

(2006) 05 MP CK 0111
In the Madhya Pradesh High Court
Case No : Second Appeal No. 820 of 1995

Amar Singh Thakur

APPELLANT

Vs

Bhaiyalal Kothale (Dead) through L.Rs. Smt. Tarabai and
Others

RESPONDENT

Date of Decision : 16-05-2006

Acts Referred:

Citation : (2006) 05 MP CK 0111

Hon'ble Judges : A.K.Shrivastava, J

Bench : Single Bench

Advocate : A.K. Jain, for the Appellant; V.R. Rao, for the Respondent

Final Decision : Allowed

Judgement

A.K. Shrivastava, J.—This second appeal is at the instance of defendant having lost from the two Courts below.

2. In brief the case of plaintiff/respondent is that in the year 1985 he entered into an agreement to purchase the disputed house with the father of defendant-appellant. In between the period from 14.11.1985 to 30.11.1988 he (plaintiff) paid a sum of Rs. 13,875/-. On 22.6.1988 appellant-defendant in presence of the witnesses entered into an agreement of sale in regard to the disputed property and it was settled between the parties that the sale-deed would be executed on 5.9.1981. The defendant failed to execute the sale-deed even after giving notice by the plaintiff. Hence a suit for specific performance was filed by plaintiff/respondent.

3. The defendant/appellant resisted the suit by filing his written statement in which he has categorically denied the execution of the agreement. According to the written statement of defendant, he did not receive amount of Rs. 13,875/-. The document of agreement of sale is a fictitious document. The defendant is still in possession of the suit property as of his own.

4. The trial Court after framing necessary issues and recording evidence decreed

the suit of plaintiff. The appeal which was preferred by defendant/appellant has also been dismissed by the impugned judgment and decree. Hence this second appeal has been filed by the defendant.

5. This Court on 17.1.1996 while admitting the second appeal framed following substantial questions of law:

- a) Whether under the facts and in the circumstances of the case the document Ex.P-9 is a transaction of loan between the parties or an agreement to sale ?
- b) Whether under the facts and in the circumstances of the case the Courts below were justified in granting a decree for specific performance when according to language of Ex.P-9 defendant had taken loan and agreed to repay with interest and on failure on his part it was agreed between the parties that the property would be sold in favour of the plaintiff-respondent?

6. Regarding substantial question of law No. 1:

The document of agreement of sale is Ex.P-9. This document has been found to be proved by the two Courts below. Thus it is held that this document was duly executed between the parties. The question which hinges is whether this document Ex.P-9 is a transaction of loan or is a document of agreement of sale. I have examined this document minutely. In this document it is mentioned that defendant/appellant is in need of money and, therefore, this document of agreement of sale is being executed for a consideration of Rs. 15,000/-, The defendant took different amount from time to time and in total he took Rs. 13,875/- from the plaintiff. It has also been mentioned that this amount which he had taken from time to time in between the period from 14.11.85 to 30.11.88 is towards earnest money. A specific condition has been embodied in this document that in case the defendant did not repay the entire amount within five months from the date of agreement (agreement was executed on 22.6.88) i.e. up-to 22.11.88 in that case defendant would be bound to repay the said amount along with the interest. In case defendant fails to repay the amount along with the interest up-to 22.11.88 in that situation plaintiff would have a right to ask for the execution of sale-deed whenever he thinks it fit. Thereafter in another para it has been mentioned that from 23.11.88 the plaintiff would be entitled to receive the rent.

7. It would be condign to quote three relevant paragraphs of the said agreement (Ex.P-9) which read thus:

**eSa rkjh[k 14-11-85 ls 30-4-88 rd viuh vko";drkuqlkj /khjs&/khjs 13]875@& dgy rsjg gtkj vkB lKs iPrj :i;s edku cspus ds fy;s c;kuk HkS;;kyky dksBkys ls ys pqdk gwa rFkk eSaus vkidks ml edku dh jftLV?h cSukek jftLV?kj ds ;gka djus dk bdjkj fd;k gSA bdjkjukesha dh "krZ ;g gS fd eSa vejflag Bkdwj vkt ls ikap ekg ckn rkjh[k 22-11-88 rd c;kus dh jde okf.l ugha djrk gwa rks rkjh[k 14-11-85 ls eSaus vk.ls tks jde c;kus ds :I esa ysuk "kq: fd;k Fkk mlh rkjh[k ls Jh HkS;;kyky dksBkys dks c;kus dh jde eSa C;kt lfgr okf.l djus dks ck/; gks?axk A

esjs }kjk rkjh[k 22-11-88 rd c;kus dh jde eSa C;kt lfgr HkaS;;kyky dksBkys dk okf.l u dh xbZ rks vkidks bl bdjkjukesd ds }kjk ;g vf/kdkj gksxk fd vki tc dgsaxs rc jftLV?h vkids i{k esa d:axk vxj ,slk u d:arks vki U;k;ky; esa tkdj esjh tk;nkn dh jftLV?h dkuuu U;k;ky; ls djf ysaos A rkjh[k 23-11-88 ls mijksDr uEcj fyf[kr edkksa dkfdjk;k HkS;;kyky dksBkys dks ysus dk gd gksxk A**

8. On going through contents of this document it is gathered that in between 14.11.85 and 30.4.88 from time to time defendant took some amount and in total he has obtained Rs. 13,875/- from the plaintiff. A further condition is embodied that defendant is bound to repay the amount along with interest up-to 22.11.88. A further condition is stipulated that in case defendant fails to repay the amount along with interest up-to 22.11.88, the plaintiff would have right to ask defendant to get the sale-deed executed as and when he deems fit. Another condition mentioned in this document is that w.e.f. 23.11.88 the plaintiff would be entitled to receive rent.

9. Thus after x-raying this document it is perceivable that in between 14.11.85 and 30.4.88 several times the defendant took amount from the plaintiff and on the date of the execution of agreement of sale (EX.P-9) he had taken Rs. 13,875/-. According to the agreement it was agreed between the parties that the amount would be repaid along with interest to the plaintiff on or before 22.11.88. Thus it is a clear transaction of loan and repayment of loan. If the intention of the parties would have been otherwise, the language of the document would have been different and the condition of repayment of the amount along with the interest would not have been there. Because in between 14.11.85 and 30.4.88 from time to time defendant obtained some amount from plaintiff which accumulated to Rs. 13,875/-, therefore, when this document was executed it was agreed between the parties that defendant would repay this amount to plaintiff along with the interest. If the intention of the parties would have been to enter into agreement of sale, definitely all these conditions would not have been there in the agreement (Ex.P-9).

10. Apart from this another condition which has been embodied in Ex.P-9 is that in case defendant fails to repay the amount up-to 22.11.88 along with interest thereafter whenever the plaintiff will say, the sale-deed will be executed. Here no fixed date has been agreed between the parties to get the sale-deed executed. This would mean that even after expiry of 28.11.88 the defendant could repay the amount otherwise this type of condition would not have been there in Ex.P-9. One more fact which cannot be marginalized and blinked away is that it was agreed. between the parties that plaintiff would be entitled to receive rent w.e.f. 23.11.88, which would mean that the possession of the suit property would remain with the defendant.

11. This document of agreement of sale (Ex.P-9) is the foundation stone of the case of the parties. I have x-rayed this document in order to ascertain the real intention of the parties. On close scrutiny of this document it cannot be said that it was intended between the parties to execute a document of agreement of sale.

On going through the findings recorded by learned two Courts below it is gathered that much emphasis was placed in regard to the execution of the document. The two Courts below have not at all considered contents of this document and intention of the parties in execution of the said document.

12. Thus the substantial question of law No. 1 is answered that document (Ex.P-9) is a transaction of loan between the parties and not agreement of sale.

Regarding substantial question of law No. 2:

13. I have already discussed hereinabove that learned two Courts below have not put their endeavour to scan document (Ex.P-9) in order to ascertain that what was the real intention of the parties. From the language of the document it is clear that it was a loan transaction only and since the defendant has taken loan and agreed to repay it along with interest, it is difficult to hold that the intention of defendant was to sell the suit property or intention of the plaintiff was to purchase the suit property.

14. In this view of the matter, substantial question of law No. 2 is answered that under the facts and circumstances of the present case the Courts below were not justified in granting a decree of specific performance because the language of Ex.P-9 clearly establishes that defendant had taken loan and agreed to repay it along with interest. Therefore, though there is a clause in the document that on failure property would be sold to plaintiff, but the real intention was only to repay the loan and for that purpose this document (Ex.P-9) was executed.

15. For the reasons stated hereinabove, this appeal is allowed. The judgment and decree passed by the two Courts below is hereby set aside and the suit of plaintiff is partially decreed to the extent that he shall be entitled to obtain Rs. 13,875/-. The document (Ex.P-9) is total silent that what would be the rate of interest. However, looking to the facts and circumstances, I am of the view that plaintiff is entitled to get interest @ 5% per annum from the date of filing of the suit till realisation of the amount. Looking to the facts and circumstances, the parties are hereby directed to bear their own costs throughout.