



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 146 OF 2023
WITH
CIVIL APPLICATION NO. 15520 OF 2022
IN SA/146/2023

Uttam Baburao Ishi

...Appellant

VERSUS

Barku Nawal Patil

...Respondent

...

Mr. A. A. Joshi h/f Mr. S. V. Natu, Advocate for
Appellant

Mr. A. S. Savale, Advocate for Respondent

...

CORAM : R.M. JOSHI, J

DATE : JANUARY 02, 2024

PER COURT :

1. By consent of both sides, heard finally at the stage of admission.

2. Appellant (Original Defendant) has preferred this Appeal under Section 100 of Code of Civil Procedure (for short 'CPC') taking exception to the judgment and decree dated 01.08.2014 passed in RCS No. 44/2001 by CJJD, Shahada and judgment and decree dated 23.11.2011 passed in RCA No. 22/2014 confirming judgment and decree of trial Court.

3. Parties are referred to as Plaintiff and Defendant for the sake of convenience. The facts which led to filing of the present Appeal can be narrated in short as under:

Plaintiff filed suit for specific performance of contract and alternatively to cancel conditional sale deed executed in the year 1996 in respect of Gut No. 72/2 admeasuring 0.80 R situated at Sonval Tarfe Borad, Tq. Shahada, Dist. Nandurbar (for short '**suit property**'). According to plaintiff, in the year 1996 he was in the need of money and hence, he approached to the defendant who paid Rs. 40,000/- in cash and against the said transaction conditional sale deed was executed on 10.06.1996. It was agreed between parties that after one year of the execution and before expiry of five years, the Plaintiff would return the said money and defendant thereafter would restore the land in the name of plaintiff. He further claimed that on 21.05.2001 he issued cheque of Rs. 40,000/- which was duly signed but in view of the terms and conditions of document, defendant did not execute the transfer deed in his favour. He, therefore, issued notice through Advocate on 01.06.2001 calling him for the compliance of the

said terms. The said notice was replied by the defendant by making false claim and hence, suit came to be filed. Defendant appeared in the suit and by filing written statement at Exh. 13 admitted execution of document. It is also admitted that he had received cheque of Rs. 40,000/- from plaintiff. It was further contention of the defendant that during 1996 plaintiff required further money and therefore, he has paid further sum of Rs. 25,000/- and it was agreed by the plaintiff that entire amount of Rs. 65,000/- would be returned and until then the property would remain with defendant.

4. Trial Court framed issues. Both sides led evidence. Trial Court held that document in question is conditional sale and decreed suit. Objection raised by the defendant about maintainability of the suit on account of alleged conflict in prayers is also dealt with and rejected by trial Court. Learned First Appellate Court confirmed the said judgment and decree in RCA No. 22/2014.

5. Learned Counsel for the Defendant submits that both Courts below have committed error in interpreting

the document executed between the parties and as such, substantial question of law is involved in the present Appeal. It is his contention that document executed is outright sale and not a mortgage by conditional sale. According to him, the recitals of document indicate that the suit property was sold by plaintiff to the defendant for consideration of Rs. 40,000/- and possession was also handed over to him. In order to support his submissions, he placed reliance on the judgment of Hon'ble Apex Court in case of Bhimrao Ramchandsra Khalate (Deceased) through Lrs Vs. Nana Dinkar Yadav (Tanpura) and Another, Civil Appeal No. 10197/2010. He further submits that the suit filed by the plaintiff is not maintainable as contradictory prayers are made i.e., prayer for performance of contract as well as cancellation of conditional sale deed which cannot sustain together.

6. Learned Counsel for Plaintiff submitted that the defendant has never raised any issue with regard to the nature of document. On the contrary, in the written statement he admitted the contents of plaint that against lending of Rs. 40,000/- to him by defendant,

document in question was executed. He further submits that notice reply of defendant also clearly shows that this is not the case of outright purchase of property under the document in question but it is a mortgage and the document is executed by way of security towards repayment of money advanced by the defendant to the plaintiff. It is his submission that since the issue of interpretation of document was never raised by the defendant before trial Court or First Appellate Court, it is not open for the defendant now to agitate the same.

7. Hon'ble Apex Court in case of Rajendra Lalitkumar Agrawal Vs. Ratna Ashok Muranjan and Anr, (2019) 3 SCC 378, has held that interpretation of terms and condition of document(s) constitutes substantial question of law and Court while dealing with such question in a second appeal needs to frame substantial question of law and then to answer the same. Considering the dictum and the issue raised by Counsel for defendant in respect of the interpretation of document i.e., conditional sale deed (Exh. 25), substantial questions of law is required to

be framed. Similarly, issue of maintainability of the suit as raised by Appellant also deserves consideration. Hence, following substantial questions of law are framed:-

(i) Whether trial Court and First Appellate Court committed error in interpreting document Exh. 25.?

(ii) Whether suit is not tenable in view of the prayers made in the plaint ?

8. As far as present case is concerned, the facts involved therein are not in dispute. Defendant has admitted case of plaintiff about execution of the conditional sale deed (Exh. 25). Similarly, in the written statement defendant has not denied the fact that he had lent Rs. 40,000/- to plaintiff and against which, the document of conditional sale came to be executed. It is further clear from the notice reply given by the defendant that this is a transaction wherein defendant had lent money to plaintiff and it was agreed between parties to retransfer property on repayment of amount. Of course, defendant claims that subsequent to transaction further sum of Rs. 25,000/- was advanced to plaintiff and he agreed to return Rs. 65,000/- in one stroke. Pertinently, the defendant has

never disputed nature of transaction and in fact accepted the fact that the document was executed towards security for repayment of money advanced to the plaintiff. In the backdrop of admitted facts, character of document in question needs to be decided.

9. At this stage, it would be pertinent to take note of judgment of Hon'ble Apex Court in case of Bhimrao Ramchandra Khalate (supra). It is held therein that distinction between conditional sale and mortgage is relationship of debtor and creditor and the transfer being security for the debt. According to Apex Court, question in each case is one of the 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 words are plain and unambiguous they must in the light of the evidence of surrounding circumstances be given their 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.

10. Apart from the fact that the defendant has never raised issue with regard to the nature of document and the trial Court was never called upon to interpret the same, a bare perusal of the document in question clearly indicates that there is specific term in the said conditional sale deed that the amount of Rs. 40,000/- received by plaintiff would be returned in one go after one year but within five years, and upon which defendant would reverse the said transaction and the land would be entrusted to the plaintiff. There is further categoric recital to say that on this main condition present document is executed. It is thus clear that the intention of the parties was to execute the said document by way of security for refund of the money and not to transfer property by outright sale. This fact gets corroborated by the written statement as well as the notice reply given by the defendant to plaintiff wherein the transaction has been admitted by him. In view of terms of instrument and even from attending circumstances, it cannot be said that the document was towards outright sale of suit property as claimed by defendant now. Consequently, there is no infirmity in the findings recorded by the learned trial

Court and confirmed by First Appellate Court about the plaintiff having fulfilled the condition of sale deed dated 10.06.1996 and is entitled for the relief as prayed. The first substantial question of law, therefore, is answered in negative.

11. Another question is raised by defendant about maintainability of the suit on the ground that the inconsistent prayers made by plaintiff makes suit not tenable. It is his contention that plaintiff cannot seek performance of contract as well as cancellation thereof simultaneously. This issue has been dealt with by the learned trial Court and it is held that the prayers are not contradictory to each other. According to trial Court, both prayers aim at retransfer of the suit property in favour of the plaintiff. Learned trial Court also observed that the plaintiff had amended the plaint with the leave of the Court. It is for these reasons, objection raised by the defendant about the maintainability of the suit came to be rejected by trial Court. Having regard to the nature of dispute, the reliefs sought by the plaintiff being not contradictory but complementary to each other and in

any event, the both prayers are made alternatively as rightly held by trial Court the same does not affect maintainability of suit. As such, both substantial questions of law are answered in negative. In the result, Appeal stands dismissed. Pending application is also disposed of.

(R. M. JOSHI, J.)

Malani