**(2016) 06 BOM CK 0123**

**In the Bombay High Court**

**Case No :** Second Appeal No. 251 of 2002

Navinchand Khushalchand Mutha — APPELLANT

Vs

Banaji Damu Sonde — RESPONDENT

**Date of Decision :** 06-06-2016

**Acts Referred:**
Transfer of Property Act, 1882 — Section 53A, 58, 58(c)

**Citation :** (2016) 6 BCR 622 : (2016) 5 MhLJ 682

**Hon'ble Judges :** T.V. Nalawade, J.

**Bench :** Single Bench

**Advocate :** Shri. S.S. Bora, Advocate, for the Appellant; Shri. V.D. Hon, Senior Advocate, for the Respondent Nos. 1 to 6; Shri Ram B. Deshpande, Advocate, for the Respondent Nos. 7 to 14

**Final Decision :** Dismissed

## Judgement

T.V. Nalawade, J.—The appeal is filed against the judgment and decree of Regular Civil Appeal No.358/1997 which was pending in District Court Ahmednagar. The appeal of the present respondents, plaintiffs, is allowed by the District Court and the suit filed by the respondents for relief of redemption of mortgage is decreed. Both the sides are heard.

2. The suit was filed in respect of land Survey No.655/4 (Gat No.2132), admeasuring 2 hectares 31 R situated at village Deolali Pravara, Tahsil Rahuri, District Ahmednagar. The owner of this land has right to take water from the well situated in previous Survey No.655 in the proportion of the area.

3. It is the case of the respondent, plaintiff that in the year 1970 the suit property was given by way of mortgage to Khushalchand, the predecessor-in-title of present appellant for securing debt amount of Rs. 5000/- taken from Khushalchand. The document of mortgage was registered and the period of 5 years was mentioned in the document. It is contended that before expiry of the period, the amount was tendered to defendant No.1, Navinchand, successor of

Khushalchand, but he refused to accept the amount. It is contended that the possession of the land was given to Khushalchand and so possession was also to be returned by defendant No.1 to the plaintiffs. It is contended that notice was then issued in the year 1984 through Advocate and they were requested to accept the amount and return back the possession. It is contended that false reply was given by successors of Khushalchand and they refused to return back the land and so cause of action took place for the suit. Relief of redemption of this mortgage was claimed.

4. Defendant No.1 filed written statement and contested the matter. He did not dispute that the suit land was initially belonging to the plaintiffs. The defendant contended that under document dated 15-9-1970 the land was given in possession of Khushalchand and under the disputed document, the transaction of absolute sale was made and it was not a mortgage transaction. It is contended that Khushalchand died in the year 1972 and the plaintiffs were not in a position to return the money and repurchase the property as per the aforesaid agreement. Defendant No.1 contended that on 28-5-1974 the plaintiffs agreed to sell the suit property and one more land viz Survey No.655/2 to the defendant No.1 for consideration of Rs. 42,000/- and the agreement was written on a stamp paper. It is contended that on the date of the agreement cash amount of Rs. 10,000/- was given and the previous amount of Rs. 5,000/- was adjusted as earnest money. It is contended that remaining amount of Rs. 27,000/- was to be given at the time of execution of sale deed and the sale deed was not immediately executed as it was necessary to take permission under the provisions of the Prevention of Fragmentation and Consolidation of Holdings Act. It is contended that on 28-5-1974 under agreement of sale possession of the land Survey No.655/4 was confirmed but the possession of Survey No.655/2 was to be given after taking permission of the revenue authorities.

5. It is the case of the defendant No.1 that he was always ready and willing to perform his part of contract. He contended that he is entitled to the protection of Section 53-A of the Transfer of Property Act as he came in possession as the part performance of the contract. Defendant No.1 admitted that notice dated 3-1-1984 was issued by the plaintiffs to him and he admitted that reply was given by him. Defendant No.1 contended that he has spent huge amount for improving the quality of the land and he has spent amount for preparing the land for horticulture. He prayed for dismissal of the suit.

6. Issues were framed on the basis of the aforesaid pleadings by the trial Court. Only the plaintiff gave evidence. The plaintiff was cross examined to some extent but as no interest was shown to further cross examine the plaintiff, order of "No Cross" was made by the trial Court. The trial Court dismissed the suit by holding that the defendant No.1 is entitled to protection of the provision of Section 53-A of the Transfer of Property Act. However, the trial Court had held that the transaction of 1970 was of mortgage.

7. The first appellate Court held that there was agreement of sale but the

 

agreement of sale had not discharged the liability under the mortgage and there was no merger of the previous transaction into the agreement of sale. The first appellate Court held that the plaintiffs are entitled to redemption of mortgage. The first appellate Court has considered the conditions which need to be fulfilled for taking protection of section 53-A of the Transfer of Property Act and has held that two conditions of Section 53-A of the Transfer of Property Act including readiness and willingness to perform part of the contract are not fulfilled. By giving such finding the suit for redemption is decreed by the first appellate Court.

8. This Court, other Hon''ble Judge, admitted the appeal by observing that substantial questions of law raised in Ground Nos.1 to 3 in the appeal memo need to be decided in the second appeal. Thus, following substantial questions of law are formulated :-

(i) Whether defendant No.1 is entitled to take protection of section 53-A of the Transfer of Property Act though the prescribed period of limitation for suit of specific performance has expired ?

(ii) Whether in view of the observations made by the Apex Court in the case of Shrimant Suryawanshi v. Pralhad Bhairoba Suryawanshi, reported as 2002 AIR SCW 659 and the ratio of Mahadeo v. Surajbai, 1994 Mh.L.J. 1145, the District Court has committed error in holding that protection of section 53-A of the Transfer of Property Act is not available as the suit for specific performance is barred by limitation ? And.

(iii) Whether the District Court has committed error in not considering the material on the record and in holding that conditions which need to be fulfilled for getting protection of section 53-A of the Transfer of Property Act are not fulfilled by defendant No.1 ?

9. Both the Courts below have held that the transaction of 1970 was mortgage transaction. This finding of the trial Court was not challenged by the present appellant. The document at Exhibit 62 of 1970 shows that it was titled as conditional sale (''krZ [kjsnh [kr ). Period of 5 years was fixed and it was mentioned that if the amount is not returned within 5 years, the document was to be treated as sale deed. Within this period the plaintiff was expected to get redeemed the property (tehu lksMowu ?ksbZu).

10. The definition of mortgage and mortgage by conditional sale can be found in section 58 of the Transfer of Property Act. Relevant provision is as under :

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-- (a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The transferor is called as mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured or the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

(b) ...

(c) Mortgage by conditional sale ? Where, the mortgagor ostensibly sells the mortgaged property -

on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

on condition that on such payment being made the sale shall become void, or

on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called mortgage by conditional sale and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale."

11. It is true that only because the condition that on repayment of the money the buyer shall transfer the property to the seller is embodied in the document, inference cannot be straightway drawn that it was mortgage by conditional sale. It is also true that the real intention needs to be ascertained on the basis of contents of the document. This Court has no hesitation to hold that the aforesaid contents which are mentioned for the present purpose are sufficient to infer that it was mortgage by conditional sale. Further the finding on this point given by the trial Court was not challenged by the defendant. The relationship of mortgagor and mortgagee continued and subsequent transaction needs to be considered separately.

12. There is something more against defendant No. 1 on aforesaid point. Defendant No. 1 is relying on document of agreement of sale, Exhibit 73. The suit property is mentioned in this document and it is mentioned that plaintiffs had agreed to sell this land and other land like Survey No. 655/2 for the consideration of Rs. 42,000/-. There is specific mention that amount of Rs. 5000/- was taken as loan and it was to be returned for redemption of mortgage and that amount was adjusted in the amount of Rs. 42,000/- mentioned as consideration in Exhibit 73. (5000 :i;s eyk vki.kkl ''krZ [kjsnh iksVh xgku lksMowu ?ks.;klkBh |ko;kps rs otk d:u 37000 :i;s jks[k |ko;kps vkgsr0) . In view of such mention in Exhibit 73 it was not open to defendant No. 1 to contend that in the year 1970 sale deed was executed and there was only agreement of re-transfer.

13. The learned counsel for the appellant placed reliance on a case reported as AIR 2013 (6) Mh.L.J. (S.C.) 80 : AIR 2013 SC 2924 Vanchalabai v. Shankarrao. In this case the Apex Court has reproduced and considered the observations made by it in the case reported as AIR 1992 SC 1236 (Tamboli Ramanlal Motilal

 

v. Ghanchi Chimanlal Keshavlal). the relevant portion is as under :-

"16. In order to appreciate the respective contentions, it is necessary for us to analyse Ex.26 dated December 11, 1950. Before that, it is necessary to utter a word of caution. Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have just now observed, that is not conclusive of the matter.

17. What does the executant do under the document ? He takes a sum of Rs. 5,000/- in cash. The particulars are (a) Rs. 2,499/- i.e. Rs. 899/- by mortgage of his house on 27-1-1944 and (b) Rs. 1,600 by a further mortgage on 31-5-1947 totalling to Rs. 2,499/-, Thereafter, an amount of Rs. 2,501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It has to be carefully noted that this amount of Rs.5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs.5,000/- with the conditional sale is executed, we are unable to see how the relationship of debtor and creditor can be forged in. In other words, by reading the document as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction."

14. There cannot be dispute over the propositions made in the aforesaid cases cited by the learned counsel for the appellant. The relevant material is considered by this Court which includes the wording used in the disputed document and also the subsequent transaction, agreement of sale between the same parties. In view of the facts of the present case, there is no other alternative than to hold that it was mortgage by conditional sale. It is true that the intention of the parties needs to be gathered from the document of transaction ordinarily. The conduct of the parties prior to the execution of document and even subsequent to the execution of the document cannot be ignored. When there is some doubt about the real intention such conduct can be considered and such conduct can be considered even for confirmation about the intention which can be gathered from the wording of the document.

15. So far as the defence taken that the appellant-defendant is entitled to protection of the provision of section 53-A of the Transfer of Property Act is concerned, it can be said that the conditions laid down in section 53-A of the Act need to be fulfilled for getting such protection. Firstly it needs to be ascertained

as to whether in a case like the present one, such protection was available due to peculiar circumstances of the case and then secondly it needs to be ascertained as to whether the conditions laid down in section 53-A of the Act are fulfilled. On this point learned counsel for the respondents placed reliance on a case reported as AIR 1982 SC 989 Govindrao Mahadik v. Devi Sahai. The observations, which are relevant for the present matter, are at paragraphs 31 and 32 and they are as under :-

"31. . . . . To qualify for the protection of the doctrine of part-performance it must be shown that there is a contract to transfer for consideration immovable property and the contract is evidenced by a writing signed by the person sought to be bound by it and from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty. These are prerequisites to invoke the equitable doctrine of part performance. After establishing the aforementioned circumstances it must be further shown that a transferee had in part performance of the contract either taken possession of the property or any part thereof or the transferee being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. The acts claimed to be in part performance must be unequivocally referable to the pre-existing contract and the acts of part performance must unequivocally point in the direction of the existence of contract and evidencing implementation or performance of contract. There must be a real nexus between the contract and the acts done in pursuance of the contract or in furtherance of the contract and must be unequivocally referable to the contract. . . . . "

"32. We may recall here that the acts preliminary to the contract would be hardly of any assistance in ascertaining whether they were in furtherance of the contract. Anything done in furtherance of the contact postulates the pre-existing contract and the acts done in furtherance thereof. Therefore, the acts anterior to the contract or merely incidental to the contract would hardly provide any evidence of part performance."

For using the observations made by the Apex Court in the cases cited supra, if the facts of the present matter are seen it can be said that in the present matter, in part performance of the contract, the previous possession of the defendants was confirmed under the document of agreement of sale and some consideration was paid to the plaintiffs. In view of these circumstances it can be said that some conditions laid down in Section 53-A of the Act were fulfilled. The necessary conditions which need to be fulfilled for getting protection of section 53-A can be found in the same case (cited supra) at paragraph 10 and they are as under :-

"10. In order to qualify for the protection conferred by the equitable doctrine of part performance as enacted in Section 53-A, the following facts will have to be established:

"(1) That the transfer or has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) That the transferee has in part-performance of the contract taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract;

(3) That the transferee has done some act in furtherance of the contract; and

(4) That the transferee has already or is willing to perform his part of the contract."

16. From the facts of the present case already quoted and the requirements of section 53-A, it can be said that the first three conditions quoted above are fulfilled. The execution of the document of agreement of sale is proved in the present matter and other two conditions are fulfilled as already observed. The question remains as to whether the remaining conditions of readiness and willingness on the part of the defendants to perform his part of the contract were fulfilled. From the contents of the agreement of sale, Exhibit 73, it can be said that total area of 2 hectares 24 R was to be sold to the defendants for consideration of Rs. 42,000/-. The amount of Rs. 5,000/- was already paid as mortgage money under Exhibit 62 and so the remaining consideration which was to be paid, was Rs. 37,000/-. Out of that amount Rs. 10,000/- was paid under Exhibit 73 and so the amount remained was Rs. 27,000/-. Even if it is considered that in respect of land Survey No.655/4 the total amount of Rs. 10,000/- was paid, the defendant was liable to pay the remaining amount of Rs. 11,000/- if the consideration is divided for aforesaid two lands. The defendant was already in possession and so he was expected to take steps for completion of the transaction.

17. In agreement, Exhibit 73, it is mentioned that possession of land Survey No.655/2 was to be received from the revenue authorities as rights of third party tenant were involved in that land and then the permission of the Sub Divisional Officer was to be obtained for sale transaction and then the possession of land Survey No.655/2 was to be given to the defendant. The relevant contents run as under :-

"R;kpk rkck yodjp eglwy vf/kdkjh ;kapsdMwu feG.kkj vkgs0 R;kosGh dCtsikorh nsowu o R;k vxksnj esa0 izkar lkgsc ;kaph ijokuxh vk.kwu tehu vkiys dCtkr nsbZu0"

This mention was in respect of land Survey No.655/2 as it was previously in possession of tenant though he had handed over the possession before making the order by the concerned authority. There is another mention in Exhibit 73 which can be said to be in respect of land Survey No.655/4. It is mentioned that for sale transaction permission of Assistant Collector Ahmednagar was required to be obtained. The Act under which permission was required to be obtained was not mentioned in Exhibit 73. In the pleadings of the written statement it is mentioned that permission was necessary under the provisions of the Prevention of Fragmentation and Consolidation of Holdings Act. The area of the land was 1 hectare 12 R and specific admission is given by the defendant in the cross examination that from the year 1977 there was no necessity of obtaining such permission. Nothing is shown to this Court to create probability that such permission was necessary under the aforesaid Act or any other Act. Thus the agreement of sale was made on 28-5-1974 and at least from 1977 there was no necessity of permission and it was within the knowledge of the defendant. In spite of this circumstance, no steps at all were taken by the defendant for performance of his part of the contract like making payment of remaining consideration to the plaintiff. Admittedly the plaintiff had given notice dated 3-1-1984 and its copy is produced on the record. It is not disputed that this notice was replied by the defendant but the reply was not produced. From the reply it could have been ascertained as to whether the defendant was ready and willing to pay the remaining amount to the plaintiff for getting the sale deed executed. Though such reply was not proved a copy of such reply was shown to this Court. It can be said that the defendant wanted to use the document of mortgage by conditional sale as the document of absolute sale and he wanted to show that he had become owner as the money was not returned within the period fixed in Exhibit 62. In the evidence also the defendant had taken stand that the land was not given by way of mortgage to him and so the plaintiff has no right to get back the land from him. In the evidence, he has stated that the amount was not returned within time fixed in the aforesaid document. In the evidence he has not stated that he is still ready to pay the remaining amount. Thus, no evidence is given to prove the readiness and willingness by the defendant. On the contrary, the defendant had no intention to pay remaining amount and he wanted to prove that he had become owner under the document at Exhibit 62. Due to this circumstance, inference is easy that the remaining conditions of section 53-A of the Transfer of Property Act are not fulfilled by the defendants.

18. There is one more circumstance against the defendant. In the agreement, Exhibit 73, one more land viz Survey No.655/2 was mentioned. Admittedly, this land was sold to third party even prior to the date of suit by the plaintiff but no steps were taken by the defendant to get relief in respect of Survey No.655/2. He was to pay consideration for completing that transaction also. It can be said that no steps at all were taken by the defendant to show his readiness and willingness. Due to this circumstance, the protection of section 53-A of the Act cannot be given to the defendant.

19. Reliance was placed by the learned counsel for the appellant on the cases reported as AIR 1970 SC 546 Nathulal v. Phoolchand; AIR 1971 SC 1238 R.C. Chandiok v. Chuni Lal Sabharwal, AIR 2005 SC 3503 Aniglase Yohannan v. Ramlatha in support of the aforesaid contentions made in respect Section 53-A of the Transfer of Property Act. Facts and circumstances of each and every case are always different. Relevant facts of the present matter are already quoted by this

 

Court. These cases are of no help to the appellant.

20. The learned counsel for the appellant submitted that the first appellate Court has not framed relevant points and findings are not given specifically on the relevant points on which the issues were framed and on that ground the decision of the first appellate Court needs to be set aside. In support of this contention reliance was placed on the cases reported as (1) 2006 (6) Mh.L.J. 759 Khatunbi v. Aminabi, (2) AIR 2013 SC 2924 Vanchalabai v. Shankarrao and the decision given by this Court in Second Appeal No.68 of 1991 (between Abdul Kadar and Ammenabi). The facts of these reported cases were also different. In the present matter the District Court has considered the relevant points and findings on relevant points are given by the District Court. In view of this circumstance, this Court holds that it is not possible to interfere in the decision given by the District Court. All the three points of substantial questions of law are answered against the appellant.

21. In the result, the appeal stands dismissed. The prayer for relief of continuation of the stay to the execution of the judgment and decree given by the first appellate Court is refused.

 