IN THE HIGH COURT OF JUDICATURE AT BOMBAY BENCH AT AURANGABAD

SECOND APPEAL NO. 292 OF 1993

1. Laxman Krushna Sangade,
Age : 50 years.

2. Krushna S/o Bhiva Sangade,
Age : 55 years.

Both Agriculturist,
Resident of Kurkundi,
Tq. Sangamner, Dist. Ahmednagar. **... Appellants**

Versus

Hari s/o Bhima Pokharkar,
Since deceased, through his heirs

1-A. Kamalabai w/o Hari Pokharkar,
Age : 48 years.

1-B. Sindhubai D/o Hari Pokharkar,
Age : 14 years.

1-C. Ramdas s/o Hari Pokharkar,
Age : 12 years.

Respondent Nos.1-B and 1-C
being minors, through their legal guardian,
respondent No.1-A mother.

2. Narayan s/o Bhima Pokharkar,
Age : 62 years,
All Agriculturist,
Resident of Kurkundi,
Tq. Sangamner, Dist. Ahmednagar. **... Respondents.**

...

Advocate for Appellants : Mr. S. V. Dixit h/f Mr. V. J. Dixit.
Advocate for Respondent Nos.1A, 1B, 1C & 2 : Mr. S.T. Shelke.

...

CORAM : S. G. MEHARE, J.

RESERVED ON : 11.09.2023
PRONOUNCED ON : 29.11.2023.

JUDGMENT :-

1. The defeated defendants have impugned the Judgments and decrees of the Court of the first instance and the first appellate Court.

2. The appellants will be referred to as the "defendants" and the respondents as the "plaintiffs" for convenience.

3. The plaintiffs have claimed that they had filed a suit for redemption and possession. The agricultural fields were the suit lands. The plaintiffs had a case that they were in dire need of money. They contacted the defendants for financial assistance. The defendants agreed to pay a loan subject to the condition of executing the sale deed in their favour. They also agreed to reconvey the suit lands to them upon returning their amount. A contract was concluded that the plaintiffs would refund Rs.1200/- to them within ten years, and they would reconvey the suit fields to them. Accordingly, on 03.11.1973, the sale deed was executed. On the same day, a contemporary document titled an agreement of resale of the suit lands on

refunding the loan amount was also created. It was purely a mortgage by conditional sale. The plaintiffs went to the defendants with the loan amount and requested them to reconvey the suit lands. However, they denied it. Hence, the suit was filed.

4. The defendants had a case that the plaintiffs agreed to sell the suit lands to them. Hence, from time to time, the plaintiffs took Rs.1130/- from them. They requested the plaintiffs to execute the sale deed, but they avoided it. They had no written evidence of the money they had paid the plaintiffs. Taking advantage of the said situation, the plaintiffs forcibly got an agreement of resell of the suit lands from them. They were afraid of losing the money paid to them. Hence, they executed the said agreement. They never intended to resell the suit lands, as they had their other lands adjoining to the suit lands. It was purely a sale transaction. It was not a mortgage by a conditional sale.

5. Both Courts held that it was a mortgage by a conditional sale. The defence of the defendants was discarded.

6. Heard the respective counsels at length.

7. The appeal was admitted on 23.09.1993. On that day, leave to amend and add ground Nos.2, 3 and 7A was granted. The learned counsel for the appellants amended the grounds accordingly. However, no substantial questions of law were framed. Therefore, this Court had formulated the substantial questions of law on 11.09.2023, which reads thus;

> (A) Whether the terms of re-conveyance shall only be embodied in the document that affects the sale ?
>
> (B) Whether the transaction was a mortgage by conditional sale ?
>
> (C) Whether Section 36-A of the Maharashtra Land Revenue Code protect the defendants ?

8. The learned counsel for the defendants has vehemently argued that unless the condition for resell is embodied in the document of sale, it cannot be said to be a mortgage by conditional sale. The contemporary document of resell of the land does not prove that it was a mortgage by conditional sale. To bolster his argument, he relied on the case of ***Ashokkumar Nandalal @ Girdharilal Maliwal and others Vs. Jaswantsing Pyarasing Sikh and others, First Appeal No.129 of 2007***, decided by this Court on 27.02.2019. He also argued that the

defendants belong to the Scheduled Tribes. Hence, they are protected under section 36-A of the Maharashtra Land Revenue Code. ("M.L.R. Code" for short). It was a question of law, and oral evidence on such an issue is not essential. Such a legal issue may be raised at any stage of the suit. He prayed to allow the appeal.

9. Per Contra, the learned counsel for the plaintiffs would submit that there are two fact findings against the defendants. Therefore, there is a little scope to interfere with the impugned judgments and decrees. He relied on the case of ***C. Doddanarayana Reddy (Dead) By Legal Representative and Others Vs. C. Jayarama Reddy (Dead) By Legal Representatives and Others ; (2020) 4 SCC 659*** and argued that when the view taken by the trial court and the First Appellate Court is possible, and findings of fact are not perverse, then the Court should not exercise the powers under section 100 of the Civil Procedure Code. He also relied on the case of ***Santakumari And Others Vs. Lakshmi Amma Janaki Amma (D) by L.Rs. and Others ; AIR 2000 SC 3009***. The facts of the said case were that the sale deed and agreement to sell the same property after ten years were executed simultaneously. On these facts, it was held that the construction of the document raises a substantial

question of law, and this proposition of law is well settled. Further, it was held that both documents should be read together to understand the intention of the parties. Reading these two documents together, the intention of parties to the contract was nothing, but a mortgage by a conditional sale. The Hon'ble Supreme Court specifically observed that it is to be remembered that at that time, the Transfer of Property Act did not operate in the State of Travancore, and only the general principles of that Act based upon justice, equity and good conscience were applicable. These observations indicate that the ratio was laid down in the particular facts of the case. In this case, the suit land was situated in the Maharashtra State, where the Transfer of Property Act was applicable. Hence, the said case is distinguishable on facts.

10. He also argued that the plaintiffs did not enter the witness box. However, before the suit, they had issued a notice to the defendants. The defendants did not reply to it. They did not prove the undue influence and coercion. Their defence was false. At the time of the transaction, the plaintiffs were in dire need of money for the family expenses; hence, they had no option except to execute a nominal sale deed in favour of the defendants. They had a clear agreement to reconvey the suit

lands to them on refunding the amount of the loan within ten years. Since the terms of the agreements were clear, a contemporary document was created. Silence for such a long period speaks volumes about the intention of the parties. On reading the agreement to resell as a whole, the sole conclusion could be drawn that it was a mortgage by a conditional sale. Both courts have correctly appreciated the evidence, and there is no perversity in the impugned judgments and decrees. No substantial questions of law have been involved in the appeal. The ground of protection under Section 36-A of the Maharashtra Land Revenue Code has been raised for the first time in the second appeal. There was absolutely no pleading that they belonged to Scheduled Tribes and as such protected under the said provision. No substantial questions of law have been involved in this appeal. He prayed to dismiss the appeal.

11. The entire case revolves around the intention of the parties. It is evident that a separate agreement to resell the same land was also executed on the same day. The Plaintiffs had a case of mortgage by conditional sale. Hence, Section 58(C) of the Transfer of Property Act would apply. It has been provided in the said section that where the mortgagor ostensibly sells the mortgaged property, on the 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, this is a mortgage by conditional sale. The proviso to this clause is significant to determine whether it was a mortgage by conditional sale or the transition of a pure sale. The said proviso reads thus ;

> 'No such transactions shall be deemed to be the mortgage unless the condition is embodied in the document which affects or purports to affect the sale'.

12. It is very specific that to determine whether the document is a mortgage by conditional sale, the condition of resell shall be embodied in the document of sale itself.

13. In the present case, a separate agreement to sell was executed on the same day. Both courts admitted the plaintiffs case, read the sale deed and agreement to resell together, and held that the intention of the parties was not to sell the suit lands, but that it was a mortgage by conditional sale.

14. The question that emerged for consideration is whether such a contemporary document complies with the proviso to

clause (C) of Section 58 of the Transfer Property Act. A similar question had cropped up before this Court in the case of *Ashokkumar* (*cited supra*). This Court considered the ratio laid down in the case of ***Pandit Chunchun Jha Vs. Ebadat Ali and Another ; AIR 1954 Supreme Court 345***, in which it was held that under the proviso to section 58 (C) of the Transfer Property Act, if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage whether the documents are contemporaneously executed or not. But the converse does not hold good, that is to say, the mere fact that there is only one document does not necessarily mean that it must be a mortgage and cannot be a sale. If the condition of the repurchase is embodied in the document that effects or purports to effect the sale, then it is a matter of construction which was meant. The Legislature has made a clear cut classification and excluded transactions embodied in more than one document from that category of mortgages".

15. The Hon'ble Supreme Court recently, in the case of ***Prakash (Dead) By L.Rs. Vs. G. Aradhya and others, Civil Appeal No.706 of 2015, Decided on August 18, 2023***, has in paragraph No.24 held thus;

> "24. A perusal of the aforesaid proviso to sub-section (c) of Section 58 of the Act 1882 Act provides that no transaction shall be deemed to be a mortgage unless the condition is embodied in the document which effects or purports to effect the sale. It is the undisputed case in hand that it was not a single document, the condition contained in Civil Appeal No. 706 of 2015 have to be considered by this Court to opine that the transaction was not a sale, but a mortgage. Admittedly, there are two documents".

16. The ratio decidendi in the above case was that if the condition for re-transfer is not embodied in the same document that effects or purports to effect a sale, the transaction would not be regarded as a mortgage by conditional sale. The facts of this case are similar. The plaintiff did not comply strictly with clause (C) of Section 58 of the Transfer of Property Act. Hence, the plaintiffs' case that by two separate documents, the sale deed in question was a mortgage by a conditional sale could not be accepted.

17. As far as another document of repurchases executed on the same day, the Hon'ble Supreme Court in Prakash's case has referred to the observations in the case of ***Umabai Vs. Nilkanth Dhondiba Chavan ; (2005) 6 SCC 243*** in which it was observed in paragraph No.21 that "There exists a distinction between

mortgage by conditional sale and a sale with a condition of repurchase. In a mortgage, the debt subsists, and a right to redeem remains with the debtor, but a sale with a condition of repurchase is not a lending and borrowing arrangement. There does not exist any debt and no right to redeem is reserved thereby. An agreement to sell confers merely a personal right which can be enforced strictly according to the terms of the deed and at the time agreed upon. Proviso appended to Section 58 (C), however, states that if the condition for retransfer is not embodied in the document which effects the sale, the transaction will not be regarded as a mortgage".

18. The law is well settled that to appreciate the document, its contents are to be read in their entirety, and the intention of the parties is to be gathered from the language used therein.

19. Bearing in mind the above proposition of law, the Court read the contents of the sale deed (Exh.44), which does not recite any other transaction of advance of any sum by the vendee to the vendor, which was entered into by and between the parties. The recitals therein are clear that before the date of sale the vendor had received substantial consideration from the vendees for repaying the hand loans they had taken from

others, and the remaining balance consideration was also paid. They had executed the sale deed voluntarily. On the same day, the possession was also delivered to the vendee. Nothing is recited in the sale document that it was a mortgage by conditional sale. It was also not recited that it was a sale on the condition of repurchase.

20. In the case of *Santakumari*, the Supreme Court held that the execution of a separate document on the same day of the sale deed, along with the indebtedness of the vendor, shows that the intention was to re-convey the property to the vendor. However, in paragraph No.12 it has been observed that it is to be remembered that at the time, The Transfer Property Act did not operate in the state of Travancore, and only the general principles of that Act based on justice, equity, and conscience were applicable. Hence, the said case is distinguishable on facts and does not assist the plaintiffs in believing that the separate agreement could be read with the sale deed to prove that it was a mortgage by conditional sale.

21. The agreement to sell (Exh.40) executed on the same day recites that they have sold the suit field for a consideration of Rs.1200/-. If the said amount is paid to the vendee within

ten years, he would sell the suit land to the vendees. The document does not recite that the sale deed was executed as security towards the loan received from the vendee and that a nominal sale deed was executed. However, the recitals were clear that the vendee, the defendant, had to execute the sale deed within or after ten years on consideration of Rs.1200/-. The recitals of the agreement to sell were clearly an agreement to sell, the consideration was agreed upon, and the date was also fixed for the specific performance. It was a document dated 03.11.1973. So, construing the terms of purchase from the agreement, the plaintiffs/Vendors had to execute their personal right to seek specific performance of the contract within three years from 03.11.1983, i.e. on or before 03.11.1986. The plaintiffs/vendors had served notice through a lawyer on 15.10.1982 calling upon the defendants to inform the date of execution of the sale deed as per the agreement. The defendant/vendee replied to his notice through a lawyer on 21.10.1982. They had a defence that the plaintiffs had agreed to sell the suit land to them orally. The plaintiffs had received Rs.1130/- from time to time. However, the plaintiffs were avoiding to execute the sale deed. The plaintiffs obtained the agreement to sell under pressure. They were apprehensive about losing their amount of Rs.1130/-. In these circumstances, the agreement to sell was executed. Indirectly, they had a case that it was not an agreement to sell but a document created under pressure.

22. The plaint reveals that the plaintiffs in the first part brought a story of the execution of sale for the term of ten years and the defendant No.1 had executed an agreement to return the suit field before ten years. It was further agreed that when the plaintiffs would pay the money as per the agreement, he would execute the sale deed. On getting the money, the plaintiffs went to the defendants and asked to execute the sale deed, but they denied. A notice was served upon the defendants on 15.10.1982. The suit was based on the agreement to sell. He avoided to execute the sale deed. Hence, the suit was filed. However, the prayers were otherwise. Order XXXIV of C.P.C. deals with the suit for foreclosure sale and redemption. The relevant rules would be discussed in the later part of the judgment. What should be the nature of the redemption suit should be examined first.

23. The mortgager is the owner who parted with some rights of ownership, and the right of redemption is a right which he exercises by virtue of his residuary ownership to resume what

he had parted with. Section 60 of the Transfer of Property Act provides that after the money becomes due, the mortgagor has a right, on payment or tender at a proper time and place, of the mortgage-money to require the mortgagee to deliver the mortgage deed and all documents relating to the mortgaged property, to deliver possession thereof to the mortgagor. The section is clear that where the mortgagor wishes to redeem the mortgage, he may, on the failure of the mortgagee to redeem, file a suit for redemption, as provided under Order XXXIV of the Civil Procedure Code. On reading Rule 7 of the said Order, it is specific that in a suit for redemption, the plaintiffs have to plead the case of mortgage, the type of mortgage, whether the direction is required to the mortgagee for an account of the principal money and interest due, costs of the suit if any or pray for declaring the amount due at that date or directions to the mortgagee to deliver the documents and possession if parted and retransfer the mortgaged property on payment of the money in the Court. It seems from the prayer that those are like a suit for the specific performance of the contract. There were no specific prayers for redemption, possession and re-conveyance.

24. If it is assumed that the plaintiffs wanted to execute the rights acquired through the said agreement in the form of specific performance of the contract, then, they were required to plead and prove that they were ready and willing to perform their part of the contract. That is the requirement under Section 16 (C) of the Specific Relief Act. The plaintiff did not enter the witness box. The defendants had no opportunity to bring the material on the facts from his mouth. Hence, it is presumed that their evidence was not favourable to the plaintiffs. In other words, an adverse inference is to be drawn against them that they had no case of redemption for the mortgaged property, and their case was not true.

25. The written statement is silent about the protection under Section 36-A of the M.L.R. Code. There should be a specific claim disclosing the caste or tribe for seeking protection under the said section. That issue is a question of fact. Hence, without specific pleadings and evidence, such ground could not be raised for the first time in the second appeal.

26. The above discussion leads this Court to answer the substantial questions of law formulated by this Court as follows;

Question (a) :- The terms of sale by conditional sale should be embodied in the document itself and not in a separate document.

Question (b) :- The sale deed in question was not a mortgage by conditional sale.

Question (c) :- The protection under Section 36-A of the M.L.R. Code is redundant for want of specific pleadings and evidence.

27. The facts discussed with the law further leads this Court to hold that the impugned judgments and decrees of the Court of first instance and first appellate Courts are illegal and perverse. Hence, the following order;

O R D E R

(i) The appeal is allowed.

(ii) The judgments and decrees passed by the learned Joint Civil Judge, Junior Division, Sangamner in R.C.S. No. 123 of 1983 dated 31.3.1987 and confirmed by the learned Additional District Judge, Ahmednagar, in R.C.A. No. 221 of 1987 27.01.1993 stand set aside.

(iii) The plaintiffs' suit stands dismissed, and the decree be drawn up accordingly.

(iv) No order as to costs.

(v) Record and proceedings be returned to the Trial Court.

(S. G. MEHARE, J.)

28. After pronouncement of the judgment, learned counsel for the respondents requested to stay the judgment and order of this Court, as he wish to impugned before the Hon'ble Supreme Court.

29. The respondents is in possession of the suit land. Hence, to protect the interest, the effect and operation of this order is stayed for six (6) weeks from today.

(S. G. MEHARE, J.)

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vmk/-