Iresh

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 624 OF 2015
WITH
CIVIL APPLICATION NO. 1359 OF 2015
IN
SECOND APPEAL NO. 624 OF 2015

Subhash Ramchandra Palsande .....Appellant

Vs.

Pushpa Bickchand Gandhi .....Respondent

Mr. Vaibhav R. Gaikwad for the appellant

CORAM : GAURI GODSE, J.

DATE : 13th DECEMBER 2024.

IRESH
MASHAL

Digitally signed by IRESH MASHAL Date: 2024.12.21 16:22:53 +0530

ORDER:

1. Heard learned counsel for the appellant. This second appeal is preferred by the original defendant to challenge the judgment and decree passed by the first Appellate Court directing the defendant to pay an amount of Rs. 1,50,000/- with simple interest at 6% per annum from the date of the suit till realisation of the amount.

2. The trial Court had dismissed the suit on the ground that the plaintiff was not entitled to recover the amount based on the document

of mortgage by a conditional sale executed in favour of the plaintiff. The first Appellate Court has decreed the suit on the ground that the plaintiff is entitled to file a suit for recovery of the mortgage amount in view of Section 68 of The Transfer of Property Act, 1882 ('the said Act').

3. Learned counsel for the appellant submits that once there is mortgage by a conditional sale, the plaintiff would be entitled only to file a suit for foreclosure and the plaintiff would not be entitled to file a suit for recovery of the mortgage amount. In support of his submissions, learned counsel for the appellant relied upon Section 67 of the said Act and submitted that in view of the terms and conditions of the mortgage document, the plaintiff was not entitled to seek recovery of the amount and the only remedy was, right to foreclose or sale of the property. To support his submissions, learned counsel for the appellant relied upon the decision of this Court in the case of ***Pandurang Maruti Dombale vs. Bapurao Piraji Owal and Ors***[1]. He pointed out paragraph 8 of the judgment and submitted that as per the view taken by this Court, the scheme of the Act indicates that the only remedy of a mortgagee by conditional sale is to apply for foreclose and

1 **2017 SCC OnLine Bom 71**

not for a decree of sale. Learned counsel for the appellant therefore submits that the legal principles settled by this Court in the case of ***Pandurang Dombale*** would squarely apply to the present case. He therefore, submits that the second appeal would raise substantial question of law on the point that the plaintiff was not entitled to file a suit for recovery of the mortgage amount.

4. To examine the arguments raised on behalf of the appellant, I have carefully perused both the judgments. The first Appellate Court has considered the facts and the terms and conditions of the mortgage document in detail. There is no dispute that there was a document executed for mortgage by conditional sale on 15th February 2000, by the defendant by accepting Rs. 1,50,000/- from the plaintiff. The execution of the mortgage deed and the terms and conditions of the document are not in dispute. The first Appellate Court has recorded that the amount was accepted by the defendant, free of any interest and there was no delivery of possession of the suit property to the plaintiff. Considering the terms and conditions of the mortgage document, the plaintiff is held entitled to seek recovery of the amount in view of Section 68 of the said Act. The first Appellate Court has referred to the definition of mortgage by conditional sale under Section

58(c) of the said Act and held that in view of breach of the conditions of repayment within the stipulated period, the plaintiff would be entitled to seek recovery of the amount as contemplated under section 68 of the said Act. The first Appellate Court thus held that the plaintiff had two independent rights and she has chosen not to file a suit for recovery of the mortgage amount s per the rights conferred under Section 68 of the said Act.

5. Thus, considering the terms and conditions of the contract and the findings of facts recorded regarding payment of the amount by the plaintiff, the terms providing for repayment, and the possession never being handed over to the plaintiff, the first Appellate Court accepted the plaintiff's claim for recovering the mortgage amount. In view of the admitted facts of the case, I do not see any illegality or perversity in the reasons recorded by the first Appellate Court.

6. In view of different facts of this case, the legal principles settled by this Court in the case of ***Pandurang Dombale***, would not be of any assistance to the arguments raised on behalf of the appellant. Even otherwise, the observations in paragraph 8 of the decision in the case of ***Pandurang Dombale*** are not with reference to the right to sue for

mortgage money as contemplated under Section 68 of the said Act. The point for consideration in the said decision was on the right to seek foreclosure as contemplated under Section 67 of the said Act. Hence, the reference to the scheme of Act is with reference to the right under Section 67 of the said Act. In the present case, the point for consideration is the right of the mortgagee under Section 68 of the said Act. Hence, the arguments raised on behalf of the appellant would not require any consideration by this Court.

7. The second appeal does not raise any question of law. Hence, the second appeal is dismissed.

8. In view of dismissal of second appeal, Civil Application No. 1359 of 2015 is disposed of as infructuous.

[GAURI GODSE, J.]