

(2007) 11 BOM CK 0012
In the Bombay High Court
Case No : F.A. No. 123 of 1962

Nathmal Jodharaj since deceased through LRs. Ramesh
Nathmal Agrawal and Others

APPELLANT

Vs

Chandrarao Vijaysingh Deshmukh and Others

RESPONDENT

Date of Decision : 28-11-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 15, Order 34 Rule 7, 96
Specific Relief Act, 1963 — Section 22
Transfer of Property Act, 1882 — Section 100

Citation : (2008) 2 ALLMR 84 : (2008) 2 MhLj 691

Hon'ble Judges : B.P. Dharmadhikari, J

Bench : Single Bench

Advocate : S.C. Mehadia, for the Appellant; B.N. Mohta, for Respondent Nos. 1 and 2 and A.M. Gordey, for the Respondent

Judgement

B.P. Dharmadhikari, J.—This appeal by original defendant No. 29 u/s 96 of CPC challenges the judgment and decree dated 30th April, 1962 delivered by Civil Judge (Senior Division), Achalpur, in Special Civil Suit No. 7A of 1954 filed by present respondent No 2 and her son i.e. present respondent No. 1 for redemption of mortgage and specific performance of agreement to reconvey the property. Division Bench of this Court on 23-6-1971 disposed of this appeal along with First Appeal No. 93 of 1962 filed by Narayanrao i.e. original defendant No. 3 and First Appeal No. 20 of 1963 filed by Taradevi, original defendant No. 1 who happens to be mother-in-law of present respondent No. 2. Division Bench found that the matter was compromised and hence in view of said agreement of compromise between original plaintiffs on one hand and original defendant No. 3 on the other hand, it modified the decree of trial Court accordingly. Defendant No. 29 in said suit and appellant in present appeal then approached Hon'ble Apex Court in Civil Appeal No. 837 of 1972 complaining that his grounds of attack were not affected by said agreement of compromise and Division Bench could not have disposed of his Appeal in its light. By order dated 2-4-1998,

Hon"ble Apex Court accepted his grievance and after noticing that present appellant was not consenting party to the said disposal by High Court, remanded this appeal back for decision on merits preferably within a period of six months. It appears that original appellant before this Court expired on 8-11-1998 and as his legal heirs were not brought on record, on 9-3-2000 the appeal was disposed of as abated. The abatement was set aside by condoning delay and appeal was restored back by order dated 6-5-2004 and thereafter legal heirs of respondent No. 4 and of respondent No. 5 were required to be brought on record. It appears that in these circumstances the matter remained pending.

2. The brief facts giving rise to this appeal may now be stated. Suit properties consisted of 16 fields spread over four different villages and two house properties situated at Amravati belonging to Madhao husband of original defendant No. 1 and respondent No. 3 Taradevi in this appeal. On 21-2-1946 he executed a sale deed in respect of all these properties in favour of respondent No. 4 deceased Vitthalrao who was defendant No. 2 in suit for consideration of Rs. One lakh. The sale deed was registered on 2-3-1946 and on same day Vitthalrao also executed an agreement in favour of Madhaorao agreeing to resell all these properties back to Madhaorao on receipt of aforesaid amount of Rs. 1 lakh. Madhaorao died on 15-11-1948. After his death, his widow Taradevi adopted Vijaysingh as a son on 17-11-1949. Vijaysingh died on 30-9-1952 leaving behind his widow Vijay Laxmi (original plaintiff No. 2 and present respondent No. 2). On 2-1-1954, Vijay Laxmi adopted original plaintiff No. 1 and present respondent No. 1 Chandrarao as son to her husband. In the meantime, defendant No. 2 Vitthalrao sold away many of the properties purchased by him from Madhaorao to different purchasers and thereby recovered total amount to Rs. 68,579/- only. Balance amount payable to him under the agreement of resell was thus reduced to only Rs. 31421/-. For this amount, he executed a sale deed at Exhibit P-14 = Exh. 3-D-6 in favour of original defendant No. 3 Narayanrao (deceased respondent No. 5 in this appeal) on 27-6-1951. This sale deed included 10 fields and one house. Present appellant i.e. original defendant No. 29 filed Civil Suit 62A/1953 claiming right of pre-emption on 19/24th share of Survey No. 56 of Mouza Talwel and for its possession against deceased Narayanrao and succeeded in view of judgment dated 29-7-1953 delivered therein in his favour. Present Civil Suit 7A/1954 came to be filed on 1-7-1954 by respondents No. 1 and 2 in this appeal for redemption or in the alternative for specific performance of agreement of reconveyance. This suit came to be decreed on 30-4-1962. Civil Court granted declaration that sale dated 27-6-1951 in favour of defendant No. 3 was in nature of mortgage and nothing was due to be received by him under said mortgage. Defendant No. 3 was accordingly directed to deliver possession of properties comprising that sale deed except three properties in 2 villages. Defendant No. 3 and defendant No. 29 (present appellant) were further directed to deliver possession of 19/24th portion of Survey No. 56 at Talwel to present respondents No. 1 and 2.

3. Original defendant No. 3 challenged this judgment and decree in First Appeal No. 93 of 1962. Original defendant No. 1 and present respondent No. 3 Taradevi

approached in First Appeal 20 of 1963 asking for the decree of possession in her favour jointly with original plaintiffs as her one-half share in the property was found to be not in dispute. Present appeal came to be filed by original defendant No. 29 aggrieved by direction to hand over possession of Survey No. 56. All three appeals came for hearing before Division Bench of this Court on 23-6-1971 and during hearing original defendant No. 3 expressed his desire to remit the amount of Rs. 11,000/- (as claimed) in favour of original plaintiffs provided original plaintiffs conceded to one-half share of Taradevi and to decree for possession along with her. Said offer came to be accepted by original plaintiffs and hence, First Appeal 93 of 1962 filed by original defendant No. 3 Narayanrao came to be dismissed for non prosecution. In the light of this compromise or agreement, Division Bench modified the decree of trial Court and after noticing that original plaintiffs had already succeeded in recovering the possession of properties in execution of very decree, it directed original plaintiffs to put original defendant No. 1 Taradevi in possession of her one-half share and by consent of parties directed separation of that share by equitable partition in execution as per law. In relation to present appeal, Division Bench observed that as sale in favour of original defendant No. 3 was itself subject to an agreement of resell as found by trial Court, as said defendant No. 3 himself could not resist original plaintiffs' claim for possession, the rights of defendant No. 2 in the matter could be no better. Division Bench, therefore, dismissed his appeal i.e. present appeal.

4. Present appellant then approached Hon'ble Apex Court in Civil Appeal No. 837 of 1972 as briefly stated above. After noticing the facts and the disposal of other 2 first appeals by the Division Bench of this Court in view of settlement between original plaintiffs and present respondent No. 3 Taradevi, Hon'ble Apex Court also noticed that present appellant raised questions of law and facts and mentioned grounds No. 1, 2 and 3 in his appeal memo before this Court by way of illustration. Hon'ble Apex Court found that such contentions of present appellant (original defendant No. 29) have not been considered by High Court and his appeal could not have been disposed of because of walkover given to original plaintiffs and original defendant No. 1 (Taradevi) by his vendor original defendant No. 3 Narayanrao. It held that merits of contentions of present appellant were required to be considered and hence, First Appeal 123/1962 came to be remanded back to this Court as mentioned above.

5. I have heard Advocate Mehadia for present appellant, Advocate Mohta for original plaintiffs i.e. present respondents No. 1 and 2 and Advocate Gordey for legal representative of respondent No. 3 and legal representative No. (iv) of respondent No. 5.

After pointing out the facts stated above, appellant has argued that in view of consent deed of original plaintiffs proved before trial Court and appearing on Exhibit 3-D-6 or Exh. P-14 i.e. sale deed dated 27-6-1951 executed by original defendant No. 2 Vitthalrao in favour of original defendant No. 3 Narayanrao, Court below erred in holding that Narayanrao was also under obligation to

reconvey the property to original plaintiffs. He further argues that 19/24th share in field Survey No. 56 of village Talwel came to be purchased by him for Rs. 6690/- only as per judgment in suit for pre-emption filed by present appellant against Narayanrao vide Civil Suit No. 62A/1953. In view of this verdict of competent Court, the agreement for reconveyance stood superseded and could not have been invoked against him. Original plaintiffs were neither necessary nor proper parties to his pre-emption civil suit in view of consent deed executed by them on sale deed in favour of Narayanrao. The decree in pre-emption suit cannot have been indirectly challenged in Special Civil Suit No. 7A/1954 and trial Court could not have adjudicated about its validity or correctness. Consent of original plaintiffs for sale in favour of Narayanrao ought to have been given its full and natural meaning without any limitation and as no right of reconveyance is preserved in sale deed, no such right could have been worked out by trial Court through it. He contends that in any case judgment in Civil Suit No. 62A/1953 has the effect of conferring absolute title upon appellant. He also argued that original defendant No. 1-Taradevi alone could have filed suit for enforcement of agreement for resell and suit as filed by present respondents No. 1 and 2 was not tenable. He invites attention to prayer clauses in the plaint to point out that the prayer clauses are defective and no relief as prayed for therein could have been legally granted. He also points out that there is no express prayer for possession insofar as Survey No. 56 or original defendant No. 29/ present appellant is concerned. I find that this argument can be conveniently considered in appropriate details a little latter. Lastly, he stated that though there is direction to hand over possession to original plaintiffs, there is no direction to repay amount of Rs. 6,690/- only paid by him in pre-emption suit back to him.

Advocates respectively for original plaintiffs as also representative heirs of original defendants No. 2 and 3 have opposed these arguments. They state that right to reconveyance is specifically embodied in registered agreement and suit filed was for its specific performance. Advocate Mohta urged that impugned judgment of trial Court itself demonstrates that both defendants No. 2 and 3 were aware of their obligation and hence when defendant No. 2 executed sale deeds in transactions in which right of reconveyance was agreed and required to be waived, the same has been accordingly expressly waived by original plaintiffs. There is no such waiver in consent deed appearing on Exhibit P-14 and hence, trial Court has correctly construed it. Judgment in suit for pre-emption obtained by present appellant cannot enlarge the scope of Exhibit P-14 and as original plaintiffs were not parties to such pre-emption suit, nothing in that suit or judgment can be used against them. He also invites attention to the fact that no decree for redemption was required to be passed as no amount was found due to original defendant No. 3 Narayanrao and hence, trial Court has only specifically enforced agreement of reconveyance. He further urges that in view of Section 22 of Specific Relief Act, no express prayer for possession was essential in present facts. Advocate Gordey states that there is no question of refunding amount of Rs. 6,690/- only to present appellant as there was no such prayer before Lower

Court. Both advocates contend that there is no substance in the arguments raised by appellant and his appeal needs to be dismissed.

6. In view of arguments heard, I find that following questions need consideration in this matter:

I) Whether present appellant/original defendant No. 29 acquired absolute title to the suit property i.e. 19/24th share in Survey No. 56 of Mouza Talwel?

Ans.: No, see discussion below.

II) Whether plaintiffs before trial Court were necessary parties to suit for pre-emption filed by present appellant?

Ans.: Yes, see paragraph 7 below.

III) Whether there is any material defect in prayer clauses in plaint warranting dismissal of suit?

Ans.: No, see paragraph 14 below.

IV) Whether Court below has failed to decide any material question?

Ans.: No, see paragraph 14 below.

V) Whether appellant is entitled to refunded of Rs. 6690/- and if yes, then from whom?

Ans.: Entitled to receive from L.Rs. of respondent No. 5-Narayanrao. See paragraph 12 below.

VI) Whether suit filed by respondents No. 1 and 2 was maintainable?

Ans.: Yes, see paragraph 13 below.

At the outset it needs to be stated that neither the appellant nor any of the respondents have contended that any portion of the oral evidence has been either overlooked or wrongly appreciated by the trial Court. They have not even referred to any oral evidence on record during their entire arguments. They only pointed out how conclusion arrived at by trial Court about supremacy of right of reconveyance in favour of original plaintiffs is either not erroneous or erroneous by referring to earlier pre-emption suit and sale deed at Exh. P-14. But again no arguments are advanced questioning the correctness of finding that said sale on 27-6-1951 in favour of vendor (Narayanrao) of present appellant was either in the nature of a mortgage or an out and out sale with an option of repurchase.

7. It is not in dispute that in suit for pre-emption filed by present appellant vide Civil Suit No. 62A of 1953 original plaintiffs were not joined as party defendants. All learned Counsel pointed out copy of judgment dated 29th July, 1953, delivered therein by Additional Civil Judge, Class II, Achalpur. The suit has been decided together with Civil Suit No. 49A of 1953 filed by one Ganeshrao against Narayanrao for very same relief of pre-emption in relation to very same property.

In Special Civil Suit No. 7A/1954 instituted by original plaintiffs i.e. present respondents No. 1 and 2 said Narayanrao is defendant No. 3. In pre-emption suit, Narayanrao filed written statement pointing out that his vendor Vitthalrao had executed a registered agreement in favour of original vendor Madhaorao agreeing to return the property back to Madhaorao if the amount was paid back within 15 years and he purchased property from Vitthalrao subject to same condition and hence if any decree was to be passed in Civil suit No. 62A of 1953, same would be subject to the condition of reconveyance. That Civil Court has found that Madhaorao had only 19/24th share in Survey No. 56 and therefore he could only transfer that much share to Vitthalrao and hence Vitthalrao in turn could transfer only that much share to Narayanrao. Though Court below passed judgment in this pre-emption suit, it permitted Ganesha to deposit amount of Rs. 6,690/- only towards said 19/24th share in Survey No. 56 and upon failure of Ganesha to so deposit, present appellant was permitted to deposit it and Narayanrao was directed to deliver possession to him. It appears that ultimately present appellant deposited said amount and got the possession of said share from Narayanrao. These facts are not in dispute that all. However, that court has not considered specific defence of Narayanrao that there was an agreement of reconveyance in favour of original plaintiffs and his own title was, therefore, subordinate to such agreement. It is, therefore, difficult to accept arguments of learned Counsel for appellant that in view of this decree in preemption suit and Court purchase, he got absolute title to share purchased by him in Survey No. 56. It is to be noted that said agreement for reconveyance is reflected in sale deed executed on 27-6-1951 vide exhibit P-14 by Vitthalrao in favour of Narayanrao. Vitthalrao in turn had purchased property from Madhaorao and hence this agreement of reconveyance was in favour of Madhaorao and his heirs. It is not in dispute that original plaintiffs in Special Civil Suit No. 7A/1954 are legal heirs of said Madhao. These legal heirs were not joined as party defendants by appellant in his Suit No. 62A of 1953. It is, therefore, obvious that even if Additional Civil Judge, Class II, Achalpur, who decided said pre-emption suit, had expressly made reference to and interpreted the said obligation of reconveyance in any way, it would not have been binding on plaintiffs in Special Civil Suit No. 7A/1954 i.e. present respondents No. 1 and 2. The situation, therefore, cannot be otherwise when said Additional Civil Judge, Class II, Achalpur, has not at all considered said issue. Narayanrao did not get better title than his vendor Vitthalrao and agreement for reconveyance with Madhaorao by Vitthalrao was binding upon Narayanrao which obligation Narayanrao expressly accepted and also pointed out to Additional Civil Judge, Class II, Achalpur. It was therefore necessary for present appellant to join original plaintiffs as party defendants in his pre-emption suit and having failed to do so, he cannot now contend that decree for pre-emption or Court purchase of share in Survey No. 56 by him in any way displaces the agreement for reconveyance in favour of Madhaorao or his legal heirs. He also cannot contend that clog on title of Narayanrao vanished or his own title got enlarged because of Court decree in pre-emption suit. Sale deed executed on 27-6-1951 vide exhibit P-14 by Vitthalrao in favour of Narayanrao or

agreement for reconveyance mentioned therein or its effect/legality could not have been adjudicated upon and has not been adjudicated upon in said pre-emption suit.

8. The most important document to find out the rights derived by present appellant is, therefore, sale deed executed on 27-6-1951 vide exhibit P-14 by Vitthalrao in favour of Narayanrao. Appellant has contended that by this document Narayanrao got absolute ownership without any obligation to reconvey. Contesting respondents on the other hand argued that interpretation of said document by appellant is perverse. Perusal of said document exhibit P-14 reveals that its very first recital mentions name of original vendor Madhaorao and also written agreement casting obligation to execute a re-sale deed in favour of Madhaorao after refund of amount. Fact of his death and names of his 2 legal heirs are also appearing therein and it is mentioned that therefore with the consent of these two legal heirs, Vitthalrao (original defendant No. 2 before trial Court) was executing sale deed in favour of Narayanrao. Names of these two legal heirs are Taradevi (original defendant No. 1 before trial Court) and Vijaysingh (father of present respondent No. 1 Chandrarao). Vitthalrao has also mentioned that he has received certain amount back from these two legal heirs of Madhaorao and amount of Rs. 31,421/- only was still recoverable by him. It also mentions that both above legal heirs willingly sold to third person some of the property purchased by him and amount of consideration for such sale was received by him. It is again reiterated that balance remaining thereafter was Rs. 31,421/- only and hence remaining property was sold by Vitthalrao to Narayanrao for said balance amount as consideration. It is specifically mentioned that balance amount was accepted as consideration by Vitthalrao without determining the market value of any of the items of properties sold under exhibit P-14. Total 10 properties as mentioned thereunder are sold by Vitthalrao to Narayanrao for this balance amount of Rs. 31421/- only. It is no doubt true that latter in this document Vitthalrao has stated that he has sold above properties to Narayanrao and put them in his possession. It also mentions that "From today, you have become the owner of this property. Neither myself nor any one on my behalf shall prefer any claim to this property, nor shall any objection to your ownership rights and possession and enjoyment will be taken. In that case I hold myself liable for your loss". At the end of sale deed there is signature of Vitthalrao and two attesting witnesses. After this separately "consent deed" executed by Taradevi and Vijaysingh on 27-6-1951 itself appears with signatures of two other/different persons as attesting witnesses. These two attesting witnesses are different than the attesting witnesses for signature of Vitthalrao. In its opening paragraph, it is stated that it is a deed of consent to this sale deed executed in favour of Narayanrao by Taradevi Madhaorao Deshmukh and Vijaysingh Madhaorao Deshmukh in 1951. In it, it is mentioned that Shri Vitthalrao Jamdar (original defendant No. 2 before trial Court) had executed in favour of Madhaorao Deshmukh, the husband of Taradevi and adopting father of Vijaysingh, a Karinama (agreement) as mentioned earlier in the sale deed.

Obviously, the reference is to agreement of reconveyance. Consenters have mentioned they received from them some amount as shown in the sale deed and balance to be paid to him was Rs. 31,421/- only. Consenters have stated that they were not in a position to arrange said amount and purchaser Narayanrao was paying said amount to Vitthalrao with their consent. It is written thereafter that "Therefore, we both are giving the consent to this sale deed without accepting anything. Accordingly we have executed this deed of consent dated 27-6-1951".

9. It is important to note that the sale deed does not speak of market value of the property transferred thereunder and amount then in balance recoverable by Vitthalrao has been accepted by Vitthalrao from Narayanrao as consideration for such transfer. Thus amount which has passed from Narayanrao to Vitthalrao is not the market value of the properties purchases by Narayanrao but amount in balance which Vitthalrao was to receive from Taradevi and Vijaysingh. Thus Vitthalrao sold to Narayanrao his rights in 10 properties mentioned in the sale deed and he did not accept market value of properties as consideration obviously because of obligation to re-convey which he passed on to Narayanrao. On account of this only both consenters namely Taradevi and Vijaysingh by giving consent expressly mentioned that they gave their consent "without accepting anything". Attempt therefore was only to emphasis that no amount over and above Rs. 31,421/- is given by Narayanrao and they have not received any consideration towards sale of property. If the sale dated 27-6-1951 was supposed to be an out and out or absolute sale in favour of Narayanrao free from obligation of reconveyance, there was no need to employ such language in sale deed or consent deed. Though sale deed by Madhaorao in favour of Vitthalrao is executed on 21-2-1946, it is registered on 2-3-1946. The agreement for reconveyance by Vitthalrao in favour of Madhaorao is also registered on 2-3-1946. The present appellant developed interest in the property only after execution of sale deed dated 27-6-1951 by Vitthalrao in favour of Narayanrao. In absence of this sale deed, he could not have made any grievance in 1953 about the transaction between Madhaorao and Vitthalrao. How transaction between himself and Madhaorao was understood by Vitthalrao is reflected in recitals of sale deed dated 27-6-1951. Understanding of Narayanrao about the nature of this sale deed in his favour has come on record in his written statement filed while opposing the pre-emption suit of present appellant. The clog on his own title understood by Vitthalrao and after him by Narayanrao is as per their understanding of the agreement with Madhao. A document needs to be interpreted to find out intention of parties when parties have differences but when parties jointly or collectively accept the meaning and effect of document without any dispute, there is no scope for taking recourse to process of interpretation. In facts of present case, parties to the documents i.e. agreement of reconveyance dated 2-3-1946 and sale deed dated 27-6-1951 have no doubt whatsoever about the interpretation of respective documents and their obligations arising therefrom. The present appellant is totally a stranger to both

these documents. The existence of their respective obligation accepted by Vitthalrao and Narayanrao as flowing from relevant documents in fact can be gathered from bare words mentioned above. Hence even if it is presumed that two interpretations i.e. one in favour of original plaintiffs and other in favour of present appellant are possible, still in view of clear understanding of parties the other interpretation in favour of present appellant allegedly supporting his absolute title by superseding the agreement of reconveyance will have to be ignored. Any Court of law, in case of doubt, will be required to accept that interpretation which furthers the intention and is supported by the conduct of parties and which reasonably flows from the document. There is no scope for presuming any mala fides against present appellant on the part of parties to sale deed or consent deed dated 27-6-1951 because interest of present appellant have come to fore only as a result of Court verdict in two pre-emption suits, one filed by him and one by Ganesha as mentioned above. Obviously, therefore, there cannot be anything in said verdict in pre-emption suit which would overrule or modify said intention of parties to sale deed or consent deed dated 27-6-1951.

10. In M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, in para 10 Hon"ble Apex Court observes that in construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used. The surrounding circumstances are to be considered. But that is only for the purpose of finding out the intended meaning of the words which have actually been employed by relying upon its judgment in case of Ram Gopal Vs. Nand Lal and Others, and AIR 1930 242 (Privy Council) . Again in United India Insurance Co. Ltd. Vs. Great Eastern Shipping Co. Ltd., , while interpreting the insurance policy, the Hon"ble Apex Court has stated that the Courts have to keep in mind the intention of parties as also words used in policy. If the intention of parties subserves the expression used therein then the expression used in that context should be given its full and extended meaning. In the facts of present case, original defendant No. 2 has unequivocally explained his obligation to reconvey to defendant No. 3 Narayanrao. His understanding about it and intention to honour agreement of reconveyance is very much apparent in sale deed dated 27-6-1951. Language of consent deed executed by Taradevi and Vijaysingh also does not show that they relinquished their right to have reconveyance. Vitthalrao also mentions in sale deed dated 27-6-1951 that both above legal heirs willingly sold to third person some of the property purchased by him from Madhaorao and amount of consideration for such sale was received by him. It is therefore obvious that when right to repurchase or have reconveyance was to be given up, these two legal heirs have themselves executed sale deed in favour of third person and permitted Vitthalrao to receive consideration for such sale towards amount due to him. Vitthalrao passed on this obligation to Narayanrao and understanding of Narayanrao in this respect is seen in his written statement filed in Civil Suit No. 62A of 1953 instituted by present appellant for pre-emption at Achalpur. In conventional language the interpreter must put himself in the armchair of those

who were parties to the documents. Here actually position is clear and no interpretation a such is called for. In these circumstances, it is difficult to agree with arguments of Advocate Mehadia and I find nothing wrong in application of mind and conclusions reached by trial Court.

11. Perusal of judgment of trial Court in paragraph 33 reveals that in view of sale deeds executed in favour of defendants No. 4 to 25, defendant No. 2 Vitthalrao realized sum of Rs. 68,579/- only out of Rs. One lakh and he had to recover Rs. 31,421/- only. It also records that defendant No. 3 Narayanrao had agreed to reconvey in favour of defendant No. 1 Taradevi and plaintiff Vijaysingh. It also shows that defendant No. 3 admitted that property was worth more than Rs. 31,421/-. I find that such admission is also contained in paragraph 11(a) of written statement of defendant No. 29/present appellant. It therefore records a finding that document at exhibit 3-D-6 was in the nature of Mortgage and in any case out and out sale with option of repurchase. Trial Court notices that defendant No. 3 claimed to have paid amount of Rs. 43,500/- only to Vitthalrao and hence he claimed that if Taradevi and Vijaysingh wanted to repurchase the property, they had to pay him said amount. The trial Court has accepted amount as mentioned in the document. It has also found that defendant No. 3 admitted that property purchased by him was of more value than the amount paid to defendant No. 2. It noticed that rent of house sold thereunder itself was Rs. 195/- per month and building would have been itself more in value than Rs. 31,421/-. Trial Court also notices that two pre-emption Suits No. 25A/52 and No. 100A/51 were compromised with express term that Taradevi and Vijaysingh had given up their right of reconveyance of lands. This application of mind by trial Court or its appreciation of evidence is not even challenged in arguments before me. The contention of Advocate for appellant that decree in pre-emption suit in favour of appellant is indirectly being set aside without assailing the same or without even raising the plea that it is not binding upon original plaintiffs and without any prayer for the purpose is again misconceived. He has also tried to urge that trial Court has not correctly appreciated the impact of pre-emption decree on the subject matter before it but trial Court has found that agreement of reconveyance was binding upon Narayanrao, the vendor of present appellant and defendant No. 29 before it, and it also found that defendant No. 29 could not obtain better title or status than his vendor. Again, these findings are not demonstrated to be contrary to law or facts by appellant. It is no doubt true that in written statement, defendant No. 3 in paragraph 35-D contended that he did not accept agreement of reconveyance between Madhaorao and Vitthalrao dated 2-3-1946 and there was separate agreement for reconveyance between Vijaysingh and himself and as per that agreement amount of Rs. 43,500/- only was agreed to be paid for reconveyance to him and not amount of Rs. 31,421/-. He further stated that original defendant No. 1 Taradevi alone was entitled to enforce said agreement. Trial Court has found that in evidence this defendant did not stick to this story and such agreement of reconveyance was between himself, Taradevi and Vijaysingh. However in view of arrangement of reconveyance also

incorporated therein, trial Court found that this issue was not that significant. Similarly, there is no substance in contention of appellant that agreement of reconveyance was fully implemented and stood exhausted in present facts and his reliance on such defence by defendant No. 3 in paragraph 36A of his written statement is misconceived. As pointed out by advocates Mohta and Gordey, in paragraph 33(C) defendant No. 3 accepted his obligation to re-convey within 15 years but claimed amount of Rs. 43,500/- only for that. In view of the discussion above, I do not find it necessary to dwell more on this aspect.

12. Advocate Mehadia has also contended that though there is direction to appellant to hand over possession to original plaintiffs, there is no corresponding direction to pay amount of Rs. 6,690/- paid by him as determined in his preemption suit. Advocate Mohta has rightly pointed out that trial Court should have directed defendant No. 3 to refund said amount. Advocate Gordey states that there was no such prayer made by present appellant/defendant No. 29. It is to be noted that trial Court was not concerned with right inter se between defendant No. 3 and defendant No. 29 and hence it had no occasion to consider grant of such relief. However, considering the fact that present appeal is by defendant No. 29 and it is defendant No. 3 who has received the amount in pre-emption suit, I direct defendant No. 3 represented by his legal heirs No. 5A to 5D to pay back jointly and severally said amount to appellant within a period of three months failing which the legal heirs of Appellant will be entitled to recover the amount with simple interest calculated at 6 percent per annum from the date of this judgment till its realisation.

13. Advocate Mehadia has also urged that as trial Court has found that Taradevi had one half share in all properties, relief in relation to all properties could not have been given to original plaintiffs. I find that trial Court has discussed the entitlement of plaintiffs in paragraph 34 of its judgment and found that plaintiffs before it were entitled to maintain the suit. It appears that objection in this respect was personal to original defendant No. 1 Taradevi and against the decision of trial Court she filed Appeal No. 20 of 1963 contending that trial Court ought to have passed the decree in her favour jointly with original plaintiffs for possession. From judgment of Division Bench of this Court dated 23-6-1971 it appears that this dispute was compromised between original plaintiffs and Taradevi. In any case, original plaintiffs are heirs of deceased Madhaorao who had agreement for reconveyance with Vitthalrao. This Vitthalrao transferred his rights on 27-6-1951 to Narayan. As I have found that this Narayan i.e. vendor of defendant No. 29 himself was under an obligation to re-convey the property, he could not have conferred any better title on defendant No. 29/present appellant who was total stranger so far as family of original plaintiffs and Taradevi is concerned. It is not the case of present appellant that Taradevi at any point of time opposed the prayers for redemption or repurchase made by original plaintiffs. In the circumstances, I do not find any substance in this argument.

14. This brings me to consideration of other two arguments of appellant. By

inviting attention to prayer clauses in the plaint before lower Court it has been contended that if prayer Clause "b" which seeks relief of redemption in terms of Order 34, Rules 7 and 15 of Civil Procedure Court read with Section 100 of Transfer of Property is granted, relief of specific performance claimed in alternative for reconveyance vide prayer Clause "d" could not have been granted. It is also contended that there is no prayer for possession in respect of Survey No. 56 on which present appellant exercised his right of pre-emption and succeeded. Advocate for respondent No. 1/original plaintiff has contended that in view of prayer Clause "b", prayer Clause "e" becomes redundant and as specific performance of agreement of the reconveyance has been claimed from appellant also, in view of Section 22 of Specific Relief Act when such document of reconveyance is executed, as per law. Appellant and original defendant No. 3 is duty bound to deliver possession also and therefore, it was not necessary to seek relief of possession. He points out that in operative order, trial Court has directed execution of document by appellant as also by original defendant No. 3 in favour of original plaintiffs and delivery of possession also which is only consequential. It is to be noted that prayer Clause "d" is in the alternative and seeks decree for specific performance of contract of reconveyance in respect of Property described in Appendix No. 1 attached with the plaint. 23/24th share in field Survey No. 56 of Mouza Talwel over which present appellant claims right is included in this Appendix. In operative part, in view of its earlier finding that original defendant No. 3 Narayanrao has recovered entire amount due to him under the mortgage, after, holding that said sale deed Exhibit 3-D-6 is in the nature of mortgage, Court was given declaration that nothing remains due under it to him on taking accounts.

15. Hence except three field properties which were sold with consent of original plaintiffs and in relation to which original plaintiffs expressly waived their right of repurchase, all other properties are directed to be handed over by him to original plaintiffs. Defendant Nos. 3 and 29 i.e. present appellants have been directed to deliver possession of 19/24th portion of Survey No 56 at Talwel with further direction that they would re-transfer the property at the cost of plaintiffs, if so required. Even if transaction is held to be mortgage or an outright sale with right of reconveyance/repurchase, position of present appellant remains the same. Even if it is presumed that exact nature of transaction has not been determined by trial Court, there are no arguments advanced pointing out corresponding injury or prejudice to present appellant. Hence, I find that this argument of Advocate Mehadia does not raise any material issue having bearing on the controversy insofar as this appeal is concerned. The finding that nothing is due on taking accounts to defendant No. 3 under mortgage has not been even argued to be perverse. Moreover, the existence of registered agreement for reconveyance is also accepted. It has not even been argued that reconveyance sought is either premature or without necessary compliance. Hence even if overlapping prayers are made in the alternative, I do not find that it has prejudicially affected any right of appellant. In view of undisputed findings on

facts reached by trial Court the trial Court has issued necessary directions to do complete justice between parties and none of the directions is demonstrated to be without jurisdiction, I do not find any substance in the technical objection of Advocate Mehadia. It may also be noted that after making various prayers vide Clauses "a" to "g", original plaintiffs vide prayer Clause "h" have also prayed for grant of any other prayer to which they are entitled. Fact remains that as pointed out by Advocate Mohta, trial Court has not taken recourse to any decree under Order 34, Civil Procedure Code.

16. In the result, present-appeal is partly allowed. The judgment and decree of trial Court is already modified by Division Bench of this Court on 23rd June, 1971 while accepting the compromise between original plaintiffs and original defendant No. 1 Taradevi in Appeal No. 20 of 1963. The said modification does not in any way prejudice the rights of present appellant. This modified judgment and decree of trial Court is further modified by this judgment and order to the extent stipulated above and legal heirs of original defendant No. 3 who are respondents before this Court are directed to pay back to present appellant amount of Rs. 6,690/- only within a period of three months from the date of this judgment failing which, appellant shall be entitled to recover said amount from them jointly and severally, with further interest calculated at 6 percent per annum. In the, circumstances, there shall be no order as to costs. Decree be drawn accordingly.