

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.604 OF 2011
WITH
SECOND APPEAL NO.605 OF 2011

SHAIKH AMBIR SK SHAHABUDDIN
THROUGH GPA - ASHABEE W/O SK.AMBIR = APPELLANT/s
(Orig.Defendants)

VERSUS

ASADULLAKHA NASRULLAKHA AND ANR. = RESPONDENTS
(Orig.Plaintiffs)

Advocate for Appellants : Mr. M M Joshi,
Mr.S S Kazi, Adv. For Resp.Nos. 1 & 2.

CORAM : SMT.VIBHA KANKANWADI,J.

RESERVED ON : 27/07/2021

PRONOUNCED ON : 05/08/2021

PER COURT :-

1. Heard learned Counsel appearing for respective parties.
2. Since both these appeals are between the same parties and in respect of same subject matter, and both the Courts below have given common judgment and, therefore, here also, the appeals are heard and dealt with together and decided by this common reasoning/order.
3. Appellants in Second Appeal No.604/2011 were

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original defendants in the suit filed by the respondents herein, bearing Regular Civil Suit No. 256/2015 before learned Civil Judge, Junior Division, Paithan, District Aurangabad, which came to be decreed on 31.8.1999 and the said decree was confirmed by learned Additional District Judge, Aurangabad in RCA No. 310/1999 on 5.1.2003.

4. The appellant in Second Appeal No.605/2011 was original plaintiff who had filed Regular Civil Suit No. 249/1995 before the same Judge for declaration, possession and cancellation of sale-deed, which came to be dismissed on 31.8.1999 and the said decree has been confirmed in Regular Civil Appeal No. 307/1999 by the same Judge on 5.1.2003.

5. Learned Advocate appearing for the appellants in both the matters submitted that both the Courts below have not considered the facts and the findings properly. The transaction between (for the sake of convenience, the parties are addressed by their nomenclature before this Court) the appellants and the respondents, was that of mortgage and they never intended to have a sale-deed, i.e. out and out sale, on 14.8.1981. In order to prove that the

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document was mortgaged, the plaintiffs have examined the witnesses who were present before the concerned authorities at the time of registration of the sale-deed. Though there was a written document; yet the plaintiffs were entitled to lead oral evidence and there was no bar under Section 92(1) of the Evidence Act to lead evidence. He relied on the decision in the case of Smt. Gangabai Rambilas Gilda Vs. Smt. Chabubai Pukhrarji Gandhi - AIR 1982 SC 20, wherein, it has been held, -

"The bar imposed by sub-section (1) of [section 92](#) applies only when a party seeks to rely upon the document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the

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document, was entered into between the parties.”

6. The same ratio has been laid down in the case of K. Bhaskaran Nair Vs. Habeeb Mohammed and Ors. - AIR 2002 Kerala 308.

7. Both the parties failed to consider that even in 1981 when the document was executed, the land, admeasuring 13 acres and 34 gunthas, i.e. 5 hectares and 60 Ares, could not have been sold only for Rs.2,000/-. Therefore, taking into consideration the extrinsic evidence, both the Courts below ought to have come to the conclusion that real nature of the transaction was mortgage.

. Further reliance has been placed on the decision in the case of Gangadhar Ramchandra Gaikwad Vs. Rambhau Santu Ushir & Anr. - 2007 (1) Bom.C.R. 517, on the point that a document has to be read as a whole to find out whether the document is deed of sale or conditional mortgage? He also pointed out that the learned First Appellate Court has not complied with order 41 Rule 31 of CPC and when so many issues were framed and answered by the learned Trial Judge; the first Appellate Court has framed only one issue, as to whether the sale-deed dated 14.8.1981 is a mortgage by a conditional sale? Further

reliance is place on the ratio laid down in Khatunbi wd/o Mohammad Sayeed and Ors.. Vs. Aminabai wd/o of Mohammed Sabir - 2006 (6) Mh.L.J. 579 and similar view has been taken in Dwarika Prasad Marwari Vs. Sudarshan Pd.Chaudhary and Ors. – AIR 1984 Patna 274; and Vishwas Balu and Ors. Vs. Ghasiram Ramratan Jajum and Ors. – AIR 1975 Bom. 278. The oral evidence was not at all considered by the Courts below and, therefore, the judgment is vitiated. Substantial questions of law are arising in these appeals, requiring admission of the Second Appeals.

8. Per contra, learned Advocate Mr. Waheed holding for Advocate Mr. Kazi, appearing for Respondent Nos. 1 and 2, supported the reasons given by both the Courts below and submitted that the present appellants failed to prove that there was existence of relationship as creditor and debtor between the respondents and the appellants respectively. It can be seen that the nature of the transaction was mortgage or conditional sale. Further, the original plaintiffs/present appellants, in their suit had not even examined the original plaintiff, but only General Power of Attorney was examined, who had no personal knowledge. Evidence of such person could not have been considered.

No substantial questions of law are arising in this case.

9. It is not in dispute that a document was executed on 14.8.1981, which is registered document and it is styled as sale-deed between the present appellants and the respondents. The appellants were executants whereas the respondents were executors. The suit property was admeasuring 5 hectares and 60 Ares from Gut No.22. The plaintiff had come with a case that the real nature of the transaction was mortgage. When the appellants themselves had gone before the Court, asking for the relief that the defendants therein are liable to deliver the possession of the suit land to them, then, in fact, half of the subject matter, i.e. the dispute, was over. It was only to be shown by the present respondents in their own suit as to whether the defendants in their suit were obstructing their possession over the suit land? Another fact to be considered is, that immediately after the execution of that document, mutation entries were taken and the present appellants had not challenged those entries. Both the Courts below have rightly considered that there was no evidence to show that the relationship between the present appellants and the respondents was that of debtor and creditor, which is a *sine*

qua non for a mortgage transaction. Even if we accept that the appellants were entitled to lead oral evidence and, there could not have been bar under Section 92 of the Evidence Act; yet whatever evidence has been produced by the plaintiff, it cannot be beyond the document. If the parties had no intention to execute the sale-deed, then the terms would have been different. It could have been specifically stated the other terms of the transaction, i.e. when the advance amount is required to be repaid; in what manner etc. The evidence of the plaintiff also appears to be silent on this point. Therefore, even consideration of the oral evidence would give the same result. There is absolutely no reasonable ground shown by the present appellant as to why he had not entered into the witness box to support his claim. He has examined his wife, who was the General Power of Attorney. But it can be seen that her presence was not on record when the sale-deed was executed. The sale-deed mentions that it is absolute sale and no stipulation for refund of the amount was mentioned. There was no separate document also entered into between the parties to show that the real intention was different. Even the recital regarding handing over of possession has been taken and, as aforesaid, the suit was for recovery of possession also.

That means, on the day the document was executed, the plaintiff parted with the possession of the suit property. If he was supposed to get the loan of Rs.2,000/- only then for how many months or years, he could have allowed the defendant to cultivate the land is a question. The document was executed on 14.8.1981 and the suit for declaration, cancellation and possession was filed by the plaintiff on 4.12.1995. The defendant, only on the basis of loan amount of consideration or meager amount of consideration, cannot get the sale-deed cancelled or come with a case that the real nature of the transaction was different when he had, in fact, parted with possession of the property. Therefore, taking into consideration the appreciation of evidence, which is already there, showing that there was no relationship of debtor and creditor between the appellants and the respondents, the conduct also does not support the contention that the real transaction was mortgage in nature. No substantial questions of law are arising in this case.

10. As regards the alleged non-compliance of Order 41 Rule 33 of CPC is concerned, it is to be noted that the basic point regarding the transaction, in question, was framed by the learned Trial Judge and he has also

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considered the other evidence on record which may not have been firstly formulated in the form of points. All the points involved in the appeals were considered by the learned First Appellate Court and, therefore, only on the basis of the contention that there is non-compliance of order 41 Rule 33 of CPC, the appeals cannot be admitted.

11. Both the Courts below have properly appreciated the evidence and the legal points involved in the appeals have been addressed and finding has been given and, therefore, when no substantial questions of law is arising, in view of the decision in the case of Kirpa Ram (Deceased) Through L.Rs. And Ors. Vs. Surendra Deo Gaur and Ors. - (2021) 3 Mah.L.J. 250, both the appeals, filed under Section 100 of CPC, deserve to be dismissed at the admission stage and accordingly they are dismissed. Pending Civil Application, if any, stands disposed of.

(SMT. VIBHA KANKANWADI)
JUDGE

BDV