses Ajit and Krushnakant that the defendant has approached the appellant time and again so as to get release his land and since the appellant has not agreed to his request, he was prompted to initiate the suit proceedings.

9. The fact remains that for redemption of mortgage the limitation prescribed is that of 30 years.

10. While appreciating the evidence of witnesses of the Respondent/Plaintiff and that of Appellants/Defendants, both the Courts below have recorded the findings that there was no intention on the part of the Respondent/Plaintiff to pass over absolute title in favour of the Appellants/Defendants and the transaction was in the nature of mortgage by conditional sale. As such the very requirement under Section 58 (C) of the Transfer of Property Act is satisfied.

11. Admittedly, suit came to be initiated within a period of limitation of 30 years. The recitals in the deed if were appreciated by both the Courts below and this Court has also read the same in analytical

manner. Only conclusion that can be drawn is absence of intention on the part of the Respondent to pass over absolute title in favour of the appellant. Rather both the Courts below based on evidence had held that it was a transaction of “mortgage by conditional sale”.

12. In the aforesaid background, the suit was rightly decreed by the Trial Court and confirmed by the First Appellate Court.

13. As far as misjoinder of cause of action or issue of non joinder of necessary party is concerned, the fact remains that the appellant has failed to demonstrate any prejudice to him when the suit claim was agitated. The Trial Court in my opinion was on right side of law by relying on provisions of Order I Rule 3 of Code of Civil Procedure to infer that the suit claim is based on Exh.38 and 39 can be brought in action in a single suit.

14. No question of law which warrants consideration can be noticed. The appeal as such fails and is accordingly dismissed.

15. I am informed that the Appellate Court has already protected the interest of appellant till 13/02/2020 as such the decree be not executed against the appellant till 13/03/2020.

(NITIN W. SAMBRE, J.)