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(2018) 06 BOM CK 0122

In the Bombay High Court

Case No : SECOND APPEAL NO. 24 OF 1994 CIVIL APPLICATION NO. 294 OF 1994, 2475 OF 1999, 956 OF 2007

BABU GENU WAGHCHAURE — APPELLANT

Vs

SHANKAR TUKARAM THORAT — RESPONDENT

Date of Decision : 04-06-2018

Acts Referred:
Transfer of Property Act, 1882 — Section 58(c)
Code of Civil Procedure, 1908 — Order 20 Rule 12

Citation : (2018) 06 BOM CK 0122

Hon'ble Judges : V. K. JADHAV, J

Bench : Single Bench

Advocate : V. J. Dixit, A. S. Kulkarni, S. S. Choudhari,

Final Decision : Disposed Off

Judgement

1. Being aggrieved by the judgment and order dated 29.12.1993 passed by 3rd Additional District Judge, Ahmednagar in Regular Civil Appeal No. 241

of 1988, the original defendants have preferred this Second Appeal from the appellate decree.

2. Brief facts giving rise to the present Appeal are as follows:

a. The respondent/plaintiff had instituted a Suit bearing Regular Civil Suit No. 152 of 1983 for redemption of the mortgaged property i.e. land survey

no. 24 ad-measuring 4 acres 21 gunthas situated at village Veergaon, Taluka Akole, District Ahmednagar. The respondent/plaintiff had executed a

conditional sale deed dated 02.08.1962 for a consideration of Rs.2,700/- in favour of Babu Genu Waghchaure (appellant no.1 herein) and deceased

Shankar Genu Waghchaure (father of appellant nos. 2 and 3 herein). The appellant nos.1 (Babu) and 2 (Sudhakar) are no more and substituted by

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their legal representatives. According to the respondent/plaintiff, the transaction is a ""mortgage by conditional sale"". The respondent/plaintiff had to

pay society loan and Tagai loan and for that purpose, he had borrowed certain amount from the defendants. It is also the case of the

respondent/plaintiff that the suit land was fertile and its possession was also handed over to the appellants/defendants. It was also agreed that the

principal amount and the interest amount would be adjusted from the income of the land. Accordingly, the respondent/plaintiff had instituted the

aforesaid suit for redemption of the mortgage with consequential prayers.

b. The appellants/defendants had strongly resisted the said suit by filing written statement Exhibit 14. According to the defendants, the suit transaction

is a transaction of conditional sale. It was agreed between the parties to repay the amount of consideration and reconvey the suit land in favour of the

plaintiff on payment of the amount of consideration within the stipulated period of five years. It was agreed that within five years the price amount, if

not repaid by the respondent/plaintiff, the sale would become absolute. The suit of the plaintiff is misconceived and not tenable. In the month of

January 1970, the respondent/ plaintiff had admitted in writing that the suit transaction is a conditional sale. The appellants/defendants have developed

the land by incurring huge amount. In the year 1970, there has been substantial increase in the price of the suit field as irrigation facility was made

available. Thus, the respondent/plaintiff was trying to make out false case for getting back the possession. As per the original transaction, the

respondent/plaintiff had a right to get executed the reconveyance deed till the year 1967 and as such, the suit itself is barred by limitation.

c. On the basis of the rival pleadings of the parties, the trial court has framed the issues. The respondent/plaintiff adduced oral and documentary

evidence in support of his contentions. However, the appellants/defendants have not adduced any oral evidence.

d. The learned Civil Judge, Junior Division, Akole, by the judgment and decree dated 30 th March, 1988, dismissed the suit with costs. Being aggrieved

by the same, the respondent/plaintiff had preferred Regular Civil Appeal No. 241 of 1988 before the District Court, Ahmednagar. The learned 3rd

Additional District Judge, Ahmednagar, by the judgment and decree dated 29.12.1993, allowed the appeal with costs, quashed and set aside the

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judgment of the lower court and decreed the suit with costs. The learned District Judge, Ahmednagar directed that the plaintiff should pay in the lower

court, within a period of two months from the order, the amount of Rs.2,700/- for being paid to the defendants and on depositing the said amount in the

court, the defendants, within one month thereafter on accepting the said amount, shall return the original document Exhibit 37 to the plaintiff in respect

of the suit field and accordingly theÂ mortgage would be redeemed on payment by the plaintiff of the amount of Rs.2,700/- and thereafter, the

plaintiff will be entitled to get possession of the suit field. The learned District Judge also directed an inquiry into the future mesne profits in respect of

the period from the date of said payment till delivery of possession on application under Order 20 Rule 12 of the Code of Civil Procedure, if made by

the plaintiff. Being aggrieved by the same, the original defendants have preferred this Second Appeal.

3. The learned senior counsel for the appellants submits that as per the statement in the deed Exhibit 37, if the amount was not paid within the

stipulated period of five years, then the deed would be treated as a permanent sale deed and after that, the transferee could enjoy the land forever and

the transferor or his successor would be precluded from making any claim and the condition of repurchase was to operate only within the stipulated

period and not further. The learned senior counsel submits that these are the clear indications of sale with the condition of repurchase. The learned

senior counsel submits that the deed Exhibit 37 does not create, expressly or by implication, the relationship of debtor and creditor, nor the amount paid

by the Â Â transferee to the transferor made a charge on the land. There is no provision in the deed with regard to the interest and the possession of

the land was handed over to the transferee. The learned senior counsel submits that on careful perusal of the deed Exhibit 37, it appears that the

plaintiff had accepted the amount of Rs.2,700/- in cash from the defendants to repay the society loan and Tagai loan and the said amount was not

taken as a loan at all. Thus, there exists no relationship as debtor and creditor and by reading the document as a whole, there is nothing to conclude

that there is a debt and the relationship between the parties is that of a debtor and creditor. The suit property was sold conditionally for a period of five

years and the possession was also handed over. The deed Exhibit 37 proceeds to state that the defendants and their legal heirs are entitled to use and

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enjoy the property under the ownership right after the said period of five years, if the amount is not repaid. It has also been specifically mentioned in

the deed itself that if the executant fails to repay the amount within the stipulated period of five years, neither he nor his heirs or legal representatives

will have any right to take back the said property. The learned senior counsel submits that the first appellate court has erred in Â Â concluding that the

deed dated 02.08.1962 was not a conditional sale but it was a mortgage by conditional sale as claimed by the plaintiff. The learned counsel submits

that the plaintiff has committed breach of the agreement executed on 02.08.1962 and as such, lost the right for re-conveyance of the property and the

sale has become absolute in favour of the appellants/defendants. Even the respondent/plaintiff has acknowledged in the year 1970 that the suit

transaction was of a conditional sale and not a mortgage. However, this admission was overlooked by the first appellate court. After a gap of 13

years, the respondent/plaintiff has no right to say that the transaction is a mortgage. The first appellate court has not properly appreciated the evidence

of PW1-Advocate Deshmukh in the light of the deed Exhibit 37. There is no recital in the deed Exhibit 37 that the amount of consideration was to be

appropriated against the income from the property which would be fetched by the appellants/ defendants.

4. The learned senior counsel appearing for the appellants, in order to substantiate his submissions, placed reliance on the following cases:

1. Chunchun Jha vs Ebadat Ali, reported in AIR 1954 SC 345,

2. Tamboli Ramanlal Motilal vs Ghanchi Chimanlal Keshavlal, reported in AIR 1992 SC 1236,

3. Nana Tukaram Jaikar vs Sonabai Mahadev and Ors., reported in AIR 1982 Bom. 437,

4. Tulsi and Ors. vs. Chandrika Prasad and Ors., reported in AIR 2006 SC 3359 and

5. Vanchalabai Raghunath Ithape (D) by L.Rs. Vs Shankarrao Baburao Bhilare (D) by L.Rs. and Ors., reported in AIR 2013 SC 2924.

5. The learned counsel for the respondent/plaintiff submits that the condition for repurchase is embodied in the deed Exhibit 37 which is the main

condition for mortgage by conditional sale as contemplated under Section 58(c) of the Transfer of Property Act, 1882 (for short, ""Act of 1882""). The

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learned counsel submits that the question as to whether the transfer is a sale or a mortgage not only depends upon the language used in the deed, but

also the circumstances Â Â attending thereto. The learned counsel submits that the intention of the parties is required to be gathered from the

language of the deed to be interpreted in the light of the surrounding circumstances. The form in which the deed is clothed is not decisive. The learned

counsel submits that the first appellate court has rightly considered the attending circumstances and interpreted the transaction as a mortgage by

conditional sale as contemplated under Section 58(c) of the Act of 1882 and accordingly granted relief to the respondent/plaintiff. The learned counsel

submits that no substantial question of law is involved in this appeal and the Second Appeal is thus liable to be dismissed.

6. The learned counsel for the respondents, in order to substantiate his submissions, placed reliance on the following cases:

1. Gangadhar Ramchandra Gaikwad vs Rambhau Santu Ushir since deceased through his heirs Sitabai Rambhau Ushir and Ors., reported in 2006 (5)

Mh.L.J.

2. Sk. Md. Illiyas vs Narayan Sa, reported in AIR 2009 Patna 17,

3. Chennammal vs Munimalaiyan & Ors., reported in 2005 AIR SCW 5280,

4. Murarilal since deceased and after his death his newly substituted legal representatives Umedi Lal and others vs Devkaran since deceased and

after his death his legal representatives , Jagan Prasad and others, reported in AIR 1965 SC 225,

5. Vishwanath Dadoba Karale vs Parisa Shantappa Upadhye (deceased by L.Rs.), reported in AIR 2008 SC 2510,

6. P.L. Bapuswami vs N. Pattay Gounder, reported in AIR 1966 SC 902 and

7. Banwarilal (deceased by L.Rs.) vs Puran Chand and others, reported in AIR 1985 P&H 189.

7. I have carefully considered the submissions advanced by learned counsel for the respective parties. With their able assistance, I have perused the

pleadings, grounds taken in the petition, the annexures thereto and the authorities cited by them. I have also perused the record and proceedings. This

Court, by order dated 12.08.1994, admitted the Appeal on the basis of ground nos. VI and VII which raise the substantial question of law. Ground nos.

VI and VII read as follows:

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Â Â VI. The learned lower Appellate Court should have seen that the document was executed on 2 nd August 1962 and the suit for necessary relief

was instituted by the plaintiff on 16th November 1983. Thus, the suit itself is barred by limitation and, therefore, it is liable for dismissal.

VII.It should be seen that since the plaintiff has committed the breach of the agreement executed on 2nd August 1962, the plaintiff has lost his right

for re-conveyance of the property, and therefore, the sale has become absolute in favour of the present Appellant.

8. The crux of the distinction between a mortgage by conditional sale and a sale with a condition of repurchase lies in the fact that the former

evidences a debt, the repayment of which is charged on the property conveyed, whereas in the later, the relationship of debtor and creditor does not

subsist, in form, a mortgage by conditional sale is an ostensible sale, but in reality it is a mortgage. The very definition of a mortgage by conditional sale

postulates an element of sale. The court must look into the form and reach the real intention of the parties. The intention whether the deed evidences a

mortgage or sale must be gathered from its terms and the other attending Â Â circumstances. Each case must, however, be decided on its own facts

and the true intention of the parties should be gathered from the language of the deed, interpreted in the light of the surrounding circumstances. For

example; 1) price below the true market value on the date of the transfer, 2) the continuance of the transferor in possession of the property

transferred, and the like. The court has to look into the language of the deed as a whole and the cumulative effect of all the surrounding

circumstances, in order to determine the true nature of the document. The question of intention will depend on the particular facts and circumstances

of each case.

9. on careful perusal of the Exhibit 37, it appears that the language used in it indicates the existence of a debt and the long period indicates the

transaction as mortgage by conditional sale. Further, the meager consideration amount as shown in the deed Exhibit 37 against the land admeasuring 4

acres 21 gunthas indicates the transaction as a mortgage by conditional sale. It has been clearly mentioned in the deed Exhibit 37 that the

respondent/plaintiff requires the amount of Rs.2,700/- for repayment of loan taken from the society and also the Â Â Government loan towards Tagai.

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It further appears from the contents of the document that there was already the existence of a debt payable by the respondent/plaintiff and therefore,

he was constrained to borrow the amount from the defendants and executed the document of conditional sale. It is needless to repeat here that the

very definition of the mortgage by conditional sale postulates an element of sale. The true intention of the parties has to be gathered from the language

of the deed, interpreted in the light of the surrounding circumstances. The Court has to look into the language of the deed as a whole and the

cumulative effect of all the surrounding circumstances, in order to determine the true nature of the document. It is also well settled that where a

transfer is made for a consideration below market value of the property, it would amount to mortgage, even though it is described as sale. I do not

think that the particular words are necessary to create a mortgage provided the substance thereof is incorporated or indicated by the language of the

deed itself.

10. In the instant case, the first appellate court has rightly considered the contents of the deed alongwith the surrounding Â Â circumstances and

concluded that the transaction is a mortgage by conditional sale. The specific words used in the deed Exibit 37 such as ""your money"", ""my land in

transaction"", ""would get re- conveyance"" and ""if the amount is not repaid the transaction should be considered as a sale transaction"" are rightly

considered by the first appellate court to conclude that the intention of the parties was to enter into a transaction of mortgage by conditional sale.

11. It is well settled that the evidence of contemporaneous conduct is always admissible but evidence as to subsequent conduct of the parties is

inadmissible. However, the appellants/defendants have specifically given reference to the admission given by respondent/plaintiff in the year 1970 in

response to the notice issued by the appellants/defendants. The respondent/ plaintiff has examined the counsel who has issued the legal notice on

behalf of the appellants/defendants to the respondent/plaintiff. The said notice is marked at Exhibit 30. On careful perusal of the same, it appears that

the appellants/defendants have specifically contended in the said notice that on 02.10.1967, the respondent/plaintiff by accepting Â Â the earnest

amount of Rs.350/-, agreed to sale the suit land permanently to the appellants/ defendants by executing a registered sale deed. Though the

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respondent/plaintiff has responded in a different manner to the said notice, it appears that the appellants/defendants unequivocally accepted through

the legal notice Exhibit 30 that the earlier transaction Exhibit 37 dated 02.08.1962 is not a transaction of sale.

12. In the case of Chunchun Jha vs Ebadat Ali (supra), relied upon by the learned senior counsel appearing for the appellants, the Supreme Court dealt

with the question of determination as to whether the transaction is a mortgage by conditional sale or a sale out and out with a condition of repurchase

and held that the test of determination is based on the common sense and the intention of the parties has to be gathered from the document itself

alongwith the surrounding circumstances. In para 5 of the said judgment, the Supreme Court held that once a transaction is embodied in one document

and not two, and once its terms are covered by Section 58(c) of the Act of 1882, then it must be taken to be a mortgage by conditional sale unless

there are Â Â express words to indicate the contrary, or in case of ambiguity, the attendant circumstances, necessarily lead to the opposite conclusion.

The Hon'ble Supreme Court in this Case, wherein the plaintiffs preferred an appeal in the suit for redemption, considered various circumstances

including the subsequent conduct of continuance of proceedings at the instance of the appellant/plaintiff as important circumstance. In the instant case

also, the price paid was below the market price and the first appellate court has also noticed that the consideration amount was inadequate. Further,

the re-conveyance was also agreed on the same amount of consideration as shown in the deed Exhibit

37. The case of Chunchun Jha, on the other hand, helps the respondent/plaintiff than the appellants/defendants. In the remaining cases relied upon by

the learned senior counsel for the appellants, the disputed transaction and the intention of the parties thereto is considered in the facts and

circumstances of each case.

13. In the aforesaid premise, I do not find any reason to interfere with the findings recorded by the first appellate court. There is no substantial

question of law involved in this Appeal.

Thus, the Appeal is liable to be dismissed but without any costs. Hence the following order:

I. The Second Appeal is hereby dismissed. In the circumstances, there shall be

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no order as to costs. II. Pending Civil Applications also stand disposed

of.

14. At this stage, the learned counsel for the appellants submits that this order may be stayed for a period of eight weeks from today so as to enable

the appellants to approach the Supreme Court. Learned counsel submits that during pendency of this Second Appeal, stay was operating. None

present for the respondents.

15. In view of the above submission, the order is hereby stayed for a period of eight weeks from today so as to enable the appellants to approach the

Supreme Court, if so desired.

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