

(2017) 02 BOM CK 0228
In the Bombay High Court
Case No : 291 of 2004

Chhabu Punja Gaikwad

APPELLANT

Vs

Vishnu Nana Chavan

RESPONDENT

Date of Decision : 15-02-2017

Acts Referred:

[Transfer of Property Act, 1882](#), [Section 60](#)
a> - Right of mortgagor to redeem

Citation : (2017) 02 BOM CK 0228

Hon'ble Judges : S.C. Gupte

Bench : SINGLE BENCH

Advocate : Nitin Mulye, S.A. Rajeshirke

Final Decision : Dismissed

Judgement

1. Heard learned Counsel for the parties.
2. This Second Appeal challenges a judgment and order passed by the District Court at Nashik. By the impugned judgment and order, the learned District Judge dismissed the appeal filed by the Appellant herein from the judgment and decree passed by the Trial Court in a suit for possession and reconveyance filed by the Respondent.
3. The case of the Respondent (Original Plaintiff) before the Trial Court was that the suit property, being an agricultural land bearing Survey No.275 and admeasuring 22 Ars, was mortgaged by the Respondent to the Appellant by way of a conditional sale. The mortgage money was Rs.1500/, whereas the repayment period was of 10 years. Since the possession of the mortgaged property was handed over to the Appellant for his use, there was no provision for payment of interest. It was submitted by the Respondent that, in the year 1973, the Respondent had repaid the sum of Rs.1500/to the Appellant but that the Appellant retained the possession of the suit property. The Appellant, in the premises, filed this suit claiming redemption of mortgage and recovery of

possession of the suit property from the Appellant. In his written statement, the Appellant claimed the suit transaction as an outright sale and not a mortgage. It was submitted that this suit property was sold by the Respondent to the Appellant, according to the then market price of Rs.1500/, but that since the parties had friendly relations between them, merely by way of a concession, the deed was termed as a conditional sale and a provision was made for reconveyance of the suit property in favour of the Respondent on payment of Rs.1500/. Alternatively, it was claimed that since, on 29 March 1973, the Appellant had acknowledged receipt of the sum of Rs.1500/from the Respondent, and, at the same time, refused to handover possession of the suit property, the Appellant was actually in adverse possession with effect from 29 March 1973 and, having continued for over 12 years in such possession, has become an owner of the suit property by adverse possession. It was argued that the Respondent's suit for recovery of possession was barred by the law of limitation.

4. The Trial Court decreed the Respondent's suit and ordered the Appellant to redeem the mortgage by reconveyance as per the terms and conditions of the agreement of 5 October 1970. The Trial Court also directed the Appellant to handover the possession of the suit property to the Respondent and reserved liberty unto the Respondent to file a separate suit for mesne profits.

5. The order of the Trial Court was carried in appeal by the Appellant herein before the District Court at Nashik. The learned District Judge came to the conclusion that since the mortgage money was duly repaid by the Respondent to the Appellant, the relationship of mortgagor and mortgagee between the parties had ceased and that, accordingly, the Respondent (mortgagor) was entitled to file a suit not for redemption of mortgage but for recovery of the suit property from the Appellant. The learned District Judge, accordingly, dismissed the appeal and confirmed the judgment and decree of the Trial Court, save and except the decree of redemption. The learned District Judge modified this part of the decree by directing the Appellant to execute a reconveyance in terms of the agreement dated 5 October 1970 and also to handover possession of the suit land to the Respondent.

6. The Second Appeal involves substantial questions of law concerning (i) the equity of redemption of a mortgagor, (ii) the plea of adverse possession, and (iii) the bar of limitation for a suit for recovery of possession of immovable property based on title in the face of a plea of adverse possession set up by the Defendant.

7. Both the Courts below have come to a unanimous finding that the document in question, namely, the deed of 5 October 1970, was a deed of mortgage by conditional sale and not an outright sale. This conclusion involves construction of the document. By all counts, the document, read as a whole, clearly suggests that it is not a document of outright sale but a document of mortgage by conditional sale. The nature and effect of a document is a mixed question of law and facts. The conclusion of the courts below that the document was a mortgage by a conditional sale and not an outright sale is clearly a possible conclusion,

which is supported by evidence. No relevant or germane material is disregarded and no irrelevant or nongermane material considered, by the courts below to arrive at this conclusion. The construction of the document on facts found also does not suffer from any error of law. There is, thus, no substantial question of law which can be said to arise from the conclusion.

8. Learned Counsel for the Appellant relies on a judgment of the Supreme Court in the case of *Chunchun Jha vs. Ebadat Ali*, AIR 1954 SC 345 in support of his contention that an absolute conveyance does not cease to be so and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase the property. In *Chunchun Jha's* case, the Supreme Court quoted the following dictum of Lord Cranworth in *Alderson vs. White*, (1858) 44 E.R. 924 at p.928(B) @ page-SC347 :

"The rule of law on this subject is one dictated by commonsense; "prima facie" an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase In every such case the question is, what, upon a fair construction, is the meaning of the instrument"?

What this dictum, read in proper light, conveys is that if on a fair construction, a document has the characteristic of an absolute conveyance, it does not cease to be so simply because there is a stipulation containing the vendor's right to repurchase the property. It may well be that a document of absolute conveyance may have an inbuilt agreement of repurchase between the parties. In that case, the document really contains two transactions, though combined in a single document, namely, an outright transfer of property by way of sale and an agreement of repurchase of the same property at a future date. In all such cases, the question is fairly and squarely of interpretation of the document, as the Supreme Court itself noted in the case of *Chunchun Jha*. As in all other cases, even here the intention of the parties to the document may be gathered, in the first place, from the document itself. If the words in the document are express and clear, effect must be given to them and no extraneous inquiry into the intention of the parties is called for. The real question in such a case, as noted by the Supreme Court, is not what the parties intended or meant but what is the legal effect of the words which they used. If, however, there is an ambiguity in the language employed in the document, then it may be permissible to look to the surrounding circumstances to determine what was intended by the parties. As I have explained above, in the present case, the express words used in the document are sufficiently clear to bring out the intent of the document, namely, to create a security by way of a mortgage by conditional sale of the mortgaged property. The document, which is placed on record before the courts below, makes it very clear that the land was not to be transferred absolutely or finally but that it was to be repurchased on return of the mortgage money of Rs.1500/. The document expressly states that since the land was not to be

transferred absolutely, there was no need to take any permission from the competent authority under the Maharashtra Prevention of Fragmentation and Consolidation of Holdings Act, 1947. The document further provides that the transferee was entitled to enjoy the land for 10 years till repayment of the amount of Rs.1500/by taking crop in the suit land; that the transferor was entitled to repay the amount of Rs.1500/and thereafter, have the property reconveyed at his own costs; and that in the event the amount was not returned as stipulated, the document shall be treated as an absolute sale and in that event, the transferee would be entitled to have and hold the property in absolute ownership. These are nothing but classical stipulations in a mortgage by conditional sale.

9. Usually in a case of what is loosely called a conditional sale, the question to be decided is whether there is an outright sale coupled with an agreement for repurchase at a future date or a mortgage by conditional sale. In the former transaction, as I have noted above, the sale is complete, though there is a simultaneous agreement for repurchase at a future date. The relationship between the parties is that of a vendor and a purchaser, who are also respectively an agreement purchaser and an agreement vendor for the repurchase part. In a mortgage by conditional sale, the mortgagor sells the mortgaged property to the mortgagee merely ostensibly and on a condition that on default of repayment of the mortgage money by the stipulated date, either the sale shall become absolute or that on such payment being made, the sale shall become void, or on a condition that on such payment being made, the buyer shall transfer the property to the seller. In other words, every mortgage by conditional sale is an ostensible sale containing all incidents of sale except that there is, in addition to the incidents of sale, one or the other of the stipulations referred to above embodied in the document. That is precisely what is the case here. The condition, in the present case, which is stipulated expressly in the document, is that only in the event of the transferor being unable to repay the original amount paid to him by the transferee by the stipulated date, the sale shall become absolute. There is also a stipulation that on such payment being made, the seller will be entitled to have the property reconveyed to him at his own costs. The impugned judgment and order, in the premises, cannot be faulted on the construction applied to the document.

10. Alternatively, it is submitted by learned Counsel for the Appellant that even if it is assumed that there was a mortgage by conditional sale, the mortgagor having fully repaid the mortgage money and the mortgagee having signed a receipt to that effect, which inter alia records the handing over of possession of the suit property back to the mortgagor, the possession of the mortgagee, after the date of repayment and its acknowledgement, must be treated as adverse to that of the mortgagor. The impugned judgment and order of the first appellate court has rejected this contention on the ground that it is the Appellant's own case, which he deposed to before the court, that in 1989 when the Plaintiff demanded reconveyance of the suit land, the Appellant had agreed to reconvey

the same subject to the payment of the market price prevailing at the relevant time. The Appellant further deposed that in 1973, when the Plaintiff repaid the mortgage debt, the market price of the suit land was not paid, though it was so agreed between the parties. On this deposition, the first appellate court held that the possession of the Appellant cannot be said to be with an intention to own the subject property with hostility to the Plaintiff. The court observed that the facts constituting adverse possession must be of such nature that an intention to hold the property adversely to the true owner must be manifest and open. The person claiming such adverse possession, after being initially put in permissive possession, will have to point out the point of time from which he started claiming possession adversely to the real owner and at which he cautioned or otherwise notified the real owner of his intention of so asserting the title to enable the real owner to take steps for recovery of possession. That is a correct statement of the law of adverse possession. The first appellate court came to the conclusion that the evidence before the court did not show that at any particular point of time, the Appellant started claiming possession adversely to the Respondent. The court noted that even in the written statement, there was no specific pleading to that effect. Learned Counsel for the Appellant points out portions of his written statement and claims that there was a pleading of adverse possession in the written statement. The written statement claims that on 29 March 1973 when the amount of Rs.1500/was paid by the Respondent to the Appellant and a receipt was issued to that effect by the Appellant, the Appellant refused to reconvey the property or handover possession thereof to the Respondent and that with effect from that date, the Appellant's possession was adverse to the Respondent. As we have noted above, this plea is belied by the Appellant's own evidence. In his examination in chief, what the Appellant has claimed is that at the time of the purchase of the suit property it was agreed between the parties that (though the agreement stipulated for repayment of the sum of Rs.1500/) in case of increase in land rates, the land would be repurchased at an additional cost and that in accordance with this agreement, the Appellant insisted on payment of market price for reconveying the suit land to the Respondent. This evidence not only undermines the original case of outright sale, but also runs counter to the alternative case of adverse possession. What this evidence implies is that the condition of mortgage required not just the repayment of mortgage money, but an additional amount in case the land prices had increased in the interregnum. That means a dispute as to the correct condition of the mortgage, on the basis of which the mortgagee refuses to execute a reconveyance, and not a case of an open assertion of an adverse title. The impugned judgment and order of the first appellate court, accordingly, does not suffer from any infirmity of law on this count.

11. Learned Counsel for the Appellant relies on the judgment of Travancore High Court in the case of Ananthan Potti vs. Krishna Pillai, AIR 1957 TRAV-CO 145 (V 44 C 45 May). In that case, there were conscious acts on the part of the mortgagor in a usufructuary mortgage of (i) paying the mortgage amount, (ii)

getting possession of part of the mortgaged property, (iii) obtaining all the deeds back from the mortgagee and (iv) executing a registered receipt. The court held that it was idle to contend in the face of all these facts, that the parties had any intention to continue the jural relationship of mortgagor and mortgagee after that date; and if, therefore, any portion of the mortgaged property remained in the hands of the mortgagee, he could not be taken to have held it under the old relationship, and his possession of that portion must be held to be adverse to the mortgagor and a suit filed after 12 years must be treated as barred by limitation. These facts are clearly distinguishable from the facts of our case. In our case, there is the defendant's own evidence that he disputed the plaintiff's interpretation of the condition of the mortgage and retained the mortgaged property (presumably as a mortgagee) unless the condition was fulfilled according to his interpretation. That shows continuation of the jural relationship of mortgagor and mortgagee and not an independent assertion of title adverse to the mortgagor.

12. It is lastly contended by learned Counsel for the Appellant that the suit, as originally framed, was for redemption of mortgage; the original judgment and decree passed by the trial court was for redemption of mortgage. It is submitted that the first appellate court came to a conclusion that since the mortgage money was fully repaid and such payment was accepted by the mortgagee, the suit for redemption did not lie and that the Plaintiff had instead to apply for reconveyance of the suit property in accordance with the stipulations of the document. It is submitted that despite finding that a suit for redemption of mortgage did not lie, the appellate court proceeded to grant a decree of reconveyance on a totally different basis not warranted by the pleadings of the Plaintiff. Learned Counsel relies on the judgment of the Supreme Court in the case of *Siddu Venkappa Devadiga vs. Smt. Rangu S. Devadiga*, (1977) 3 SCC 532 and submits that the appellate court cannot go outside the pleadings and make out a new case, which was not urged by the Plaintiff before the trial court.

13. The Respondent had, in his plaint, prayed for possession of the suit property from the Appellant in addition to a prayer for redemption of mortgage. Under Section 60 of the Transfer of Property, Act, redemption of mortgage itself implies, in the case of a mortgage by conditional sale, either retransfer of the mortgaged property to the mortgagor at the latter's cost or execution of a registered acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished, in addition to delivery of possession of the mortgaged property, where such possession has been delivered to the mortgagee under the mortgage. If, therefore, for any reason, the court comes to the conclusion that since the mortgage money has already been repaid, there is no case for ordering redemption of mortgage by payment of the mortgage money, the court, in a case where reconveyance has not been effected or possession has not been redelivered to the mortgagor, could always order execution of the reconveyance and delivery of possession of the mortgaged property, based on both the stipulations of the document of mortgage and the

title of the Plaintiff. In that sense, the relief ordered by the first appellate court is not foreign to the frame of the suit. The suit was essentially based on the Plaintiff's title to the suit property and his entitlement to the possession and reconveyance thereof. The judgment of the Supreme Court in the case of Siddu Venkappa Devadia (supra) cited by learned Counsel for the Appellant has no application to the facts of our case. That was a case where the plaintiff had gone to the court with an express plea that he was an absolute owner of the property and that the defendant was merely an employee in possession of the property on his behalf and that the latter was bound to make over the possession of the suit property to him. On the other hand, the defendant had set up a plea of ownership of the suit property, claiming that the business belonged to him as an owner. On these pleadings, the court found that there was no basis for the High Court to render a finding of a benami transaction. There was no plea that the business was benami for the plaintiff. The parties did not join issues on this question. On the other hand, the point in issue was, whether the plaintiff was the owner of the business and entitled to the tenancy rights of the premises, where were in occupation of, and claimed by, by the defendant. The Supreme Court, in the premises, applied the law laid down by it in *Trojan and Co.Ltd. vs. Rm. N.N. Nagappa Chettiar*, 1953 SCR 789 : AIR 1953 SC 235 : 23 Com Cas 307 and *Raruha Singh vs. Achal Singh*, AIR 1961 SC 1097 to the effect that the decision of the case cannot be based on a ground outside the pleas of the parties and what has to be found is whether or not the case pleaded is correct. These observations have no application to the facts of our case, where the relief finally granted by the first appellate court is based on nothing but a document concurrently found by itself and the trial court to be a document of mortgage by conditional sale. The only question before the court was, whether the court should actually order redemption of mortgage by repayment of the mortgage money, or should simply order reconveyance of the suit property along with its possession on the basis that the mortgage has already been redeemed by full payment of the mortgage money, entitling the mortgagor to the reconveyance of the suit property along with possession.

14. In the premises, there is no merit in the second appeal. The appeal is, accordingly, dismissed. No order as to costs.

15. Learned Counsel for the Appellant applies for continuation of the interim relief operating in his favour in the second appeal. Learned Counsel submits that this interim relief has been enjoyed by him ever since the admission of the second appeal. On this application, the interim order passed on 17 July 2006 shall continue for a period of six weeks from today.