IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 248 of 2020
WITH
CIVIL APPLICATION NO. 1316 OF 2019
IN
SECOND APPEAL NO. 248 of 2020

Laxman Nana Sawant, since deceased
through Legal heirs .. Appellants
Versus
Thalu Krishna Kamble & ors .. Respondents

…

Mr. P.D. Dalvi with Mr.Rushikesh Patil with S.S. Kurade for the appellant.
None for the respondents.

CORAM: BHARATI DANGRE, J.
DATED : 3rd MARCH 2020.

<u>ORAL JUDGMENT</u> :-

1 Heard finally by consent of the parties.

2 The suit property involved in the Second Appeal is a piece and parcel of land situated at Sr.No. 347, Block No. 554B area 2 Hectare 41.1 are at Village Pernoli, Taluka Azara, District Kolhapur.

3 The plaintiff instituted a Regular Civil Suit which was numbered Regular Civil Suit No.24 of 2001 for redemption of mortgage regarding the suit land.

4 The case set out in the plaint is that the suit land is ancestral and the plaintiff along with the defendant nos.2 and 5 are its owners. The plaintiff along with his brother Mahadev and father Krishna mortgaged the suit land to defendant no.1 for Rs.3,000/- Out of the said amount, Rs.300/- is taken on loan from the defendant no.1 for getting re-conveyance of the suit property from one Mr.Vyankatesth Nadgouda and additional amount of Rs.2700/- is taken on account of marriage of Mahadev being performed in the near future.

5 On acceptance of Rs.3,000/- from the defendant, a registered deed of mortgage came to be executed on 7.7.1973 in favour of defendant no.1. It is the case of the plaintiff that the said deed permitted the defendant no.1 to possess, occupy and enjoy the suit property for period of 10 years and thereafter the mortgagor could redeem the suit land within five years. It further stipulated that the defendant no.1 would then execute the re-conveyance deed in favour of the plaintiff and failure to do so, granted liberty to the mortgagor to knock the doors of the Court.

6 It was the claim in the plaint that after death of Mahadeo and Krishna, the plaintiff requested the defendant no.1 to accept the amount of Rs.3,000/- and execute re-conveyance deed as contemplated but he refused to do so. The plaintiff issued a legal notice on 15th June 1996 to the defendant seeking redemption of mortgage and on denial, the suit was filed seeking redemption of mortgage and possession of property as well as mesne profits.

7 The suit was contested by defendant no.1 by filing a written statement where there was denial to the nature of transaction of mortgage. The document dated 27.7.1973 according to the defendant was document of out and out resale. It was stated that there was no relationship between the parties as debtor and creditor and by virtue of the document the defendant no.1 became the absolute owner of the suit land on the date on which the deed was executed. Another stand taken in the written statement was to the effect that during this period, a compromise decree was effected and the suit land was allotted to the share of defendant nos.6 and 7 and the land is in their possession. Prayer was made to dismiss the suit. Defendant nos.6 and 7 also contested by adopting similar stand as was taken by defendant no.1. As defendant nos.2 to 5 did not file any written statement, the suit proceeded ex-parte.

8 The Civil Judge, Jr. Division, the fora of Original Jurisdiction framed Issue No.1 as "Whether the suit transaction is mortgaged and it is so proved by the plaintiff". The second issue framed was "Whether the defendant no.1 proved that the document in question amounts to out and out sale". On answering the Issue no.1 in favour of the plaintiff, the trial Court also answered issue no.3 in the positive and declared that the plaintiff is entitled for redemption for mortgage but denied mesne profits.

9 On construction of the document in question and on making reference to the contents of the said document, the trial Court held that the title/caption of the documents is not conclusive of its nature but it would be necessary to determine the nature of transaction by referring to the contents of the deed and conduct of the parties and the intention of the parties to enter into a transaction should be read from the contents of the deed – read expressly or impliedly reflecting from the conduct.

10 The Court recorded a finding that on perusal of the deed dated 27th July 1973, which is titled as "conditional sale deed" but the contents of the deed disclose that it is in the nature of mortgage. By recording that the executing party had accepted Rs.3,000/- in lieu of condition sale deed in the nature of mortgage, the Court recorded that in legal terminology, it would

constitute mortgage by conditional sale. The contention of the defendant that the transaction was out and out sale was rejected and the defence that land has been allotted to the share of defendant nos.6 and 7 was dealt with by holding that the defendant nos.6 and 7 step in the shoes of defendant no.1 and they are jointly responsible for redemption. Thus, conclusively holding that the alleged transaction was mortgage, the Civil Judge, Jr. Division held that the plaintiff is entitled to redeem the same. The Suit came to be decreed. The defendant nos.1, 6 and 7 were directed to accept amount of Rs.3,000/- from the plaintiff and other defendants and were directed to execute a deed of re-conveyance. The defendant nos.1, 6 and 7 were directed to hand over actual possession of suit land to the plaintiff and defendant nos.2 to 5 on receipt of aforesaid payment. Failure to do so, plaintiff and defendant nos.2 to 5 were held entitled to recovery mesne profits from the date of payment/deposit till realization of possession.

11 The judgment being appealed by the appellant before the District Judge, Gadhinglaj, the Appellate Court affirmed finding by recording that the document (Exhibit 95) dated 27th July 1973 is mortgage by conditional sale. Reiterating the recitals in the said documents, the Appellate Court returned a finding that the document demonstrate the debtor and creditor relationship and on ascertaining the intention of the parties, it

attempt to create a security for repayment of loan and not to transfer ownership of the suit property for price paid or agreed to be paid. Reliance was placed in the judgment of the Apex Court in case of *Tulsi and ors vs. Chandrika Prasad, AIR SC 3359* and the judgment in case of *Tamboli Ramanlal Motilal (deceased) by his legal heirs Vs. Ghanchi Chimanlal Keshavlal (dead) by LRs and anr, reported in AIR 1992 SC 1236* was found to be not applicable and it was held that intention of the parties at the time of executing the document Exhibit-95 was to create a mortgage and not an outright sale with the condition of repurchase. The compromise which transferred the property in favour of defendant nos.6 and 7 was found not to impede the right of the plaintiff in redeeming the mortgage. As far as the issue of limitation is concerned, the Appellate Court made a reference to Article 61 of the Limitation Act, 1963 which provide limitation of 30 years to redeem a mortgage by a mortgager or recover possession of the immovable property mortgaged and the period to run from the time when the right to redeem or to recover possession accrues by recording that the plaintiff exercise their right to redeem before expiry of 15 years, in terms of Exhibit-95 i.e. to say after expiry of 10 years, the plaintiff's exercise their right before expiry of fifth year from the 10th year, the suit was held to be within limitation.

12 The focal point of the matter is the document dated Exhibit 95. The said document is found to be inscribed on a stamp paper of Rs.75/-. The title of the document is “conditional sale”. It is executed on 27th July 1973 between the appellant and the plaintiff as well as two others being Krishna Vithu Kamble and Mahadeo Krishna Kamble. After the necessary particulars, the deed record as follows :

<u>Details of the the rakkam (payment) as under</u> :

Rs.300/-	Amount of Rs.300/- is received from you for repurchase of the land mentioned below from Vyankatesh Ramchandra Nadgonda and since the amount is received as an advance, there is no grievance about payment of the said amount.
Rs.2700/-	The amount of Rs.2,700/- has been obtained as an advance from you for the expenses of the marriage of Mahadeo Vathalu and for other requirements, the said amount being received as advance, there is no grievance about payment of the said amount.
Rs.3,000/-	For the said amount, the land is mortgaged for conditional sale.

13 The document then contain the description of the land and a further recital to the effect that on getting the land

released from Vyankatesh Ramchandra Nadgonda on the date of execution of the document, the land is given in possession of the defendant. The amount payable on the said land, if any due, would be borne by the defendant and the defendant and his legal heirs by conditional sale are entitled to enjoy the said land. Another important covenant in the said document reads thus :-

> *"On the amount of Rs.3,000/- being repaid within a period of five years after the land has been enjoyed by you for 10 years in any month (Chaitra Padwa) the land would be released in our favour and you would execute a reconveyance deed. Whatever expenses incurred for its registration in form of stamp duty would be equally divided. Any dereliction on your part to execute the re-conveyance deed inspite of receipt of the amount, would entail legal proceedings for its release and even after expiry of the period the said land would continue to remain in your possession on conditional sale basis".*

14 These recitals are determinative of the nature of transaction and that the nomenclature of a document is not conclusive of determining its nature but it is the intention of the parties that would lead to the nature of the document. Merely because the document is styled as a conditional sale would not determine it to be so. If one goes to the recitals of the document, what can be easily inferred is that the plaintiff received an amount of Rs.3,000/- bifurcated into two sums; Rs.300/- for the purpose of reversing the sale of the land in question from Vyankatesh

Nadgonda and Rs.2700/- obtained as as advance amount/loan for marriage of Mahadeo and other necessities. The deed further stipulate that in consideration of the amount of Rs.3,000/- being received, mortgage by conditional sale is being made in respect of the suit land. The deed also contain a clause for putting the defendant no.1 in possession of the said land for its enjoyment as a purchaser by conditional sale but the determinative part of the document is the right of redemption in form of a clause which says that after enjoying the land for 10 years from the date of execution of the document and within a period of five years thereafter, if the amount received is returned, the defendant no.1 would execute a reconveyance in favour of the plaintiff. Thus, the document contain a clause for redemption of the mortgage.

15 Section 58(c) of the Transfer of Property Act provides for mortgage by conditional sale and is reads as under :-

> *(c) Mortgage by conditional sale.—Where, the mortgagor ostensibly sells the mortgaged property— on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale: 1[Provided that no such transaction*

shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.]

16 The said Section convey that in case of mortgage by conditional sale, the sale is only ostensible. The sale being ostensible and not real can be ascertained from the intention of the parties as reflected in the documents and it would comprise a right of redemption in favour of the mortgagor despite the expiry of the period stipulated in the contract for its payment. The mortgagor retained the option to redeem the mortgage and take back the property on payment of the mortgage money and this is what distinguishes the transaction of mortgage by conditional sale from a sale with an option of repurchase. In a mortgage by conditional sale the ostensible sale is conditional and intended as a security for the debt. In a mortgage, the debt subsists and the right to redeem remains with the debtor.

17 The Apex Court in Tamboli (supra) has made the following observations in paragraph no.16.

"16 In order to appreciate the respective contentions, it is necessary for us to analyse Ex.26 dated 11-12-1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a 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. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also 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. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter".*

On the distinguishing fact, the Apex Court in the said judgment has concluded that there is no relationship of a creditor and debtor and observed thus :-

> *"17 What does the executant do under the document ? He takes a sum of Rs.5,000/- in cash. The particulars are (a) Rs.2,499/- i.e. Rs.899/- by mortgage of his house on 27-1-1944 and (b) Rs.1,600/- by a further mortgage on 31-5-1947 totalling to Rs.2,499/. Thereafter an amount of Rs.2501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs.5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs.5,000/- with the conditional sale is executed, we are unable to see how the relationship of the debtor and the creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that*

> *there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction.*
>
> *18 The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state "therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right".*
>
> *It is this distinguishing point which has to be borne in mind because an argument was levelled that in Chunchun Jha's case (AIR 1954 SC 345) (supra), also there was a clause transferring possession. But in this case the enjoyment by the transferee has to be under the ownership right. That makes all the difference.*
>
> *19 The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the documents were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well settled in law that the right of redemption and foreclosure are coextensive. The absence of such a right of the mortgagee could only mean that it is a conditional sale."*

18 The facts of the said case are clearly distinguishable. The Court noted that sum of Rs.5,000/- was taken in cash to

repay miscellaneous debts and domestic expenses and business and this amount was not taken as a loan. By executing the document, the executants discharged all prior debts and outstandings and there was no relationship of a debtor and creditor between the parties. On the fact and finding that there was no debt, the Court held that there was no relationship between the debtor and creditor.

19 If in terms of the ratio flowing from the said judgment the right of redemption and foreclosure are co-extensive and absence of such a right of the mortgage would mean that it is a conditional sale, then the facts in the present case do not justify the applicability of the ratio in Tamboli's case. The distinction between mortgage with conditional sale and sale with an option of repurchase has been well settled and in *Pandit Chunchun Jha vs Sheikh Ebadat Ali And Anr,* reported in AIR 1954 SC 345, the distinguishing features were noted as under :-

> *(i) In a mortgage with conditional sale, the relation of a debtor and a creditor subsists while in a sale with an option of re-purchase, there is no such relationship and the parties stand on an equal footing.*
>
> *(ii) A mortgage by conditional sale is effected by a single document, while a sale with an option of repurchase is generally effected with the help of two independent documents.*

> *(iii) In a mortgage with conditional sale the debt subsists as it is a borrowing arrangement, while in a sale with an option of repurchase, there is no debt but a consideration for sale.*
>
> *(iv) In a mortgage with conditional sale, the amount of consideration is far below the value of the property in the market but in a sale with an option of repurchase the amount of consideration is generally equal to or very near to the value of the property.*
>
> *(v) In a mortgage with conditional sale, since this is a mortgage transaction, the right of redemption subsists in favour of the mortgagor despite the expiry of the time stipulated in the contract for its payment. The mortgagor has the option to redeem the mortgage and take back the property on the payment of the mortgage money, after the specified time, but in a sale with an option of re-purchase, the original seller must re-purchase the property within the stipulated time period. If he commits a default the option of repurchase is lost"*

20 Applying the test of determining the real intention of the parties who had executed the document, the document in question would clearly establish a loan being obtained and the property being mortgaged in consideration of the said loan which was required for the marriage of Mahadeo and since the family was in need of money and in lieu thereof, the property was mortgaged with the first defendant. The mortgagor retained the right of reconveyance on repayment of the amount on any Chaitra Padwa falling in five years after expiry of period of 10 years and contemplated reconveyance of the suit property

including its compensation. By the said document, the title has not been made over absolutely to the first defendant but a right of reconveyance was retained by permitting its exercise within five years from expiry of period of 10 years from execution of the document. The document by no construction can be conveyed as an absolute sale in favour of the defendant. The debt being subsisting and the right of redemption being continued with the debtor is a distinguishing factor which would not permit the document to be construed as sale. The First Court as well as Appellate Court have rightly construed the document in question by ascertaining the intention of the parties and rightly concluded that the same is "mortgage by conditional sale" and decreed the suit.

21 No substantial question of law arises in the present Appeal and the same deserves to be dismissed.

22 In view of the dismissal of Second Appeal, Civil Application No.1316/2019 does not survive and is disposed of accordingly.

SMT. BHARATI DANGRE, J

Tilak