2024:BHC-AS:16551

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 698 OF 2014
WITH
CIVIL APPLICATION NO.1646 OF 2007

Dyanoba Nivrutti Jagdale and Ors. ... Appellants.

Versus

Laxman alias Appasaheb Ramchandra Jagdale ... Respondents.

Mr. S.P. Thorat, for the Appellants.
Mr. S.G. Deshmukh a/w. Mr. Nagesh Chavan. for the Respondents.

Coram : Sharmila U. Deshmukh, J.
Date : April 5, 2024.

P. C. :

1. Being dissatisfied by the judgment dated 26th February, 2007 passed by the Appellate Court in Civil Appeal No.27 of 2001 dismissing the Appeal confirming the judgment of the Trial Court dated 21st November, 2000 partly decreeing the suit and directing redemption of mortgage, the original-defendants are before this Court.

2. The facts of the Court are that the plaintiffs instituted Regular Civil Suit No.130 of 1991 for redemption of mortgage as well as declaration. The suit property was described as 3 Anna 3 ps. share of Gat No.2061.

3. It was contended that the suit property was mortgaged for ₹1000/- with the deceased-Nivrutti on 28th March, 1967 by the plaintiff's father for five years. Accordingly, the possession was handed over to Nivrutti. On 17th April, 1972 i.e. during the lifetime of the plaintiff's father the mortgage money was paid and the mortgage was redeemed by executing unregistered re-conveyance deed and accordingly possession was obtained. It was contended that the defendants have no concern with the property however, as the re-conveyance deed was lost in the Tahsildar's office, the name of the defendants remained on paper. Hence, the suit was filed claiming declaration that the suit property was redeemed and was under the ownership of the plaintiffs and an alternate prayer was made that the defendants be directed to execute re-conveyance deed and to handover possession, if the defendants are found in possession.

4. The suit came to be resisted by the defendant no.1 contending that the said transaction between the parties was not mortgage but sale with condition to repurchase within five years and as there was no repurchase within five years, the sale has become absolute. The possession with the plaintiffs was also denied.

5. The parties went to trial. The Trial Court construed the document as mortgage by conditional sale. The Trial Court did not accept the case of the plaintiffs that on 17th April, 1972, there was a redemption by execution of unregistered deed or that possession was handed over to the plaintiffs. The Trial Court held that as the document was mortgage deed the plaintiffs have right to redeem the mortgage especially when the defendants had not filed suit for foreclosure. The Trial Court thus passed a preliminary decree for redemption.

6. As against this, the defendants filed Civil Appeal No.27 of 2001. The Appellate Court re-appreciated the evidence on record and upheld the construction of terms of the document Exhibit 79 as mortgage by conditional sale. The Appellate Court considered the recitals in the document at Exhibit 79 and held that relationship of debtor and creditor was created by the said document. The Appellate Court held that it was a transaction of mortgage by conditional sale and the suit for redemption was brought within the prescribed period of limitation and dismissed the Appeal.

7. Heard Mr. S.P. Thorat, leanred counsel for the Appellants and Mr. S.G. Deshmukh, learned counsel for the Respondents.

8. Mr. Thorat, learned counsel appearing for the Appellant would submit that once the Court has held that the plaintiff has failed to prove the redemption by an unregistered deed of 1972, the suit could not have been partly decreed as the time period which was specified in the document Exhibit 79 was a period of five years. He submits that the plaintiffs have not challenged the said finding which has become final.

9. *Per contra*, Mr. Deshmukh, learned counsel appearing for the Respondent would submit that the plaintiffs have accepted the findings of the Trial Court that there was no payment of mortgage money in the year 1972 and no re-conveyance of the suit property. He submits that the plaintiffs are willing to redeem the mortgage as directed by the Trial Court. He further submits that the suit has been rightly decreed by the Trial Court.

10. Considered the submissions and perused the record.

11. There are concurrent findings of the Trial Court and the Appellate Court construing the document "Exhibit 79" to be mortgage by conditional sale. No submissions have been advanced as regards the recitals in the said document to contend otherwise. In a mortgage the debt subsists and right to redeem remains with the debtor. The only submission advanced is that the Trial Court having held that there was no redemption in the year 1972, as the period prescribed in the document was five years for payment of the mortgage money, the suit could not be decreed. Under Section 60 of the Transfer of

Property Act, 1882 at any time after the principal money has became due, the mortgagor has a right on payment or tender of the mortgage money to require the mortgagee to reconvey the mortgage property which is known as right to redeem and it is this right which is sought to be enforced in the instant suit. It is well settled that once a mortgage always a mortgage and right to redeem cannot be limited by any contract between the parties. The limitation for filing of the suit for mortgage is 30 years as per the Article 61 of the Limitation Act, 1963. The plaintiffs have accepted the judgment of the Courts that there was no re-conveyance and payment of mortgage money in the year 1972 and are prepared to comply with the decree.

12. Once it is held that the document is mortgage by conditional sale and the defendants have not filed any suit for foreclosure, the Trial Court and the Appellate Court have rightly decreed the suit directing redemption.

13. No substantial question of law arises. Appeal stands dismissed.

14. In view of the disposal of Second Appeal, Civil/Interim Application(s) taken out in this Appeal, if any, does not survive and same is disposed of.

[Sharmila U. Deshmukh, J.]