IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.727 OF 2017
WITH
CIVIL APPLICATION NO.1437 OF 2017
IN
SECOND APPEAL NO.727 OF 2017

Dattatray Ganpat Takale
since deceased through the legal
heirs
1A]Sou Sindhu Vasantrao Tavare
and Ors. ...Appellants

Versus

Deepak Suryakant Purawant
(deceased)and Ors. ...Respondents

....

Mr. V.P. Sawant, Senior Advocate with Mr. Sugandh Deshmukh for the Appellants.
Mr. Ajay Joshi for the Respondents.
Mr. Vishwanath Talkute for Respondent No.6A

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED : 02nd NOVEMBER, 2023.

P.C. :-

1. The Appellant herein has filed the second appeal under Section 100 of CPC challenging the judgment and order dated 29/06/2017 in Regular Civil Appeal No.63 of 2009. By the impugned judgment, the First Appellate Court has reversed the judgment and decree dated 31/08/2006 passed by learned Civil Judge, Junior Division,

Pandharpur in R.C.S. No.26 of 1988 and consequently dismissed the suit for specific performance, filed by the Appellant-Plaintiff.

2. The Appellants are the legal representatives of the original Plaintiff-Dattatray Takale and the Respondents were Defendants in the suit and shall be hereinafter referred to as the 'Plaintiff' and the 'Defendants' respectively.

3. The dispute is in respect of the property under gat No.291/A and 291/D admeasuring 20 acres, situated at village-Karkamb, Taluka-Pandharpur, District-Solapur. The said property shall be hereinafter referred to as 'the suit property'.

4. The suit property is a part of the joint family property owned by the original Plaintiff – Dattatray and the Defendant Nos.3 to 8. The said property was originally surveyed under Survey No.125 and later under Gat No.291. In the year 1961, the original Plaintiff-Dattatray had obtained loan of Rs.11,000/- from Defendant Nos.1 and 2 and mortgaged the suit property by way of security, vide mortgage deed dated 04/08/1961 for a period of 10 years. The Plaintiff claimed that he was unable to repay the loan of Rs.11,000/-and hence executed a sale deed

dated 29/04/1972 in favour of Defendant Nos.1 and 2 by retaining possession of the suit property.

5. The Plaintiff claimed that the Defendants No.1 and 2 did not have money lending license and hence they had agreed to execute the sale deed to secure the loan amount. The said sale deed was nominal and the parties had agreed not to act upon the same. The Plaintiff claimed that under a contemporaneous oral agreement, the Defendant Nos.1 and 2 had agreed to reconvey the suit property after a period of 20 years, on repayment of loan of Rs.11,000/- with interest @ 1% per annum. On 24/12/1987, the Plaintiff offered to repay the loan amount and requested the Defendant Nos.1 and 2 to reconvey the property. The grievance of the Plaintiff is that the Defendants, in breach of the oral agreement, failed to reconvey the suit property and hence the Plaintiff filed a suit for specific performance seeking to direct the Defendants No.1 and 2 to execute the deed of reconveyance and further to restrain them from interfering in the suit property.

6. The Defendants No.1 and 2 denied that the sale deed was nominal or that the same was executed to secure the loan and claimed that it was an outright sale. The Defendants claimed that they have

partitioned the property amongst themselves and are in possession of the suit property. The Defendants denied the oral agreement for re-conveyance in favour of the Plaintiff. During the pendency of the suit, the Defendant Nos.1 and 2, by deed of sale dated 05/12/1989 sold the suit property to Defendant No.14-Deepak Purwant, the Respondent No.1 in this Appeal.

7. The Trial Court framed the issues and upon considering the evidence adduced by the parties recorded a finding that sale deed dated 29/04/1972 executed between the Plaintiff and Defendant Nos.1 and 2 was without consideration and was not intended to be acted upon. Learned Judge further held that the said sale deed is nothing but a renewal of the earlier mortgage transaction, whereunder the loan amount was to be repaid with interest within 20 years from the date of the said sale deed. Learned Judge held that the limitation for filing a suit for redemption is 30 years from the date the right to redeem accrues. The learned Judge therefore held that the suit was within the prescribed period of limitation. Learned Judge further held that the Plaintiff has proved that he was in possession of the suit property and that by an oral agreement, Defendant Nos.1 and 2 had agreed to re-convey the property in favour of the Plaintiff on repayment of the loan amount. The learned

Judge therefore decreed the suit and directed the Defendant Nos.1 and 2 to execute the deed of re-conveyance for sale consideration of Rs.11,000/- with interest @1% per annum from 29/04/1972 till the date of the order.

8. Being aggrieved by this order, the Defendant No.14, who is the subsequent purchaser, preferred an appeal under Section 96 of the CPC. The First Appellate Court after analyzing the evidence, held that the sale deed dated 29/04/1972, which is a registered document, refers to the previous mortgage and stipulates that the loan amount was adjusted towards sale consideration. The learned District Judge observed that the said sale deed proves that the Plaintiffs had sold the property to Defendant Nos.1 and 2 and had put them in possession of the suit property. The First Appellate Court also observed that on the basis of the said sale deed, mutation entry has been effected in favour of Defendant Nos.1 and 2 and that the Plaintiff had not challenged the mutation entry till the date of filing of the suit.

9. The first Appellate Court held that the oral evidence adduced by the Plaintiff to prove that the transaction was not an outright sale but was a security for loan amount is not admissible under Section 92 of the Indian Evidence Act, 1872. The learned Judge further observed that the

Plaintiff has failed to prove his possession in respect of the suit property and discarded the plea of oral agreement for reconveyance of the suit property. The first Appellate Court therefore allowed the appeal, set aside the judgment and decree of the trial court and consequently dismissed the suit. Being aggrieved by this order, the legal representatives of the deceased Plaintiff have filed this Appeal under Section 100 of the CPC.

10. Shri V.P. Sawant, learned senior counsel for the Plaintiff submits that the Plaintiff has not disputed execution of the sale deed. He submits that the Plaintiff has set up a specific plea that there was a collateral oral agreement between the parties to reconvey the property after a period of 20 years, on payment of the loan amount. He submits that the Plaintiff had not sought to alter or modify the terms of the sale deed but had adduced oral evidence to prove the collateral oral agreement and further that the parties did not intend acting upon the sale deed. He submits that Section 92 does not preclude the Plaintiff from adducing such evidence and/or proving that the sale deed was nominal and was not intended to be acted upon. He urges that the first Appellate Court has grossly erred in invoking the provisions of Section 92 of the Evidence Act and in holding that the oral evidence regarding the oral

agreement between the parties to reconvey the suit property is inadmissible. He has relied upon the decision of the Apex Court in ***Smt. Gangabai w/o. Rambilas Gilda v/s. Smt. Chhabubai w/o. Pukharajji Gandhi (1982) 1 SCC 4,*** and the decisions of the learned Single Judge of this Court in ***Shankarlal Ganulal Khandelwal v/s. Balmukund Surajmal Bharuka, 1999(2) Mh.L.J.*** and in ***Vithal Saidu Lokhande v/s. Rama Mahadev Gund and ors., 2016(1) Bom.C.R.735.***

11. Per contra, learned counsel for the Respondent No.1(Defendant No.14) submits that the sale deed dated 19/06/1987 was an outright sale. He submits that the sale transaction does not embody any condition relating to reconveyance and hence, the said sale transaction cannot be construed as mortgage by conditional sale under section 58(c) of Transfer of Property Act. He submits that the Appellate Court has analyzed the evidence indepth and has recorded a finding that the Plaintiff has failed to prove that the sale was nominal and was not intended to be acted upon. He submits that the said findings are not perverse and do not warrant interference. He submits that the Plaintiff having filed a suit based on oral agreement, burden of proving such agreement was on the Plaintiff, which he has failed to discharge. He has relied upon the decisions of the Apex Court in ***K. Nanjappa v/s. R.A.***

Hameed alias Ameersab and another (2016) 1 SCC 762, Ouseph Varghese v/s. Joseph Aley and others 1969(2) SCC 539, Bishwanath Prasad Singh v/s. Rajendra Prasad and another (2006) 4 SCC 432 , Tulsi and others v/s. Chandrika Prasad and others (2006) 8 SCC 322, Roop Kumar v/s. Mohan Thedani (2003) 6 SCC 595. Relying upon the decisions of the Apex Court in ***Ram Avadh vs. Achhaibar Dubey and Anr. AIR 2000 SC 860*** and ***Balraj Talreja and Anr. vs. Sunil Madan and Anr., AIR 1999SC 3381*** he submits that in a suit for specific performance the Plaintiff was required to plead and prove readiness and willingness to perform his part of contract and the court was under an obligation to find out whether all the requirements, specifically those indicated in Section 16 of the Specific Relief Act are complied with or not. He submits that the Plaintiff having failed to comply with the mandatory requirement under Section 16, he is otherwise not entitled for a decree of specific performance.

12. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

13. It is not in dispute that the Plaintiff – Dattatray had availed loan of Rs.11,000/- from Defendant Nos.1 and 2 and had executed a deed

of mortgage dated 04/08/1961 to secure the said loan. The Plaintiff could not repay the loan amount. The Plaintiff executed a sale deed dated 29/04/1972 and thereby sold the suit property to Defendant Nos.1 and 2. The Plaintiff filed a suit over 16 years later to direct the Defendants to execute a deed of reconveyance in respect of the suit property on receipt of an amount of Rs.11,000/-, being the loan amount advanced in the year 1961, with interest @ 1% p.a. from the date of the Sale Deed. The suit proceeds mainly on the grounds that (i) the Sale Deed dated 29/04/1972 was towards the security of loan; (ii) the Sale Deed was nominal and the same was not to be acted upon; (iii) that by contemporaneous oral agreement, the Defendant Nos.1 and 2 had agreed to re-convey the property after 20 years on payment of Rs.11,000/- with interest @ 1% p.a. from the date of the agreement.

14. The suit is essentially for specific performance and since it was filed prior to 2018 amendment, it was necessary for the Plaintiff to plead and prove his readiness and willingness to perform his part of contract. As held by the Apex Court in ***Ram Avadh*** and ***Balraj Taneja*** (supra) the court was under an obligation to ascertain whether the mandatory requirement under Section 16 of the Specific Relief Act are complied or not despite the fact that the case had proceeded exparte. The Plaintiff

having failed to comply with mandatory requirement of Section 16(c) of the Specific Relief Act, the Plaintiff would not be entitled for decree of specific performance.

15. Be that as it may, the Plaintiff has sought specific performance of oral agreement on the ground that Sale Deed dated 29/04/1972 was nominal, sham and not intended to be acted upon. There is no dispute that it is permissible to a party to a Deed to contend that the Deed was not intended upon but was only a sham document. The bar under section 92 arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show 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. Reliance is placed on ***Roop Kumar*** and ***Gangabai*** (supra).

16. Reverting to the facts of the case, it would be relevant to refer to the recitals of the sale deed dated 29/04/1972 to ascertain whether the transaction was an outright sale or whether it was executed only to secure the loan amount and the parties intended not to act upon the same. In this regard, it is pertinent to note that the Sale Deed refers to the previous

loan transaction of the year 1961 and the mortgage Deed executed by the Plaintiff in favour of Defendant Nos.1 and 2. The Sale Deed records that the Plaintiff had paid the interest and that he was unable to repay the principle sum of Rs.11,000/-. The Plaintiff had therefore sold the suit property to the Defendant Nos.1 and 2 and the loan amount of Rs.11,000/- which was due from the Plaintiff was set-off towards sale consideration. The recitals in the Sale Deed further indicate that possession of the property was handed over to the Defendant Nos.1 and 2. The Sale Deed further stipulates that the Defendant Nos.1 and 2 were liable to pay the property tax and that they and their successors were entitled to possess and enjoy the property as the owners thereof without any obstruction and interference from the Plaintiff and his family members.

17. The recitals in the sale deed clearly indicate that the Plaintiff had conveyed his right, title and interest in the suit property in favour of the Defendant Nos.1 and 2. It does not either specifically or by implication lend support to the case put forth by the Plaintiff that the sale deed was executed as security of loan. The Sale Deed does not contain any condition relating to reconveyance. In ***Tulsi and ors.*** (supra), the Apex Court has observed that :-

" 14... in terms of Section 58(c) of the Transfer of Property Act, a transaction may be held to be a mortgage with conditional sale if it is evidenced by one document. The condition precedent for arriving at a finding that the transaction involves mortgage by way of conditional sale is that there must be an ostensible sale. It must contain condition that on default of payment of 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.

15. A distinction exists between a mortgage by way of conditional sale and a sale with condition of re-purchase. In the former, the debt subsists and a right to redeem remains with the debtor but in case of the latter, the transaction does not evidence an arrangement of lending and borrowing and thus, right to redeem is not reserved thereby. "

18. In ***Bishwanath Prasad*** (supra), the suit was filed interalia for a declaration that the transaction though expressed as a deed of sale was in fact a transaction of usufructuary mortgage. The Apex Court observed that a deed, as is well-known, must be construed having regard to the language used therein. Referring to section 58(c) of the Transfer of Property Act, the Apex Court observed that :-

" 27. A bare perusal of the provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of re-transfer may be evidenced by more than one document. A sale with a condition of re-transfer is not mortgage. It is not a partial transfer. By reason of such transfer all rights have been transferred reserving only a personal right to the purchaser (sic seller), and such personal right would be lost unless the same is exercised within the stipulated time.

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29. Yet again, in Mushir Mohd. Khan v/s. Sajeda Banu (2000) 3 SCC 536, this Court upon construing section 58(c) of Transfer of Property Act opined :

> *"9. The proviso to this clause was added by Act 20 of 1929 so as to set at rest the conflict of decisions on the question whether the conditions, specially the condition relating to reconveyance contained in a separate document could be taken into consideration in finding out whether a mortgage was intended to be created by the principle deed. The legislature enacted that a transaction shall not be deemed to be a mortgage unless the condition for reconveyance is contained in the document which purports to effect to sale.*

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> *31. In Umabai v/s. Nilkanth Dhondiba Chavan (2005) 6 SCC 243, wherein one of us was a party, this Court held :-*
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> > *"21. 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 a debtor; but a sale with a condition of repurchase is not a lending and borrowing arrangement. An agreement to sell confers merely a personal right which can be agreed upon. Proviso appended to Section 58(c), however, states that if the condition for retransfer is not embodied in the document which effects or purports to effect a sale, the transaction will not be regarded as a mortgage. ..."*

19. In the instant case, a strenuous attempt has been made to contend that the Plaintiff has not set up a case of mortgage by way of conditional sale and that it is a sale with a condition of repurchase. As noted above, the averments in the plaint indicate that the Sale Deed was executed as a security of loan without parting possession of the suit property, that the Sale Deed was nominal and was not to be acted upon. It is further averred that by contemporaneous oral agreement the Plaintiff

had reserved the right to repurchase the property on repayment of the loan amount after a period of 20 years with interest @ 1% p.a. from the date of the Sale Deed. In other words, the case of the Plaintiff is that there was no absolute transfer of the rights in the property. The pleadings also indicate that there was transaction of lending and borrowing and that the debt subsists and the Plaintiff has reserved the right to redeem. Thus, the case as pleaded is not of absolute sale with condition to retransfer but is of conditional sale, in which case the suit ought to have been for redemption of mortgage and not for specific performance.

20. Be that as it may, the suit for specific performance and perpetual injunction proceeds on the basis that the Plaintiff is in possession of the suit property, that the Defendants No.1 and 2 had agreed not to act on the Sale Deed and by way of collateral oral agreement had agreed to reconvey the suit property in favour of the Plaintiff. It is to be noted that the pleadings and the oral evidence are not in consonance with the recitals of the Sale Deed. As noted above, the Sale Deed amply proves that there was absolute transfer of right, title, interest and possession of the suit property in favour of the Defendant Nos.1 and 2. As rightly observed by the first Appellate Court, the oral evidence of PW1 and the other witnesses that the Plaintiff had retained

possession of the suit property is contrary to the terms of the Sale Deed and the same is not admissible under section 92 of the Evidence Act. It is also pertinent to note that acting on the said Sale Deed, the names of Defendant Nos.1 and 2 were mutated in the survey records without any objection from the Plaintiff. In such circumstances, the first Appellate Court was justified in recording a finding that the Sale Deed is not nominal and sham or that it was not intended to be acted upon.

21. In ***K. Ninjappa*** (supra), the Apex Court has held that where the Plaintiff comes forward to seek a decree for specific performance of contract of sale of immovable property on the basis of an oral agreement or a written contract, heavy burden lies on the Plaintiff to prove existence of consensus *ad idem* between the parties for the concluded agreement for sale of immovable property. Whether there was such a concluded contract or not, would be a question of fact to be determined in the facts and circumstances of each individual case. It has to be established by the Plaintiff that the vital and fundamental terms for sale of immovable property were concluded between the parties.

22. In the instant case, the first Appellate Court upon considering the evidence on record, has recorded a finding that the Plaintiff has failed to prove the oral agreement. It is to be noted that though PW1 – Sindhu,

the daughter of the Plaintiff claims that she was present at the time of execution of the Sale Deed and the oral agreement between the parties, admittedly she was not a signatory to the Sale Deed. Similarly, PW3 – Chandrakant, who has deposed about the oral agreement, is related to the Plaintiff and was also not a signatory to the Sale Deed. The evidence of PW2 – Shantinath as regards the oral agreement, is too vague to prove the terms of the oral agreement or that there was a concluded contract between the parties. In such circumstances, the finding of fact recorded by the First Appellate Court that the Plaintiff has failed to prove the oral agreement is not perverse and does not warrant any interference.

23. Under the circumstances and in view of discussion supra, the Appeal does not involve any substantial question of law. Hence, the Appeal is dismissed. Interim Application, if any, stands disposed of.

24. Interim relief to continue for a period of four weeks from the date on which the order is uploaded, subject to the condition that the appellant or any person claiming through the appellant, shall not transfer, alienate, or create third party right in respect of the suit property and shall not change the nature of the suit property.

(SMT. ANUJA PRABHUDESSAI, J.)