
(1982) 02 BOM CK 0035
In the Bombay High Court
Case No : Second Appeal No. 718 of 1975

Nana Tukaram Jaikar

APPELLANT

Vs

Sonabai and Others

RESPONDENT

Date of Decision : 15-02-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, 11
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1982 Bom 437 : (1982) 1 BomCR 811 : (1982) MhLj 538

Hon'ble Judges : Bharucha, J

Bench : Single Bench

Advocate : R.N. Dhorde, for A.V. Savant, for the Appellant; P.N. Joshi, for M.L. Dudhat, for the Respondent

Judgement

1. This is a second appeal directed against the judgment and order of the district judge , Ahmednagar sitting on the appeal on the judgment and order of the joint Civil Judge, Junior Division , Ahmednagar.

2. On 3rd , May , 1950 the 10th respondent (the original 1st plaintiff) executed a deed in favour of one Madhav in respect of the land in suit . On 18th Nov, 1957 Madhav transferred the rights conferred upon him by the deed in favour of the 5th respondent. In 1957, one Sohanlal , the holder of a decree against the 1st plaintiff , purchased the land in suit in execution of a decree through a court sale. On 13th June , 1958 the sale was confirmed. In 1966 the first plaintiff filed a suit for redemption alleging that the deed was a mortgage by way of conditional sale and that the mortgage amount has been repaid by virtue of the rent collected . The 5th respondent was impleaded as a defendant (the 5th defendant) in the redemption suit . He pleaded that the deed was a deed of sale with a condition of repurchase. In 1967 Sohanlal filed a suit for possession of the land making the 1st plaintiff and 5th defendant in redemption suit defendants to his suit. On 28th Nov, 1967 the appellant before me purchased the land from the original first plaintiff . He was thereafter impleaded as the 2nd plaintiff in the redemption suit.

On 4th Nov, 1969 the redemption suit was dismissed being held that the deed was a deed of sale with a condition of repurchase. On 28th Nov, 1969 Sohanlal's suit was dismissed, reliance being placed on the judgment dated, 4th Nov, 1969 in the redemption suit. Sohanlal did not proceed further. Against the dismissal of the redemption suit an appeal was filed. In appeal a remand was ordered. On remand the trial court held on 30th Mar, 1972 that the deed was a deed of sale with a condition of repurchase and that the sale in execution in favour of Sohanlal conferred upon him no title to the land. The trial court therefore, dismissed the redemption suit. The plaintiff's preferred an appeal. In the appeal it was held that the deed was a deed of mortgage by way of conditional sale but the plaintiff's title to the property had been extinguished by virtue of the sale in execution in favour of Sohanlal and the plaintiff's were, therefore, not entitled to redeem. Against the dismissal of the appeal this second appeal is preferred by the 2nd plaintiff.

3. It was contended on behalf of the only contesting respondent, the 5th respondent, that the finding in Sohanlal's suit that the deed was a deed of sale with a condition of repurchase was binding upon the appellant by reason of res judicata. The first plaintiff in the redemption suit (from whom the appellant before me claims title) and the 5th defendant in the redemption suit (the 5th respondent before me) were defendant's in Sohanlal's suit. The point as to whether the deed was a deed of mortgage by way of conditional sale or a deed of sale with a condition to repurchase was in issue that was decided in that suit. There are, however, three reasons why the decision in Sohanlal's suit does not operate as res judicata against the appellant.

4. First, it is apparent from a reading of the judgment in Sohanlal's suit that the court relied upon the judgment in the redemption suit of the trial court of 4th Nov. 1969 to hold that the deed of sale with a condition of repurchase. The judgment in the redemption suit was effaced when the appeal court ordered a remand. It cannot then be said that the decision in Sohanlal's case operates as res judicata against the appellant. Reference may be made in this connection to the judgment of the privy council in *S.P.A. Annamalay Chetty v. B. A. Thornhill*. AIR 1931 PC 263. The privy council held that no decree from which an appeal lay and had in fact been taken was final between the parties so as to form res judicata. Where an appeal lay and was taken the finality of the decree was qualified by the appeal and the decree was not final in the sense that it formed res judicata between the same parties.

5. Secondly, the conclusion about the character of the deed in Sohanlal's suit cannot be said to be based upon the conclusion arrived at on 4th Nov., 1969 in the redemption suit.

6. Thirdly, it will be noted that the finding in Sohanlal's suit that the deed was a deed of sale with a condition of repurchase was a finding adverse to the appellant, who was a defendant in that suit, but Sohanlal's suit was dismissed. The appellant had, therefore, no opportunity to appeal against the finding. The

finding in Schanalal's suit cannot then be said to be finally decided against the appellant and cannot operate as res judicial against him. In that behalf a cision of this Court in Bai Nathi v. Narshi Dullabh ilr(1950) 44 Bom 321 : AIR 1920 Bom 325, may be referred to. The Court said, "we think that the finding of the Court in there could be no appeal against it, because the decree was in favour of the party against whom the finding was recorded.

7. It was contended by Mr. Hoshi, learned counsel for the 5th respondent, that it was not open to the appellant to seek to redeem the mortgage, assuming the transaction to be such, because it had been held in Sohanlal's suit that he had not equity of redemption. This is but another way of putting the same argument. It can be answered slightly differently. Sohanlal sought to establish his title to the land and obtain possession of it. His suit was dismissed. He went no further. It does not lie in the mouth of a mortgagee or his assignee (the 5th respondent) to set up title in another (Sohanlal) to destroy the mortgagor's or his assign's (the appellant's equity of redemption. In that sense, once a mortgage always a mortgage. The 5th respondent obtained the land from Madhav who obtained the land from Madhav. Who obtained the land from Madhav, who obtained it from the 1st plaintiff u/s of it. If the deed is a deed of mortgage by way of conditional sale it is, in these circumstances, not open to the 5th respondent to plead that no equity of redemption exists.

8. It was urged on behalf of the appellant that, since the Court in first appeal had held the deed to be a deed of marriages by way of conditional sale, it was not open to the 5th respondent to challenge that finding before me because he had not filed cross-objections. It is well settled that a respondent to an appeal may without filing cross-objections support the decree on grounds decided against him by the lower Court. It is, therefore, that the deed is a deed of sale with a condition of repurchase and not a deed of mortgage by way of conditional sale.

9. The principal question, then, to be decided in this second appeal is whether the deed is a deed of mortgage by way of conditional sale or a sale with a condition of repurchase. The deed was not on record. Counsel have submitted an agreed translation of it upon which, by consent, I place reliance, The deed, as translated, reads thus:

"Conditional sale-deed of house in Nagpur (Nagar ?) city for Rs. 2,000/- dated 3rd May, 1950.

M. B. Saidare Executor

K. M. Kothar Executant

Received Rs. 375/- before eight days Rs. 1,625/- I will receive (Sixteen hundred twentyfive only) before the Sub-Registrar, Anagar.

Total Rs. 2,000/- Received Rs Two thousand for the marriage of daughter and family expenses.

In exchange thereof, the house which was inherited by me as my ancestral property as my share which is without any incumbrance : description

As per the said above description the house and the land on which it is constructed and the things appurtenant thereto is sold to you conditionally for five years. The same has been given completely in your possession. Hence till the suppurated limit you should pay the municipal tax and enjoy the property, within that period I will repurchase the property after making payment. If the amount is not paid within stipulated period this deed will be treated as permanent sale deed. Therefore you should enjoy the property forever so that myself and my successors will not claim any ownership."

10. For construing the deed reliance was placed upon the judgments of the Supreme Court in Pandit Chunchun Jha Vs. Sheikh Ebadat Ali and Another, and Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, . In the former judgment it was held that each such question has to be decided upon its own facts and that the intention of the parties as shown by the document was the determining factor. Prima facie, an absolute conveyance, containing nothing to show that the relation of dealer and creditor was to exist between the parties, did not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulated that he had a right to repurchase. If the sale and the agreement to repurchase were embodied in separate documents then the transaction could not be a mortgage. Whether the documents were contemporaneously executed or not. But the converse did not hold good. If the condition of repurchase was embodied in the document that effected or purported to effect the sale, then it was a matter for construction which was meant. In the later judgment the Supreme Court said that the question whether by the incorporation of a condition of sale a transaction ostensibly of sale could be regarded as mortgage was one of the intentions of the parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances. The definition of a mortgage by conditional sale postulated the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey there was no relation of debtor and creditor nor was the price charged upon the property conveyed, but the sale was subject to an obligation to retransfer the property within the period specified. What distinguished the transactions was the relationship of debtor and creditor, the transfer being security for the debt.

11. In the instant case, the deed does not create, expressly or by implication, the relationship of debtor and creditor, nor is the amount paid by the transferee to the transferor made a charge on the land. There is no provision in the deed in regard to interest. Possession of the land is handed over to the transferee. Municipal taxes are made payable by the transferee. A period is stipulated, viz, five years, within which the transferor may purchase the land after making payment of the amount for which it was originally transferred. The statement in

the deed that if the amount was not paid within the stipulated period the deed was to be treated as a permanent sale deed and the transferee could thereafter enjoy the land forever without the transferor and his successors claiming any ownership emphasises that the condition of repurchase was to operate only within the stipulated period and no further. These, as I see it, are indications of a sale with a condition of repurchase.

12. Mr. Dhorde placed reliance upon the recital in the deed that the amount had been received by the transferor for the marriage of his daughter and family expenses. He submitted that this was indicative that the transaction was a transaction of mortgage by way of conditional sale. This recital is not indicative either way. A man may, when he is in need of money, sell his property or he may mortgage it. Mr. Dhorde also submitted that it was the appellant's case that the property had been transferred at an undervaluation, which was indicative of a mortgage, but the trial Court rejected that contention. It had done so quite rightly since it was sought to be established by nothing more than the appellant's bare word.

13. In the result, I am inclined to take the view, having regard to the text of the deed interpreted in the light of surrounding circumstances, that it is a deed of sale with a condition repurchase.

14. In the view of the matter the appeal must fail and is dismissed. Having regard to the tortious litigation to which I have earlier made reference, the fair order is that the parties shall bear and pay their own costs.

15. Appeal dismissed.