
(1972) 07 GUJ CK 0009
In the Gujarat High Court
Case No : Second Appeal No. 327 of 1967

Asmal Bagas Abharam

APPELLANT

Vs

Rai Mahijibhai Parbhatsing and Another

RESPONDENT

Date of Decision : 28-07-1972

Acts Referred:

Contract Act, 1872 — Section 2
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1974 Guj 19 : (1973) 1 GLR 600

Hon'ble Judges : S.H. Sheth, J

Bench : Single Bench

Advocate : K.C. Shah, for the Appellant; J.R. Nanavati, for the Respondent

Judgement

1. The plaintiffs against the defendant Regular Civil Suit No. 122 of 1964 in the Court of the Civil Judge, Junior Division, Karjan for redemption of mortgage of the suit property. - The suit property consists of two parcels of land carved out of S. No. 260 of village Dhamanja in Baroda District. The plaintiffs mortgaged the suit land to the defendant on 4th May 1954 for a sum of Rs. 2,925/- under a registered document. It is the plaintiff's allegation that it is a mortgage by conditional sale.
2. In defence the defendant contended that the transaction was an outright sale and not a mortgage by conditional sale. He also contended that on payment of six times the assessment in respect of the suit land he had become occupant thereof.
3. The trial Court held that the transaction was a mortgage by conditional sale, that the plaintiff No. 2 alone was entitled to redeem the mortgage and that the defendant had not become an absolute owner of the suit land under the Bombay Tenancy and Agricultural Lands Act, 1948. In that view of the matter the trial Court passed preliminary decree for redemption of mortgage against the defendant.

4. The defendant appealed to the District Court. The appellate Court confirmed the findings recorded by the trial Court. One more point was canvassed before the Appellate Court. It was contended by the defendant that under the Bombay Merged Territories (Miscellaneous Alienations Abolition) Act he had become the owner of the suit land. That contention was negated by the Appellate Court. In that view of the matter the Appellate Court dismissed the appeal.

5. It is that appellate decree which is called in question in this Second Appeal.

6. The first contention, which Mr. Shah had raised before me is that the document, Exhibit 40, is a document of outright sale. It is not a document of mortgage by conditional sale. He has argued that the document, Exhibit 40, refers to an earlier transaction between the parties in respect of the suit land as mortgage by conditional sale but it does not refer to this transaction as a transaction of mortgage by conditional sale. The second -fact upon which he has relied is that whereas the consideration for the earlier transaction of mortgage by conditional sale was Rs. 1,725/-, the consideration for the present transaction was Rs. 2,925/-. Whereas the first transaction evidenced by Exhibit 59 was entered into on 4th April 1952, the present transaction was entered into on 4th May 1954. Relying upon these-facts he has argued that there is no evidence on record to show that within the period of 25 months intervening between the two transactions, the price of the suit land had gone up so much that the defendant would be justified in paying a sum of Rs. 1,200/- more to the plaintiffs for an identical transaction. The next fact to which he has invited my attention is that under the present transaction evidenced by Exhibit 40 an obligation has been cast upon the defendant to pay revenue assessment in respect of the suit land. He has then invited my attention to the expression "(Yavatchandra Divakarau Kulabharam Nandava)" which suggests that the transaction is a transaction of outright sale. These are secondary aspects to which, in order to determine the intention of the parties, such weight as is due to them should be attached. But the principal fact which emerges from the document, Exhibit 40, is the condition to reconvey which is incorporated therein. That condition, when translated into English, reads thus:

"On our paying the aforesaid amount in respect of the land under transaction before Vaishakh Sud 3 of any year we have a right to purchase the land under transaction."

The question which has been canvassed by Mr. Shah has been different from one which was canvassed before the Courts below. He has argued that this clause reserves to the plaintiffs the right to repurchase the land. It does not render the transaction a mortgage by conditional sale. I have to read the document as a whole. The heading of that document states that it records the transaction of conditional sale of immovable property at Dhamanja for a sum of Rs. 2,925/-. Reading the document it is clear that the parties entered into a transaction not of an outright sale but a transaction of mortgage by conditional sale. Mr. Nanavaty has drawn my attention to the expressions "conditional sale" and "mortgage by

conditional sale" used in the said document. Those expressions indisputably describe the nature of the earlier transaction between the parties evidenced by Exhibit 59. If I read the aforesaid condition in light of the heading of the document and the description of the earlier transaction as stated in Exhibit 40, I have no doubt in my mind that the parties entered into a transaction of mortgage by conditional sale

7. Mr. Shah has next contended before me that within, the meaning of Section 58(c) of the Transfer of Property Act, the document does not contain the "condition" to retransfer the suit land. According to him, "condition" means an agreement between the parties to reconvey or retransfer the land to the plaintiffs. An agreement which has no consideration is void u/s 25 of the Contract Act. According to him, the agreement to reconvey or re-transfer the suit land to the plaintiffs is without any consideration. He has relied upon the definition in clause (d) of Section 2 of the Contract Act in that behalf. It reads thus.

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise."

The expression "at the desire of the promisor" governs the entire definition. Therefore, at the desire of the promisor, argues Mr. Shah, the promisee must have done one of the following six things:

- (1) He must have done something.
- (2) He must have abstained from doing something.
- (3) He does something.
- (4) He abstains from doing something.
- (5) He promises to do something.
- (6) He promises to abstain from doing something.

Out of the six alternatives, contends Mr. Shah, the fifth alternative governs the present case. According to him, therefore, the plaintiffs have promised to pay the amount of Rs. 2,925/- to the defendant at the time of seeking the re-transfer of the suit land to them. If, therefore, the plaintiffs have promised to pay to the defendant a sum of Rs. 2,925/- for getting the land re-transferred to them, the performance of that promise must be "at the desire of the promisor". The language in which the aforesaid recital is couched in Exhibit 40, shows, contends Mr. Shah, that whereas the defendant the promisor is under an obligation to reconvey the land, there is no obligation on the plaintiffs to purchase it. On the contrary, the language suggests that the plaintiffs have an option to pay the amount or not to pay it and, therefore, to purchase the land or not to purchase it. He has placed this construction on the strength of that part of the aforesaid recital which says that the plaintiffs would pay before Vaishakh Sud 3 of any

year. This expression used in Ex. 40 does not satisfy the requirement arising out of the expression "at the desire of the promisor" used in Section 2(d) of the Contract Act. If that is the case, the argument advanced by Mr. Shah will have to be upheld. In *Vishveshvar Subrao Kulkarni Vs. Sadashiv Venkatramanayya Harite*, the facts of the case show that there was a simultaneous agreement under which the defendant agreed to reconvey the land to the plaintiff whenever he tendered the sum of Rs. 1,268/-. A question arose whether the expression "whenever he tendered the sum of Rs. 1,268/-" amounted to a promise made "at the desire of the promisor". The Bombay High Court found it difficult to say that the plaintiff's promise to pay Rs. 1,268/- at some indefinite time was a promise made "at the desire of the promisor" within the meaning of clause (d). It is further observed in that decision that the words "at the desire of the promisor" in clause (d) imply a promise which has a real effect in conducing to the contract and that an, option" to buy is not equivalent to an agreements to buy because if there is an option, it becomes an agreement, if and when the option is exercised. However, if in the facts and circumstances of the present case the tender of Rs. 2,925/- from the plaintiffs to the defendant on Vaishakh Sud 3 of any year was the sole fact to constitute consideration, it must be said that the language in which the aforesaid recital in Exhibit 40, is couched indicates that there was an option for the plaintiffs to purchase the suit land or not to purchase it because they might as well not tender the amount of Rs. 2,925/- at any time. If that was the situation, it would have been difficult for me to hold that the condition to re-transfer the suit land to the plaintiffs, incorporated in Ex. 40, constituted a contract between the parties because since the option was left to the plaintiffs and since the plaintiffs had nothing to do "at the desire of" the defendant, it would lack consideration within the meaning of that expression as given in Section 2(d) of the Contract Act. Mr. Nanavaty has, however, argued that the consideration for that agreement is not what the plaintiffs have option to do but it is what the plaintiffs have done. In other words, out of the six alternatives into which I have broken the definition of "consideration" as given in Section 2(d), it is the first alternative which governs the facts of the present case. According to him, the plaintiffs would not have entered into the transaction evidenced by Exhibit 40 if the defendant, inter alia, had not agreed to re-transfer the suit land. Therefore, so far as the transaction evidenced by Exhibit 40 is concerned, the cash amount of Rupees 2,925/- and the agreement to retransfer the suit land constitute its consideration. But so far as the agreement to retransfer the land to the plaintiffs is concerned, its consideration lies in what the plaintiffs have done, viz. it lies in the ostensible sale of the suit land which the plaintiffs have made to the defendant. Therefore, within the meaning of the first of the six alternatives specified in the definition of "consideration" the plaintiffs had ostensibly sold the land to the defendant, because the defendant had agreed to retransfer it to the plaintiffs. According to Mr. Nanavaty, that is a valid consideration. I think Mr. Nanavaty is correct in this submission of his. The plaintiffs would not have sold the suit land to the defendant if the defendant had not agreed to reconvey it to the plaintiffs. The consideration, therefore, for the agreement incorporated in Ex.

40, lies in something, which the plaintiffs did in the past. If it renders the suit transaction a transaction of mortgage, the plaintiffs have a right to redeem it on payment of the agreed amount not at any time they like but during the period of limitation. They cannot make any claim after the period of limitation has expired for redeeming the mortgage. It is next argued that payment "on a certain date" is the essence of such a transaction (Section 58(c)).

8. In *Munisami Naicken Vs. Vedachala Naicken and Another*, it has been laid down that the expression "such payment" in second and third clauses of Section 58(c) refers only to the payment of the mortgage amount and the expression "on a certain date" governs the default and not the payment. In other words, the expression "on a certain date" used in first clause of Section 58(c) in the context of a "default of payment of the mortgage-money" does not govern the second and third clauses of that section. I think the view taken by the Madras High Court is correct because the first clause does not use the expression "payment of mortgage-money on a certain date", but uses the expression "default of payment of the mortgage money on a certain date". Therefore, whereas the first clause in Section 58(c) of the Transfer of Property Act provides for a situation arising out of the default of payment of the mortgage-money, the second and third clauses contemplate situations where payment of mortgage money is to be made. Therefore, the expression "on a certain date" used in the first clause in the context of the expression "default of payment of the mortgage-money" cannot be read in the second and third clauses of that section. In other words, it qualifies "default of payment" and not "payment".

9. In *Kinuram Mondol v. Nitya Chand Sirdar*, (1906-7) 11 Cal WN 400, it has been held by the Calcutta High Court that a certain date of payment is an essential element of a mortgage by conditional sale.

10. In the later decision in *Haji Mahomed Mozaffer Ali Bhuyan Vs. Asraf Ali*, , the Calcutta High Court has held that the expression "on a certain date" in Section 58(c) does not imply that the mortgagor cannot make a tender before that date. The "certain date" means only the last date. It has also been laid down in that decision that the question whether a particular transaction is an out-and-out sale or a mortgage by conditional sale is to be decided on the strength of the intention of the parties to be gathered from circumstances.

11. It appears to me that the aforesaid decision of the Madras High Court is based on sound reasoning because the expression "on a certain date" used in the context of "default of payment" within the meaning of the first clause of Section 58(c) cannot be read in the context of "payment" contemplated by second and third clauses of Section 58(c). "Payment of mortgagemoney" is contrary to "default in payment of mortgage-money". I am, therefore, of the opinion that omission to fix a "certain date" is not fatal to the condition to retransfer the suit land to the plaintiffs. It is a valid agreement enforceable at law.

12. Mr. Shah has invited my attention to the decision of the High Court of

Bombay in *Gurunath Balaji Mutalik Deshpande v. Vamanava Kom Nalarav Divan* ILR (1911) 35 Born 258. In that case a deed of sale with option of repurchase contained the following clause:

"I have given the land into your possession; if perhaps at any time I require back the land I will pay you the aforesaid Rs. 600 and any money you may have spent on bringing the land into good condition and purchase back the land."

Upon construction of this clause it was held by a Division Bench of the Bombay High Court that it was a purely personal covenant to repurchase and that therefore the suit was not maintainable. The principle laid down in that decision cannot be applied to the instant case because in that case there was really no agreement between the parties in regard to the repurchase of the land. That there was no agreement between the parties is clearly indicated by the expression "if perhaps at any time I require back the land" used in the document of sale in that case. Under these circumstances, I am unable to accede to the contention raised by Mr. Shah. I am of the opinion that the document, Exhibit 40, contains a valid agreement to repurchase the suit land because it is backed by consideration and also because it satisfied the requirements of Section 58(c) of the Transfer of Property Act.

13. The next contention which Mr. Shah has raised is that in terms of what the plaintiffs have stated in paragraph 4 of the plaint, Exhibit 1, the defendant has become the owner of the suit land under the provisions of the Bombay Tenancy and Agricultural Lands Act and, that therefore, no decree for redemption can be passed against him. I am unable to accept this contention of his. What the plaintiffs state in paragraph 4 of their plaint is that in respect of the suit land the plaintiff No. 1 has been a permanent tenant and that he has mortgaged his permanent tenancy rights to the defendant. It is then added that the defendant has paid six times the assessment in respect of the suit land to the superior landlord. If the defendant has paid six times the assessment to the superior landlord in his capacity as the mortgagee of permanent tenancy rights of the plaintiff, he is entitled to be reimbursed to that extent. The decree passed in the instant case provides for payment of that amount to the defendant. Nowhere have the plaintiffs stated in that context that the defendant has become the owner of the suit land.

14. The next contention raised by Mr. Shah is that the defendant has become the owner of the suit land under the provisions of the Bombay Merged Territories (Miscellaneous Alienations Abolition) Act. There is no evidence to show that the suit land was governed by the provisions of the said Act and that the defendant has become the owner thereof on the abolition of the tenure under which the suit land was held. He has invited my attention to Ex. 38 which is an extract from village form No. VI for village Dhamanja. Village form No. VI is not a document of title and as against the document. Ex. 40, village form No. VI, Ex. 38, cannot prevail. There is no other evidence in support of this contention. It was raised for the first time before the lower Appellate Court. Obviously therefore, in respect of

that contention no evidence was led before the Trial Court where it was not raised.

15. In the result, since all the contentions raised by Mr. Shah fail, the appeal fails and is dismissed with costs.

16. Appeal dismissed.