

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 763 OF 2023
WITH
INTERIM APPLICATIONS (ST.) NOS. 501 OF 2024 AND 500/2024

AND
SECOND APPEAL NO. 722 OF 2023
WITH
INTERIM APPLICATION NO. 18443 OF 2023

Satyabhama Bhivba Lakade (since

Deceased through Legal Heirs),

Sanjay Bhivba Lakade and Ors.

....Appellants

V/s.

Smt. Taibai Dhanshing Jadhav

(since deceased through Legal Heirs)

Hirabai Vitthal Salunke and Ors.

....Respondents

Mr. N.V. Gaikwad alongwith Mr. Dhananjay Bhosale, for the Appellants.

Mr. Abhijit Kulkarni alongwith Mr. Krushna Jaybhay and Mr. Gaurav Shahane, for the Respondents.

CORAM : SANDEEP V. MARNE, J.

Dated : 18 January, 2024.

ORAL ORDER:

1. Second Appeal No. 722 of 2023 is not on board. Since both the Appeals arise out of common Judgment and Order passed by the first Appellate Court, Second Appeal No.722 of 2023 is taken on board and with the consent of the learned counsel appearing for the parties, both appeals are decided by common order.

2. These Appeals are filed by the Appellants challenging the common judgment and order dated 4 September 2023 passed by the District Judge, Baramati by which the Appellant's Appeal bearing Regular Civil Appeal No. 88 of 2013 is dismissed and Respondent's appeal bearing Regular Civil Appeal No.97 of 2013 is partly allowed. Appellants are the Original Defendants in Regular Civil Suit No. 241 of 2005 filed by the Plaintiffs (Respondent Nos.1 and 2) for a declaration that the document dated 14 February 1976 executed by the Plaintiff in favour of Defendant No.1 is not an agreement for sale but as a mortgage deed. Plaintiff sought prayer for cancellation of the Agreement for Sale dated 14 February 1976 by accepting mortgage money of Rs.11,000/- by Defendant No.1. Plaintiffs also sought possession of the two properties as consequential relief to declaration of document dated

14 February 1976 as mortgage. In the suit filed by the Plaintiffs, Defendant No.1 filed counterclaim seeking specific performance of Agreement for Sale dated 14 February 1976 and further sought a prayer not to disturb her possession in respect of the suit property. By Judgment and Decree dated 3 April, 2013, the Trial Court proceeded to dismiss both suit as well as counterclaim. Aggrieved by the decree dated 03 April 2013, both Plaintiffs as well as Defendant No.1 filed their respective Appeals. Plaintiffs filed Regular Civil Appeal No. 97 of 2013 to the extent of dismissal of their suit. Defendants filed Regular Civil Appeal No.88 of 2013 to the extent of rejection of the counterclaim. The First Appellate Court has delivered the common Judgment and Order dated 4 September 2023 by which, the Defendant's Regular Civil Appeal No.88 of 2013 has been dismissed, whereas Plaintiff's Regular Civil Appeal No.97 of 2013 has been partly allowed and Plaintiff's suit has been partly decreed by directing the Defendants to handover possession of the suit property to the Plaintiffs with a direction to the Plaintiffs to refund the amount of Rs.16,000/- alongwith interest at the rate of 6% p.a. from the date of filing of the suit. Defendants are aggrieved by the common judgment and Order dated 4 September 2023 passed by the District Judge in Regular Civil Appeals No.88 of 2013 and 97 of 2013 and they accordingly filed the present Appeals.

3. As the hearing of the Appeal commenced, this Court raised a query with Mr. Kulkarni, the learned counsel appearing

for Respondent Nos.1 and 2 (Original Plaintiffs) as to how the District Court could have granted the relief of possession in favour of the Plaintiffs by recording a finding that Defendant Nos.1 and 2 were not ready and willing to perform their part of contract under the provisions of Section 53A of the Transfer of Property Act. This query was raised as the Plaintiffs' suit was for declaration of the Deed dated 14 February 1976 as mortgage and not the sale-deed. The prayer for possession sought by Plaintiffs was a consequential relief to declaration of title dated 14 February 1976 as a mortgage. Plaintiff did not pray for alternate relief of recovery of possession even if the document was to be treated as an agreement for sale by contending that Defendants were not ready or willing to perform the agreement dated 14 February 1976 and that therefore they must deliver possession of the suit property to the Plaintiff. Thus the end result of the common Judgment and Order of the Appellate Court is such that on account of Defendant's failure in their counterclaim to secure a decree of specific performance of agreement dated 14 February 1976, the first Appellate Court has directed delivery of possession of the suit properties. Thus, in absence of any specific case being pleaded in the plaint and in absence of any relief for delivery of possession on account of non-performance of Agreement dated 14 February 1976, the first Appellate Court has proceeded to grant the relief of possession in favour of the Plaintiffs only because the Defendants failed in their counterclaim. Faced with this situation, Mr. Kulkarni took instructions from Respondent Nos.1 and 2 (Original Plaintiffs) and

he makes a fair statement that the direction of the first Appellate Court for delivery of possession of suit properties can be set aside by granting liberty to the Plaintiffs to file a suit for recovery of possession of the suit properties. In view of the said statement made by Mr. Kulkarni on behalf of Respondent Nos.1 and 2 (Original Plaintiffs) and, direction No.5 in the operative portion of common Judgment and Order dated 4 September 2023 is set aside with consent of the Appellants and Respondent Nos.1 and 2 (Original Plaintiffs).

4. After the direction of the first Appellate Court for handing over possession of the suit properties by Defendants to Plaintiffs is set aside by this Court, Mr. Gaikwad the learned counsel appearing for the Appellants would press the Appeals *qua* dismissal of Regular Civil Appeal No. 88 of 2013 and *qua* rejection of counterclaim filed by Defendant No.1. He would submit that the trial Court has erred in dismissing the counterclaim filed by Defendant No.1, who was always ready and willing to perform her obligations arising out of the Agreement for Sale dated 14 February 1976. He would submit that the Plaintiffs have erroneously not fulfilled their obligation under the Agreement dated 14 February 1976 under a misconception that the said document was not a mortgage deed. That on account of orders passed by the Trial and the first Appellate Court, it is conclusively proved that the document dated 14 February 1976 is not a mortgage deed but an agreement for sale. That the Trial and the

first Appellate Court ought to have drawn an inference that the Plaintiffs were responsible for non-finalisation of transaction of sale by erroneously treating the transaction as mortgage when the same was that of sale. He would further submit that a specific stipulation in the Agreement required the Plaintiffs to obtain permission from Government Authorities before completion of sale transaction. That admittedly till date of filing of counterclaim, the Plaintiffs failed to obtain such permission and therefore Plaintiffs cannot be permitted to take advantage of their own mistake. That Defendant No.1 was always ready and willing to execute the sale-deed but she could not do so on account of failure on the part of the Plaintiffs to obtain requisite permission to effect the transaction of sale. He would submit that the covenant requiring prior permission of the Collector was incorporated in the Agreement for sale on account of specific Notification issued by the Government of Maharashtra imposing a ban on any sale transactions till coming into effect of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act (**Fragmentation Act**). He would submit that such ban continued to remain in operation and in emergency situation, specific provision was made to effect the transaction of sale by obtaining the prior permission of the Collector. That since ban on effecting transactions of sale continued to operate and since Plaintiffs failed to take any steps to obtain such permission, Defendant No.1 cannot be accused of not showing interest in completing the transaction of sale. He would further submit that if it is the case of the Plaintiffs that the ban on

sale transaction was withdrawn at any point of time, it was the duty of Plaintiffs to give an intimation to that effect to Defendant No.1, who would have then got the sale-deed executed in her favour. He would further submit that there is no cogent evidence in support of the findings recorded by the trial and the first Appellate Court about failure on the part of Defendant No.1 to directly deposit the loan amount of Rs.14,000/- in the bank of the Plaintiffs. That in absence of any cogent evidence, mere surmise is drawn by the Trial and the first Appellate Court in that regard. He would submit that the evidence needs to be reappreciated by this Court for the purpose of arriving at a conclusion that Defendant No.1 was always ready and willing to perform her part of the contract. He would therefore submit that substantial questions of law are involved in the present Appeals warranting their admissions and setting aside the orders passed by the first Appellate Court and the Trial Court to the extent of rejection of counterclaim filed by Defendant No.1.

5. *Per-contra*, Mr. Kulkarni, the learned counsel appearing for Respondent Nos.1 and 2 (original plaintiffs) would oppose the Appeals and support the orders passed by the first Appellate Court. He would submit that the Agreement for sale was executed on 14 February 1976 and till filing of counterclaim on 3 September 2008, Defendant No.1 never came forward for execution of sale-deed in her name in pursuance of the Agreement for Sale. That the so called ban on transactions on account of

implementation of the Fragmentation Act was lifted on 28 August 1977. In support of his contention, he would rely upon the judgment of this Court in **Nakubai Valu Dhokane, since deceased through heirs and LR's Vs. Bhagwansingh Prakash Chandra**, 2008 (6) Mh.L.J. 105. He would take me through the various findings recorded by the Trial as well as the first Appellate Court to demonstrate as to how the Defendant No.1 did not satisfy the basic condition of deposit of loan amount of Rs.14,000/- in the Bank Account of the Plaintiff. That the intention of Defendant No.1 not to complete the sale transaction is apparent from her contemporaneous conduct when she failed on the promise of repaying the loan of Rs.14,000/- by making a direct deposit in Petitioner's Bank Account. Further, the conduct of Defendant No.1 in maintaining silence for next 32 long years, leaves no matter of doubt that Defendant No.1 was never willing to get the sale transaction completed in her name. He would submit that except the modification as consented by Defendants Nos.1 and 2 (Original Plaintiffs), Appeals filed by the Appellants are required to be rejected.

6. Rival contentions of the parties now fall for my consideration.

7. Original Plaintiffs (Respondent Nos.1 and 2) have fairly agreed to modification of the common Judgment and Order passed by the first Appellate Court to the extent of direction for

delivery of possession of the suit properties by the Defendants to Plaintiffs. Since Direction No.5 in the operative portion of the first Appellate Court's common Judgment and Order dated 4 September 2023 is set aside, Plaintiffs will have to adopt necessary remedies for recovery of suit properties from Defendant No.1. However, Defendants are not satisfied with this relief and they desire that sale transaction in pursuance of the Agreement for Sale dated 14 February 1976 must be completed in their names. To this limited extent, the learned counsel appearing for the rival parties have canvassed the submissions as recorded above.

8. The trial and the first Appellate Court has refused to grant the relief of specific performance in favour of Defendant No.1 by recording a finding of fact that she was not ready or willing to perform her part of contract. It must be noted here that the Agreement for Sale was executed on 14 February 1976. It is an admitted position that till date of filing of counterclaim by Defendant No.1 on 23 September 2008, she did not write to Plaintiffs even once calling upon them to execute the sale-deed in her name. Silence on the part of Defendant No.1 for 32 long years assumes importance for determining her readiness or willingness. Another factor which is taken note of by the trial and the first Appellate Court is that the Agreement contained a stipulation for payment of amount of Rs.14,00,000/- to Defendant No.1 in the account of the Plaintiffs in the Bank of Maharashtra to satisfy the outstanding amount of loan. Both the trial and the first Appellate

Court have recorded a finding of fact that the said loan account was not closed and that the Bank of Maharashtra recovering the balance outstanding amount in the loan Account from the Plaintiffs by filing execution proceedings. On the basis of the said factum of forcible recovery made by Bank of Maharashtra from Plaintiffs, the trial and the first Appellate Court have recorded a finding of fact that Defendant No.1 failed to deposit the amount of Rs.14,000/- in Plaintiff's Bank. Thus, it is conclusively proved before the Trial and the First Appellate Court that Defendant No.1 failed to pay the consideration of Rs.14,000/- agreed in the Agreement dated 14 February 1976. This conduct on the part of defendant No.1 goes a long way to suggest her reluctance to complete the transaction of sale in her favour.

9. The next issue is about the condition incorporated in the Agreement for obtaining permission for completion of the sale transaction. The Trial Court has recorded a finding that no prior permission was necessary for alienation of agricultural land in the year 1976. The learned counsel appearing for the Appellants has submitted that on account of proposed implementation of the Fragmentation Act, a freeze was imposed on sale transactions pending consolidation of land holdings. While he may be correct in contending that there was a temporary freeze on the sale transactions, he is entirely wrong in assuming that such a freeze continued to operate indefinitely. As a matter of fact from the judgment of *Nakubai* (supra), it appears that the ban was lifted

immediately after introduction of Section 31AB in the Fragmentation Act in the year 1977. This Court has held in para-25 of the Judgment as under :

It is true that from 15th November, 1965 till 28th August, 1977 there was restriction on alienation and sub-division of consolidated holdings and also the transfer and sale was barred under section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act without prior permission of the Collector. However, by Maharashtra Act XLI of 1977, section 31-AB was introduced and, therefore once restriction under section 31 to alienate, sale or transfer was lifted by introducing section 31-AB, the respondent/plaintiff should have taken steps to execute the sale deed within one month from commencement of Maharashtra Act 41 of 1977.

10. I am therefore of the view that the ruse of failure on the part of the Plaintiffs to obtain sale permission cited by Defendant No.1 to prove her readiness and willingness is unacceptable and has rightly been rejected by the Trial and the First Appellate Court.

11. After considering the overall conspectus of the case, I am of the view that except the modification in the final decree of the first Appellate Court as agreed by the Original Plaintiffs, no further modification therein is warranted. After setting aside the direction for delivery of possession of suit properties by Defendants to Plaintiffs, no substantial question of law remains to be decided in the present Appeal.

12. While declining the relief of specific performance in favour of Defendant No.1, the first Appellate Court has moulded the relief and directed the Plaintiffs to refund the amount of Rs. 16,000/- alongwith interest at the rate of 6% p.a. to the Defendants from the date of filing of the suit till recovery of suit property. It appears that the Original Plaintiffs have already deposited the said amount with interest in the Trial Court.

13. I accordingly proceed to pass the following order:

- (i) The common Judgment and Order dated 4 September 2023 passed by the District Judge, Baramati in Regular Civil Appeal No. 97 of 2013 is set aside and Regular Civil Appeal No. 97 of 2013 is dismissed. Accordingly, direction No. V in the operative portion of the Judgment and Order dated 4 September 2023 stands set aside and deleted. Rest of the directions in the common Judgment and Order dated 4 September 2023 shall remain undisturbed.
- (ii) Regular Civil Suit No. 241 of 2005 is dismissed.
- (iii) With the above directions, the Second Appeal No. 763 of 2023 is allowed to the above extent and Second Appeal No. 722 of 2023 is dismissed.

- (iv) Respondent Nos.1 and 2 (Original Plaintiffs) shall be at liberty to institute a fresh suit to seek recovery of possession of suit properties from the Defendants. No findings recorded by the Trial, first Appellate Court as well as this Court shall come in the way of Respondent No.1 (Original Plaintiffs) while prosecuting the said suit and all contentions of the parties with regard to entitlement of Original Plaintiffs to seek possession of suit properties from the Defendants are kept open.
- (v) It would be open for Defendant No.1 to withdraw the amount of Rs. 16,000 deposited by Plaintiff in the Trial Court along with accrued interest.

14. With the above directions, both Second Appeals are **disposed of** without any order as to costs. With the disposal of the Appeals, Interim Applications do not survive. The same also stand disposed of.

NEETA
SHAILESH
SAWANT

SANDEEP V. MARNE, J.

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