



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.30 OF 2023
WITH CA/8839/2023

Premchand Lakichand Jain
Died through his L.Rs.

1. Nirmalabai Premchand Jain
Age : 65 years, Occu : Household,
R/o : Nirmala Peth, Pachora Road,
at Post. Jamner, Tal. Jamner,
Dist. Jalgaon
2. Mahendra Premchand Jain
Age : 45 years, Occu : Business,
R/o : Mount World, IInd A-wing,
Flat No.45, PASHAMUS Road,
Pune.
3. Urmila D/o Premchand Jain
Age : 47 years, Occu : Household,
4. Kalpana D/o Premchand Jain
Age : 39 years, Occu : Household,
5. Arpana D/o Premchand Jain
Age : 40 years, Occu : Household,
6. Sadhan D/o Premchand Jain
Age : 38 years, Occu : Household,

Appellant No.3 to 6 R/o : Harsh-villa, 361,
Tilak Nagar Men,
Shwetambar Jain Mandir Galli,
Indore, Tal. & Dist. Indore (M.P.)

...Appellants

Versus

Bansilal Manikchand Jain
Since deceased through his Lrs.

1. Supdabai Bansilal Jain

Age : 76 years, Occu : Household,

2. Anokchand s/o Bansilal Jain

Age : 33 years, Occu : Agril.,

Both R/o : At Post. Shahapur,

Tal. Jamner, Dist. Jalgaon.

3. Mangalabai Indarchand Zambad,

Died through her legal heirs,

3A. Dhanashree Ashish Pagariya

Age : 36 years, Occu : Household,

R/o : T-704, Madhumati Society,

Nanded City, Pune.

3B. Tejashree Mukesh Jain

Age : 34 years, Occu : Agril.,

R/o : T-203, Madhumati Society,

Nanded City, Pune.

4. Mandabai Rajendra Chhajed

Age : 37 years, Occu : Household,

R/o : Muthai Nagar, Jamner,

Tal. Jamner, Dist. Jalgaon

...Respondents

Mr. P.R. Katneshwarkar i/b Mr. Anuj Ajay Fulfagar, Advocate for Appellants;

Mr. B.R. Kedar, Advocate for the Respondent Nos.1, 2, 3A, 3B & 4.

CORAM : S.G. MEHARE, J.

RESERVED ON : 13.09.2023

PRONOUNCED ON : 29.11.2023

JUDGMENT :-

1. The appellant, who was the original defendant, had impugned the judgment and decree of the learned Civil Judge Junior Division, Jamner, passed in R.C.S. No.27 of 1982,, dated 26.07.1988

and of the learned District Judge-5, Jalgaon passed in R.C.A. No.256 of 1988, dated 30.06.2022.

2. The appellants would be referred to as the 'defendants', and respondents as the 'plaintiffs'.

3. Both plaintiffs and defendants died and their legal representatives continued the suit. This appeal is a second round of litigation. Against the judgment and decree of the Trial Court, the first appeal bearing R.C.A. No.256 of 1988 was preferred. It was decided on 01.02.1993. Against the said judgment and decree of the First Appellate Court, Second Appeal No.325 of 1993 was preferred. It was decided on 09.09.2021. This Court had set aside the judgment and decree of the First Appellate Court passed in R.C.A. No.256 of 1988 dated 01.02.1993 and relegated the matter to the First Appellate Court for *de novo* consideration of the appeal with a direction to frame appropriate points for determination in compliance with Order XLI Rule 31 of the Civil Procedure Code and decide the matter on merits. In view of the order of this Court, the First Appellate Court framed in all 21 points for determination and passed the impugned judgment and decree on 30.06.2022.

4. This Court, by order dated 25.07.2023 (Coram: Arun R. Pednekar, J.), asked the learned counsel for the respondents how questions of law formulated by this Court by order dated 05.09.2019 in the earlier round of litigation between the parties as questions of

law at nos. A, B and C would not arise for consideration. It has been further observed that the learned counsel submits that the same are not dealt with by the First Appellate Court on remand. It was directed to file a reply limited to that extent. The Court has perused the submissions of the learned counsel for the plaintiff as per the above order.

5. Both learned counsels agreed for final hearing at the admission stage. Hence, the appeal was admitted and heard finally by consent, as the original suit was filed in 1982. The following substantial questions of law have been formulated:

- (a) Whether the document in question about the filed survey no. 278/3 was a sale deed or deed of mortgage by conditional sale.
- (b) Whether oral evidence would prevail over documentary evidence?
- (c) Whether defendants/present appellants are entitled to specific performance of the field survey no.278/1?
- (d) Whether there was a delay and laches in claiming the specific performance?
- (e) Whether the defendant was ready and willing to perform his part of the contract?

6. The plaintiff had a case that he intended to purchase adjoining land bearing field Survey No. 278/1. However, he had no

money. He knew that the defendant does money lending. Hence, he approached the defendant and asked for money. The defendant asked him to give something in writing or pledge something. He also asked for 2% interest per month on the loan amount. He executed the sale deeds of the field against the loan of Rs. 6000 and the house property against the loan of Rs. 3000 on 21.1.1971. The sale deeds were executed as security against the loan. It was agreed that the possession of the house would not be delivered to the defendant, but the possession of the agricultural field Survey No.278/3 would be delivered and the defendant would maintain the account of the income fetched from the field, and it would be appropriated against the loan amount and the interest. From the loan taken from the defendant, the plaintiff purchased field Survey No. 278/1 on 15.4.1971. Instead of producing the account, in May of 1974, the defendant started demanding the loan amount. The plaintiff had no money. The defendant took advantage of the situation, took possession of field Survey No. 278/1 and obtained an agreement to sell. He did not receive any earnest money. In 1975, the plaintiff could arrange for Rs. 3000/-. He paid it to the defendant and by his application to the Village Panchayat, again an entry was taken in the Village Panchayat records. The defendant fetched heavy income from both fields, and the loan and interest amount was appropriated. But he was greedy to get more interest. Hence, he refused to redeem the

mortgage. It was prayed that the fields be redeemed, possession be delivered to him, it be declared that the loan and interest are appropriated, the defendant be directed to take the accounts of the income fetched from both fields and costs be imposed upon him.

7. The defendant denied that he does illegal money lending. He denied the plaintiff's case. It was purely a sale transaction and not a mortgage. He let the plaintiff reside in the suit house as a licensee. He asked him for many times to vacate the house, but the plaintiff avoided it. He had a clear intention to sell; hence, he agreed to sell field Survey No. 278/1 and received Rs. 2000 as the earnest amount. He agreed to bring the necessary permission from the competent authority as, at that time, the Consolidation scheme was implemented in their village. He did not get permission and avoided to execute a sale deed. He, by way of counter-claim, prayed for the specific performance of the contract. The plaintiff, in reply to the counter-claim, came up with the same case.

8. Learned counsel for the appellants has vehemently argued that the plaintiff had no case that he was in dire need of money to repay the debt or had to spend on his family. In such facts, the plaintiff's case of borrowing the loan and executing two sale deeds on the same day as security against the loan appears not genuine. He did the transactions voluntarily. It was not a mortgage. There were no recitals of retransfer of the suit properties on repayment of the loan

borrowed from the defendant. It is a precondition to prove that it was a mortgage by a conditional sale. No evidence of any type, particularly oral evidence could be led against the document which is required by law to be reduced to writing. The terms of the sale deed and agreement to sell were unambiguous; therefore also no other evidence to prove the nature of the transactions was allowed. Though it has been tried to point out that it was not a mortgage, the plaintiff averments are in the form of a mortgage. To avoid the legal burden to prove the mortgage, a new words of 'security against the loan' have been used. The meaning of the words used by the plaintiff ultimately pertains to the mortgage. The security against the loan is also the mortgage. Hence, he could not escape from the burden of proving that it was not a sale and agreement but a nominal transaction.

9. He further argued that the plaintiff failed to get permission for sale of the Survey No. 278/1. Hence, he delayed the execution of its sale deed. The defendant never denied to perform his part of the contract. Both the plaintiff and the defendants were distant relatives. Therefore, the plaintiff was allowed to reside in the house. The plaintiff told the defendant that his family is annoyed, he should fix the consideration of Rs. 11,000/ for Survey No. 278/1 and execute the sale deed of house, so he could get the permission for sale of that field. Hence, he agreed to transfer the house property in the village Panchayat record. He applied for the transfer of house in his

name, believing the plaintiff that he would get the permission from competent authority to complete sale transaction of Survey No.278/1. In the peculiar circumstances, the said application was moved. It does not prove that the defendant was engaged in illegal money lending.

10. He also argued that both Courts erred in relying on the oral evidence of the plaintiff and his witnesses against the registered document of sale. Such evidence was excluded in view of Section 92 of the Indian Evidence Act. He would also argue that the sale deed Exhibit-83 was not properly proved by examining the witnesses. Therefore, Section 68 of the Indian Evidence Act has to be considered. He also argued that unless the term of reconveyance or resell was embodied in the documents as provided under proviso to Section 58(c) of the Transfer of Property Act, such document shall not be deemed to be a mortgage by conditional sale. No conditions as such were embodied in the sale deeds of the agricultural field and the house. There was nothing on record to prove that it was agreed between the plaintiff and the defendant that the plaintiff would resell the field and the house property on settling the account of income fetched and that would be appropriated towards the loan amount. He would submit that both Courts did not consider the legal propositions of law in proper perception and erroneously held that the defendant was engaged in the illegal money lending business and the transactions were the outcome of the money lending transaction.

11. He further argued that the possession of another field survey no.278/1 was handed over to the defendant against the part consideration and the plaintiff agreed to execute the sale deed on getting permission from the competent authority. The plaintiff failed to perform his part of the contract. Since the possession was handed over in part performance of the contract, the possession of the defendant over survey no.278/1 was protected under Section 53-A of the Transfer of Property Act. He prayed to allow the appeal and set aside the impugned judgments and decrees.

12. The learned counsel for the appellant relied on the case of Mangla Waman Karandikar Vs. Prakash Damodar Ranade, AIR 2021 SC 2272, in which it has been held that once the parties have accepted the recitals and the contract the respondents could not have adduced contrary extrinsic parole evidence unless he portrays ambiguity in the language. Therefore, the Court below erred in appreciating the oral evidence against the document taking the aid of Section 92 of the Indian Evidence Act. He further relied on Kamta Singh Vs. Chaturbhuj Singh, 1934 BCI (0) 17. This case is distinguishable on fact and would not assist the defendant. He further relied on Mateen Khan s/o. Maksud Khan Pathan Vs. Mannan Khan s/o. Aadam Khan Pathan and Others, 2023 DGLS (Bom.) 1897. In this case, Section 59 of the Transfer of Property Act makes it mandatory to effect mortgage to secure principal amount of Rs.100 or

more, except in case of mortgage by deposit of title deeds, only by registered instrument. Oral mortgage is not permissible under the provisions of the Act, for security of Rs.100 of more principal amount. He further relied on the case of Bachhaj Nahar Vs. Nilima Mandal and Another, (2008) 17 SCC 491. The ratio laid down in this case that no amount of evidence can be looked into, upon the plea which was never put forward in the pleading, is a settled law therefore, needs no discussion.

13. Per contra, learned counsel Mr. Kedar for the respondents has vehemently argued that there are two concurrent judgments on the facts; hence, they need not be disturbed by this Court. He would vehemently argue that it was not a mortgage but a security against borrowed money. He also argued that the transaction was never a mortgage by conditional sale. It was a usufructuary mortgage. The possession of Survey No. 278/3 was delivered to the defendant with a right to receive rent and profit for adjusting the loan and interest. He had gained the profit from the said field sufficient to recover the amount of loan and the interest. The sale deed did not recite about the mortgage. However, the oral evidence could be given to prove the real nature of the transaction. Such evidence against the document is permissible under Section 92 of the Indian Evidence Act. Section 92 (1) of the Indian Evidence Act would not apply when it is a case of the plaintiff that the transaction recorded in the document in question

was never intended to be acted upon and that document is a sham. Since there was a specific oral agreement of reconveyance as the transaction was against the security of the loan, the oral evidence of the witnesses would prevail over. He applied for deleting his name from the Village Panchayat records about the house property which was sold to him as a security for loan after paying the amount of Rs.3,000/-. His conduct strengthens the case of executing a sale deed as security against the loan.

14. He further argued that the defendant was engaged in illegal money lending. Similar cases were filed by the other villagers against the defendant. The necessary evidence is also produced. The witnesses also proved that it was a money lending transaction. The defendant charged the interest. Illegal money lending is prohibited. Hence, the case was governed under Section 13-B of the Bombay Money Lenders Act, 1947. The evidence clearly establish that the appellant/defendant was engaged in illegal money lending transaction which can be inferred from his conduct.

15. He also submitted that the plaintiff had no intention to sell the survey no.278/1. However, he could not pay the borrowed amount and, therefore, a nominal agreement to sale was executed to assure the defendant for his money. The possession of the said field was handed over to him for recovering the loan amount. The said agreement was never intended to be acted upon. The defendant knew

the real transaction. Hence, he did not seek specific performance. That apart, he was ever not ready and willing to perform his part of contract. Therefore, both Courts have correctly held that the defendant is not entitled to specific performance to get the sale deed of survey no.278/1 executed. Since the defendant did not perform his part of contract in pursuance of the alleged agreement to sell, both Courts have correctly held that he is not entitled to protection under Section 53-A of the Transfer of Property Act.

16. The learned counsel for the plaintiff relied on the case of Ram Kumar Agarwal and another Vs. Thawar Das (Dead) through Lrs, (1999) 7 SCC 303, in which it has been held that the plea under Section 53-A of the Transfer of Property Act involves a mixed question of law and fact, therefore, cannot be permitted to be urged for the first time at the stage of second appeal. That apart, performance or willingness to perform his part of contract is one of the essential ingredients of the plea of the part performance. He would argue that the defendant failed to perform the part performance; hence, not entitled to protection under Section 53-A of the Transfer of Property Act.

17. He also relied on the case of Shankarlal Ganulal Khandelwal since deceased through L.R. Ramchandra Shankarlal Khandelwal Vs. Balmukund Surajmal Bharuka since deceased through L.Rs. Anil Balmukund Bharuka and others, 1999 (Supp) Bom.C.R.

816 (Bombay High Court). The facts reveals from the judgment were that the learned Court of first instance decreed the suit holding that the sale deed dated 23.11.1972 was nominal and in a nature of simple mortgage. The first appellate Court had reversed the judgment of the Court of first instance and held that it was out and out sale. The plaintiff approached this Court. On the facts, this Court held that oral evidence is admissible to show that the document executed never intended to operate as agreement but that some other agreement altogether not recorded in the document was entered into between the parties. Bar imposed by section 92(1) of the Evidence Act applies only when a party seeks to rely upon document embodying terms of transaction. In this case the case of Smt. Gangabai W/o Rambilas Gilda V Smt Chhabubai w/o Pukraj Gandhi, (1982) 1 SCC 4 which the learned counsel for the plaintiff relied upon was also considered.

18. He further relied on the case of Placido Francisco Pinto Vs. Jose Francisco Pinto and Another. 2021 DGLS (SC) 547. In this case the plaintiff had filed a suit for possession and accounts from younger brother, the defendant. The defendant had filed another suit against the plaintiff for declaration that the sale deed of southern half portion of the suit property as it was never executed and they did not receive the consideration. The learned Court of first instance decreed the suit of the plaintiff. The first appellate Court allowed the appeal of the defendant and dismissed the plaintiff's suit. On the basis of

evidence and case of the respective parties, the High Court affirmed the findings of the first appellate Court. The Hon'ble Supreme Court held that the findings of the First Appellate Court affirmed by the High Court are clearly erroneous. The Hon'ble Supreme Court also discussed the ratio laid in the case of Smt Gangabai (supra).

19. The Hon'ble Supreme Court in the case of Nazir Mohamed Vs. J. Kamala, (2020) 19 SCC 57 has clarified the criteria for entertaining the second appeals under Section 100 of the Civil Procedure Code, 1908 (C.P.C.), that a substantial question of law must be involved affecting the party's rights and not covered by specific legal provision or settled precedents. The interference of the High Court in second appeal is limited. The law is also well settled that in second appeal, normally the Court should not re-appreciate the evidence unless the judgments and decrees impugned before the Court are perverse and not considered the facts in proper perception or considered illegally

20. Bearing in mind the scope of Section 100 of the Civil Procedure Code and considering the substantial questions of law involved in the case, the Court proceeded with the appeal.

21. The rival contention of both parties revolve around the nature or type of the mortgage. The defendant argued that it was a case of mortgage by a conditional sale. As against this, the plaintiff argues that it was a usufructuary mortgage. Having regard to the

arguments advanced above, first it is to be answered what type of the transaction was between the parties.

22. Under Section 58 of the Transfer of property Act (“T.P. Act” for short) a conditional mortgage, the right transfer is, in the form of, a transfer of right of ownership subject to a condition that on default of payment of mortgage money on a certain debt, the sale shall become absolute or on a condition that on such payment being made, the sale shall become void, or on a condition that on such payment being made, the buyer shall transfer the property to the seller. However, such conditions shall be embodied in the document itself. If no such conditions have been embodied in the document, it would not be a mortgage by conditional sale.

23. In a usufructuary mortgage, what is transferred is a right of possession and enjoyment of usufruct. The mortgager delivers the possession or expressly or by implication binds himself to deliver the possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until the payment of the mortgage money, and to receive the rents and profits accruing from the property or any part of such rents or profits and to appropriate the same in view of interest or in payment of mortgage money, or partly in lieu of interest or partly in payment of the mortgage money.

24. The learned counsel for the plaintiff tried to argue that the security against the loan is not a mortgage of any type. He wanted

to say that it is a different concept and has no concern with a mortgage. However, the definition of the term 'Mortgage' under section 58 of the T.P. Act with plaint averments would give the correct answer to the interpretation of the learned counsel for the plaintiff. It has been defined that "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 a pecuniary liability". The definition is specific that any interest in the immovable property transferred against the loan is a mortgage. The type of mortgage depends upon the terms of the contract. A transaction between the parties, if indicates that the interest in immovable property on agreed condition is transferred against the loan whatever the local terms are, it is a mortgage. The plaint averments are clear that it was usufructuary mortgage. Hence, the plaintiff cannot escape from the rules of mortgage, rights and liabilities arising therefrom. Admittedly, the condition of reconveyance in both documents on payment of the amount raised as a loan was not embodied in the sale deeds Exhibits-83 and 84. In the absence of any such condition embodied in the sale deeds, it could be said that the transaction was a mortgage by conditional sale.

25. Admittedly, there was no mortgage deed in writing. Therefore, there is no question of its registration. The plaintiff has a

oral case of mortgage that too in contradistinction with a document of registered sale deed. As against the claim of the plaintiff, the defendant has a case that it was not a transaction of mortgage but out and out sale. He also denied that he never engaged in illegal money lending business.

26. To prove the sale was a nominal document of sale against the loan, the plaintiff relied on the extrinsic evidence of two witnesses to establish that the sale deed Exh.82 was never intended to be acted upon and it was executed by way of security of the loan. The plaintiff took the shelter of Section 92 of the Indian Evidence Act and the case law to establish his case. He would argue that in the nature of transaction the oral evidence would prevail as the documents were silent. The plaintiff did not rely upon the sale deeds to prove his claim as no terms were embodied therein.

27. It is evident that the possession of the field survey nos.278/3, and survey No.278/1 was parted with the defendant; however, the possession of the house property was not parted. The defendant was enjoying the suit fields from the date of delivery of the possession.

28. In the case of Smt. Gangabai w/o Rambilas Gilda Vs. Smt. Chhabubai w/o Pukharajji Gandhi, (1982) 1 SCC 4, the Hon'ble Supreme Court laid down the law that 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 and not 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 document, was entered into between the parties.

29. In the case of Mushir Mohammed Khan (Dead) By Lrs. Vs. Smt Sajeda Bano and Ors, (2000) 3 SCC 536, the Hon'ble Supreme Court in the middle of paragraph no.12 has observed that :

"12. The view expressed by this Court in Bhaskar case was repeated in the same words in *PL. Bapuswami v. N. Pattay Gounder* :

"The question in each case is one of determination of the real character of the transaction to be ascertained from the provisions of the deed viewed in the light of surrounding circumstances. If the language is plain and unambiguous it must in the light of the evidence of surrounding circumstances be given its true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts."

30. Oral evidence of the intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance, but evidence as to subsequent conduct of the parties is inadmissible.

31. The surrounding circumstances to prove the true intention of the parties regarding the nature of the transaction, were that the defendant on receiving Rs. 3000/-, which as per the plaintiff's case was a loan against the nominal sale deed of house had applied to the Village Panchayat for rerecording the name of plaintiff in record of rights. The another surrounding circumstance was, the defendant took the possession of survey no. 278/1 under an agreement to sell on condition to get the requisite permission from the Competent Authority on 1.11.1973. He produced an application for seeking the permission on 7.11.1973. Though the burden was on the plaintiff to get the permission for transfer, the said application came from his custody. He never asked the plaintiff to get the permission from the Competent Authority. The defendant explained that since the plaintiff was not obtaining the permission from the competent authority to complete the sale transaction of survey no.278/1, hence, he applied to the gram panchayat to reenter the house property in the name of the plaintiff. However, his explanation appears not satisfactory. His

silence and retaining the application for permission, speaks a lot about his knowledge of the nature of the transaction. The oral evidence on the terms of real transaction of mortgage has not been shattered to disbelieve the witnesses. Considering the plaintiff's case the Court is of the view that the ratio laid in the case of Smt. Gangabai and Shankarlal (supra) is squarely applicable to the case at hand.

32. The defendant had filed the counter claim for the specific performance of contract in pursuance of the agreement dated 01.11.1973 about survey no.278/1. He would submit that the date of performance was not fixed in the agreement; therefore, part II of Article 57 of the Limitation Act is applied in the case in hand. The burden to bring the permission to complete the sale transaction of survey no.278/1 was on the plaintiff. He also argued that the learned Court of first instance incorrectly held that the defendant himself failed to get the sale deed registered without there being any appropriate reason.

33. The plaintiff opposed the specific performance of contract contending that it was executed to satisfy the debt.

34. The agreement to sale placed on record is silent that it was a document created to satisfy the debt. In the said agreement Exh.90 terms were specific that the possession would be delivered at the time of execution of the sale deed. The sale deed would be

executed after obtaining the necessary permission and clearing the encumbrances, if any. No date was fixed for performance of the contract. Exh.90, as observed by the trial Court, was produced by the defendant. This was an application to the Sub-Divisional Officer for granting permission for sale under Section 43 of the Tenancy Act. The defendant had a case that in the year 1973, the consolidation scheme was implemented in the Village. Hence, permission for transfer was required. The plaintiff agreed to bring the permission. He paid him Rs.2,000/- as an earnest money. Hence, the field was given in his possession. The defendant, from time to time, requested the plaintiff to bring the permission but he did not bring it. The plaintiff was saying to him that the land was in his possession then why was he afraid of ? In sum and substance, he said that as the plaintiff told him that his family was angry, so house be transferred in his name and the amount of Rs. 3000/- be adjusted at the time of executing the sale deed. Hence, he applied for entering the name of the plaintiff in the village panchayat records. From time to time, he asked the plaintiff to bring the permission for execution of the sale deed, but he avoided under one pretext or the other. Meantime, the plaintiff filed a suit against him; hence, he was compelled to seek specific performance of the contract. There were no specific pleading that the defendant was ready and willing to perform his part of contract and get the sale deed executed.

35. It is evident that the defendant did not plead and prove that he was ever ready and willing to perform his part of contract. The explanation for applying for entering the name of the plaintiff in record of rights also appears not natural. The learned Trial Court has correctly observed that the defendant failed to plead and prove that he was always ready and willing to perform the essential terms of the contract, which were required to be performed by him.

36. The record reveals that in pursuance of the agreement dated 01.11.1973, an application seeking permission was prepared on 07.11.1973. The said application came on record from the custody of the defendant. So, it can be said that he impliedly accepted the responsibility to obtain the permission. In the circumstances, he cannot blame the plaintiff for failing to perform his part of contract. Till the plaintiff filed the suit for redemption and possession of the suit lands, he never whispered about the performance of the contract. Such a conduct reflects that he was not interested in getting the sale deed executed. The human conduct in relation to the relevant act reflects the unspoken intention. His conduct was unnatural. Such a conduct reflects that he was not interested in getting the sale deed executed. In a natural course, such an application would not have been in his custody. Therefore, the Court of first instance has correctly raised a doubt on the defendant why he did not apply to the proper Authorities for seeking permission from 1974 till filing the

written statement. In the set of the facts, the learned Court of first instance has correctly declined the specific performance of the contract. That apart, the Court believed the plaintiff that it was an usufructuary mortgage.

37. Learned counsel for the appellant has submitted that both Courts erred in denying the alternate claim of refund of earnest money.

38. The plaintiff denied that he received the earnest amount of Rs.2,000/- towards the agreement to sell. The plaintiff never opposed that the counter claim of the plaintiff for specific performance of the contract was barred by limitation.

39. The question is whether on refusing the specific performance of contract, the alternate relief of refund of earnest money could be denied. The plaintiff had a defence that it was never an agreement to sell, but the document created to repay the loan amount by apportioning the rents and profits arising out of the agricultural produce. The defendant specifically deposed that he had paid Rs.2,000/- to the plaintiff towards the earnest money. However, in cross-examination the plaintiff merely suggested that he did not pay him Rs.2,000/- and his contention is false. Mere suggestion is not a evidence. Hence, the defendant could not be disbelieved that he did not pay the earnest money. The reasons for denying the refund of earnest money appear not correct. The defendant, in alternate, is

entitled to the refund of earnest amount as the law does not bar the Court to deny the refund where it is proved that the other side had received the earnest money and specific relief was refused for his fault. The Court concludes that the defendant is entitled to refund of earnest amount of Rs.2,000/- with a simple interest @ 8 % p.a. from the date of the agreement to sell till its realization.

40. The defendant claimed that he could not be dispossessed in view of Section 53-A of Transfer of Property Act. He sought the protection, in view of the agreement to sell Exh.90. Though the agreement to sell Exh.90 does not recite handing over of the possession of survey no.278/1, the plaintiff admitted delivering the possession of the said field to the defendant.

41. In the case of Nathulal Vs. Phoolchand, AIR 1970 SC 546, it has been observed that the following postulates are *sine qua non* for basing a claim on section 53-A of Transfer of Property Act.

- (i) There must be a contract to transfer for consideration any immovable property.
- (ii) The contract must be in writing signed by the transferer or by someone on his behalf.
- (iii) The writing must be in such words from which the terms necessary to construe the transfer must be ascertained.
- (iv) The transferee must be in part performance of the contract take possession of the property, or of any part thereof.

(v) The transferee must have done some act in furtherance of contract.

(vi) The transferee must have performed or be willing to perform his part of contract.

42. Section 53-A of the Transfer of Property Act provides for a shield of protection to the proposed transferee to remain in possession against the original owner who has agreed to sell to the transferee, if the proposed transferee satisfies other conditions of Section 53-A.

43. This Court has already held that the defendant did not show due diligence in getting the permission from the Competent Authority for sale and not ready and willing to perform his part of contract. Hence, it can safely be said that the defendant had not done the said act in furtherance of the contract. In view of the ratio laid down in the case of Nathulal (*supra*), the Court is of the view that the plaintiff is not entitled to seek the protection under Section 53-A of the Transfer of Property Act and the plaintiff is not debarred from enforcing the right to claim possession against the defendant. Both courts have correctly recorded the finding on this issue; hence, does not warrant interference.

44. The plaintiff has a specific case that the defendant was engaged in an illegal money lending transaction. To prove the suit claim he had produced certified copies of the other similar suits filed

against the defendant. The defendant admitted filing of those two suits. Besides those two suits, the evidence of the plaintiff's witnesses was also appreciated about the money lending business of the defendant.

45. Learned counsel for the appellant vehemently argued that the evidence produced by the plaintiff to prove the illegal money lending business was not sufficient. Barely filing a suit of similar nature would not brand the defendant as illegal money lender. Per contra, learned counsel for the respondent/plaintiff would submit that the circumstances in which the transactions were done and the *modus operandi* of the defendant proved that he does illegal money lending transactions. Otherwise, there was no need to have a suit against him on the similar allegations. The copies of the other suits were placed on record. There shall be no direct evidence of illegal money lending business. The money lenders dominates the person in need of money and secure the documents like agreement to sell or the sale deeds. They cleverly do not allow to mention the actual terms and conditions of the transactions. The consistent transactions of the similar nature is a sufficient evidence to believe that the defendant was engaged in illegal money lending business. Therefore, whatever the transactions the defendant had with the plaintiff were prohibited under the Bombay Money Lenders Act, 1946.

46. In order to prove the illegal money lending business, the burden is on the person claiming the illegal money lending to prove that there were series of transactions of similar nature. It was incumbent upon the plaintiff to examine the person who had borrowed the amount under illegal money lending.

47. Appreciating the material available on record and admission of the defendant about the similar transactions without explaining that he does the business of purchase and sell of the property, the Court concludes that the plaintiff proved that the defendant engaged in illegal money lending business. Both courts appear to have correctly concluded that the defendant carries on business of illegal money lending.

48. In view of the aforesaid discussion, the substantial questions of law are answered as follows;

Question No.(a). The transaction was not a mortgage by conditional sale, but it was usufructuary mortgage.

Question No.(b). In the facts and circumstances of the case, the extrinsic evidence about the intention of the parties is admissible. Hence, oral evidence prevailed over the documentary evidence.

Question No.(c). The defendant is not entitled to specific performance of the contract. However, he is entitled to refund of the earnest amount with interest.

Question No.(d). There was delay and laches in claiming the specific performance.

Question No.(e). The present appellant, the defendant, was not ready and willing to perform his part of contract.

49. The Court further concludes that the appeal deserves to be partly allowed.

ORDER

- (I) The appeal is partly allowed.
- (II) The impugned Judgments and decrees denying the refund of earnest money to the defendant are set aside.
- (III) The defendant is entitled to recover Rs.2000/- with simple interest @ 8% p. a. from the date of agreement to sell till its realization.
- (IV) The decree be modified accordingly.
- (V) No orders as to costs.
- (VI) Civil Application No. 8839/2023 stands disposed of.
- (VII) The record and papers be returned to the learned Court of the first instance.

(S.G. MEHARE, J.)