Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.70 OF 2019
A/W
CIVIL APPLICATION NO.116 OF 2019
IN
SECOND APPEAL NO.70 OF 2019

Jaysing Yashwant Rode-Patil]
Age: 51 years, Occ: Agriculturist]
and Service, R/o Sarud, Tal. Shahuwadi]
District Kolhapur.] Appellant
(Original Defendant &
Appellant in Dist. Court)

Versus

1. Shalini w/o Shamrao Sutar]
Age 74 years, Occ: Agriculturist]
and household.]

2. Shri Vasudeo Shamrao Sutar]
Age 49 years, Occ: Agriculturist]
& Service, Both residing at Sarud,]
Tal. Shahuwadi, Dist. Kolhapur.]
And
Shree Sadguru Krupa Nivas,]
Tal. Haveli, Dist. Pune 17.]

3. Vinayak Shamrao Sutar]
Age: 42 years, Occ: Agriculturist]
& Service, residing at Sarood,]
Tal. Shahuwadi, District Kolhapur.]

And
Shri Sadguru Kripa Niwas,]
Near Verma Jewellers,]
Pimpri, Taluka Haveli,]
District Pune -17.]

4. Sou. Ranjana Bhimrao Sutar]
Age: 49 years, Occ: Agriculturist]

and Household, Residing at Sangrul,]
Tal. Kaveri, District Kolhapur.]

5. Sou. Kalpana Ashok Sutar]
Age: 42 years, Occ: Household,]
Residing at Islampur, Tal. Walwa,]
District Sangli.] Respondents
(Original Plaintiffs &
Respondents in Dist. Court)

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Mr. Satyajeet H. Joshi a/w Mr. Sandeep Mahadik, for Appellant/Applicant.

Mr. Nikhil N. Pawar, for Respondents No.1 and 2.

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CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 6th JULY, 2022.

P.C.

1. This second appeal is by appellant/original defendant against whom both the Trial and the First Appellate Court returned concurrent findings of facts, *inter alia*, directing the appellant to deliver possession of the suit property to the respondents/plaintiffs which came to be mortgaged with a conditional sale and to deliver it's possession free from all encumbrances, if any, created by the appellant.

2. Briefly stated, facts required for disposal of the second appeal are summarized as under.

3. On 2nd July, 1998, husband of respondent No.1 - Shamrao Ramchandra Sutar mortgaged the suit property described in paragraph 1 of the plaint with a conditional sale in favour of the

appellant for a period of nine years which was to be redeemed within 15 years. Mortgage money was Rs.50,000/-. Appellant was, *inter alia*, put into possession of the suit property which he has been cultivating. Due to his service, Shamrao Sutar was residing at *Pimpari - Chinchwad* and intermittently used to visit village Sarud to look after his properties.

4. Shamrao Sutar expired on 5th January, 2007 at Pune leaving behind respondents as legal representatives.

5. On 11th May, 2009, respondents asked the appellant to accept an amount of Rs.50,000/- and to redeem the mortgaged properties. A notice also came to be issued on 12th June, 2009 by registered post with acknowledgment due asking the appellant to redeem the mortgaged property. Appellant did not redeem the mortgage in view of his reply to the notice dated 12th June, 2009. Respondents, therefore, filed a suit for redemption of the mortgaged property.

6. Trial Court, after framing issues and having considered evidence of the respective parties, by the impugned judgment and decree dated 27th September, 2012, decreed the suit for redemption of mortgage against which, the appellant approached the First Appellate Court by preferring an appeal bearing No.494 of 2012 under section 96 of the Code of Civil Procedure. Learned District Judge concurred with the findings and reasons rendered by the trial Court while dismissing the appeal.

7. I heard Mr. Joshi, learned Counsel for the appellant. Mr. Joshi took me though the evidence and the pleadings of the parties,

however, he could not make out existence of any substantial question of law while entertaining the second appeal by this Court.

8. Section 100 of the C.P.C specifically incorporates the words "substantial question of law" which is indicative of legislative intention that the legislature never wanted second appeal to become "third trial on facts" or "one more dice in gamble". Both the Courts below had concurrently returned the finding of facts in favour of the respondents which cannot be permitted to be interfered with in second appeal.

9. The only argument advanced by Mr. Joshi is that both the trial as well as the First Appellate Court have not considered the essence of section 58 (c) of the Transfer of Property Act r/w section 60. He would argue that subsequent to the execution of the mortgage deed Exhibit 43, one more unregistered deed Exhibit 61 came to be executed on 20th July, 2003 between the parties five years after execution of the mortgage deed. By virtue of the subsequent unregistered deed Exhibit 61, deceased Shamrao Sutar had again borrowed an amount of Rs.5,000/- from the appellant for his medical treatment when he was residing at Pimpri Chichwad with his son as he was in financial difficulties. He would argue that by this subsequent deed, deceased Shamrao Sutar intended to sell the mortgaged property to the appellant for a consideration of Rs.55,000/-, *inter alia*, allowing the appellant to continue with his possession over the said property.

10. A perusal of mortgage deed depicts that the mortgage was for a period of nine years which was to be redeemed prior to 15 years

from 2nd July, 1998 which was the date of it's execution. In other words, re-conveyance was to be executed before 15 years and the parties would bear 50% cost of re-conveyance at the time of redemption of mortgage. It is an undisputed fact that deceased Shamrao Sutar had mortgaged the suit property in favour of the appellant for an amount of Rs.50,000/- at the time of executing the mortgage deed.

11. Exhibit 43 is the certified copy of mortgage deed issued by Sub Registrar. Obviously, original deed is with the appellant and, therefore, the trial Court had rightly accepted and admitted the certified copy as secondary evidence. A bare look at the recitals of the deed demonstrates that deceased Shamrao Sutar had mortgaged the suit property in favour of the appellant for the purpose of his medicines and other domestic expenses. Had it been his intention to execute a sale deed, deed dated 2nd July, 1998 would not have recitals that the amount was borrowed for medicines and domestic expenses.

12. Section 58 of the Transfer of Property Act reads thus;

> ***"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.****—(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability.*
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> *The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage -money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.*
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> *(b)* ***Simple mortgage.****—Where, without delivering possession*

of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.

(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 a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

[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.]"

13. Law is no more *res integra* on the aspect of format of words to be used in creating a mortgage. No particular format of words is necessary for creation of a mortgage. It is sufficient that transfer should be originally intended as security for debt. Deceased Shamrao Sutar, as stated hereinabove, had transferred his interest in the immovable property for securing payment of debt. There can be no other interpretation of this document as, intention of deceased Shamrao Sutar was quite clear looking to the substance and essence of the transaction. There is no point in taking into consideration and looking into subsequent unregistered document Exhibit 61 purported to be a sale deed dated 20th July, 2003 *qua* suit property between the parties.

14. Both the Courts below have, therefore, duly considered and analyzed the evidence on record and reached a proper and legal conclusion that the transaction was not of a sale but it was a mortgage with conditional sale.

15. Since no substantial question of law is involved in the appeal, in stands dismissed.

16. In view of disposal of the appeal, pending civil application stands disposed of.

[PRITHVIRAJ K. CHAVAN, J.]