

(2016) 11 BOM CK 0073
In the Bombay High Court
Case No : Second Appeal No. 604 Of 1999

Shri Kalgonda Balgonda Patil

APPELLANT

Vs

Shri Sidgonda Subhane Patil

RESPONDENT

Date of Decision : 29-11-2016

Acts Referred:

Specific Relief Act, 1963 — Section 16(c)
Transfer of Property Act, 1882 — Section 58(c)

Citation : (2017) 2 AIRBomR 469

Hon'ble Judges : R.D. Dhanuka, J.

Bench : Single Bench

Advocate : Mr. Surel Shah, Advocate, for the Appellants; Mr. R.D. Walvekar i/by Mr. D.S. Sawant for 2A to 2D, 3A to 3D, 4A to 4D, 5 to 9, 10A to 10D, Advocates, for the Respondents

Final Decision : Allowed

Judgement

R.D. Dhanuka, J.—By this appeal filed under section 100 of the Code of Civil Procedure, 1908, the appellants who were the legal heirs and representatives of the original plaintiffs have impugned the judgment and decree dated 29th July 1999 passed by the learned Additional District Judge, Gadhinglaj allowing the Regular Civil Appeal No.88 of 1998 filed by the legal heirs and representatives of the original defendants thereby setting aside the judgment and decree passed by the trial Court in Regular Civil Suit No.33 of 1979 and dismissing the suit filed by the original plaintiff inter alia praying for re-conveyance of the land bearing Survey No.366 of the Gadhinglaj town and for possession. The parties in this judgment are described as per their original status in the suit filed by the plaintiffs before the learned trial Judge. Some of the relevant facts for the purpose of deciding this second appeal are as under :-

2. The suit was filed by Kalgonda Balgonda Patil against the Sidgonda Subhane Patil who were the original plaintiff and the original defendant respectively. The appellants herein are the legal heirs of the original plaintiffs whereas, the

respondents are the legal heirs of the original defendants. The suit property belonged to the original plaintiffs.

3. On 20th December 1972, the original plaintiff entered into a Sale Deed with the original defendant in respect of the suit property for consideration of Rs.500/-. The said sale deed was registered on the same date. On the very same day, the parties entered into another agreement by which the original defendants agreed to re-convey the suit property to the plaintiff by accepting an amount of Rs.4,100/- on or before 31st December 1980. It was the case of the original plaintiff that he had requested the original defendant to accept the said amount of Rs.4,100/- on or before 31st December 1980 and to execute deed of re-conveyance in favour of the original plaintiff, however, the original defendant did not accept the said amount and did not execute the deed of re-conveyance.

4. On 8th March 1979, the original plaintiff issued a notice to the original defendant calling upon him to execute re-conveyance by accepting an amount of Rs.4,100/-. The original defendant, however, failed to comply with the said notice. The original plaintiff accordingly filed a suit for execution of re-conveyance and for possession of the suit property against the original defendant. The said suit was resisted by the original defendant by filing written statement. It was the case of the original defendant that the nature of the transaction was not an agreement for sale but was a mortgage by conditional sale. The original defendant also alleged that he was a tenant in respect of the suit property since long and thus the original plaintiff was not entitled for possession of the suit property. The original defendant also raised a plea of limitation.

5. During the pendency of the said suit, the original defendant expired and his legal heirs and representatives were brought on record. The legal heirs and representatives of the original defendant adopted the written statement of the original defendant by filing a pursis. During the pendency of the said suit, the original plaintiff also expired and his legal heirs and representatives were brought on record.

6. The trial Court framed five issues including the issue as to whether the plaintiff had proved that on 20th December 1972, the plaintiff had entered into an agreement to sale of the suit property on agreed consideration of Rs.4,100/- and whether it was proved by the plaintiffs that as per the agreed terms and conditions in the agreement, the sale deed was to be executed by the defendant in favour of the plaintiff on 31st December 1980 on payment of consideration by the plaintiff to the defendant. The learned trial Judge also framed the issue as to whether the plaintiff had proved that he was always ready and willing to perform his part of contract and whether he was entitled for a decree of specific performance of the contract.

7. The parties led oral and documentary evidence before the learned trial Judge. By a judgment and decree dated 25th April 1985, the learned trial Judge

dismissed the said suit (Regular Civil Suit No.33 of 1979) filed by the original plaintiff. Being aggrieved by the judgment and decree dated 25th April 1985, the legal heirs and representatives of the original defendant preferred an appeal (Regular Civil Appeal No.222 of 1985) in the Court of learned District Judge, Kolhapur.

8. By a judgment and decree dated 5th October 1999, the learned 2nd Additional District Judge allowed the said Regular Civil Appeal No.222 of 1985 filed by the legal heirs of the original defendant and remanding the matter back to the learned trial Judge with a direction to try the suit afresh by framing four issues and directed the learned trial Judge to record evidence on those four issues. The four issues which were framed by the learned 2nd Additional District Judge, Kolhapur in the said Regular Civil Appeal No.222 of 1985 are extracted as under :-

"1. Does the plaintiff prove that on 20th December 1972, the defendants entered into an agreement of sale of the suit property on agreed consideration of Rs.4,100/-.

2. Does the plaintiff prove that as per the agreed terms and conditions in the agreement, the sale deed was to be executed on 31st December 1980 on payment of consideration to the defendants.

3. Does the plaintiff prove that he was always ready and willing to perform his part of the contract.

4. Whether the plaintiff is entitled for a decree of specific performance of the contract."

9. Being aggrieved by the said judgment and decree passed by the 2nd Additional District Judge, the plaintiffs preferred second appeal (1350 of 1991) in this Court. This Court, however, did not interfere with the order passed by the learned 2nd Additional District Judge, Kolhapur in the said second appeal and upheld the said judgment and decree passed by the 2nd Additional District Judge.

10. The plaintiffs led additional evidence pursuant to the order of remand passed by the 2nd Additional District Judge by his judgment and decree dated 5th October 1990. The defendants, however, did not lead any oral evidence after remand of the matter. The learned trial Judge answered those four issues framed by the learned 2nd Additional District Judge, Kolhapur and passed a judgment and decree dated 14th October 1998. By the said judgment and decree, the learned trial Judge directed the defendants to execute the deed of re-conveyance in favour of the legal heirs and representatives of the original plaintiffs within two months from the date of the said decree and to transfer the suit property i.e. 15 gunthas of the land out of Revisional Survey No.366 of Mouja and taluka Gadhinglaj after withdrawal of the amount of consideration of Rs.4,100/- which was deposited by the plaintiffs in the Court and directed to hand over the possession of the suit property after execution of the deed of re-conveyance to

the plaintiffs.

11. It was made clear in the said judgment and decree that if the defendants failed to execute the sale deed as directed by the learned trial Judge in favour of the legal heirs and representatives of the original plaintiffs, the sale deed would be executed through the Court on application moved by the plaintiffs and the plaintiffs would be entitled to recover the cost from the defendants. The learned trial Judge ordered a separate enquiry for future mesne profit under Order 20, Rule 2 of the Code of Civil Procedure, 1908.

12. Being aggrieved by the said judgment and decree dated 14th October 1998 passed by the learned trial Judge, the defendants preferred an appeal (Regular Civil Appeal No.88 of 1998) in the Court of learned Additional District Judge, Gadhinglaj. The learned additional District Judge, Gadhinglaj framed five points for determination. The learned Additional District Judge, Gadhinglaj answered the issue as to whether it was proved that the defendants had agreed to sell the suit property to the original plaintiff for Rs.4,100/- under agreement dated 20th December 1972 in negative. In so far as the issue whether it was proved that the parties had agreed that the sale deed was to be executed on or before 31st December 1980 is concerned, the learned Additional District Judge answered the said issue in negative. It is also held by the learned Additional District Judge that deceased plaintiff had not proved that he had been ready and willing to perform his part under the contract. It was held that the plaintiff was not entitled for relief of specific performance. In the impugned judgment and decree dated 29th July 1999, the learned Additional District Judge held that the nature of the transaction was not an agreement for sale of the suit property but it was a mortgage by conditional sale.

13. Being aggrieved by the said judgment and decree dated 29th July 1999 passed by the learned Additional District Judge, Gadhinglaj, the plaintiffs filed this second appeal under Section 100 of the Code of Civil Procedure, 1908.

14. This Court while admitting this second appeal on 18th February 2000 formulated the following substantial questions of law:-

(i) Whether the lower appellate Court was justified in recording a finding that the plaintiff has failed to prove that as per terms and conditions of the agreement to sell, the sale deed was to be executed on or before 31st December 1980 on the payment of consideration to the defendant. In view of the fact that the defendant has not disputed agreement to sell in their written statement and has also not disputed averment in the plaint to the effect that the plaintiff had from time to time asked the defendant to execute sale deed of the suit property by taking amount of consideration and also there is specific term in the agreement to sale to that effect.

(ii) Whether the lower appellate Court was justified in recording a finding that the document in question is a mortgage by conditional sale and not agreement to sell, which is contrary to the contents of the said document in view of the bar in

Section 92 of the Indian Evidence Act which excludes oral evidence regarding contents of documents.

15. Mr. Surel Shah, learned counsel appearing for the plaintiffs invited my attention to the agreement dated 20th December 1972 i.e. agreement of re-conveyance entered into between the parties. He submits that before expiry of the period mentioned in the said document, admittedly the original plaintiff had already called upon the original defendant to accept the amount mentioned in the said document and to execute the deed of re-conveyance in favour of the original plaintiff, however, there was no compliance by the original defendant in respect of the said demand made by the original plaintiff.

16. Learned counsel for the plaintiffs invited my attention to the examination-in-chief of the original defendant who alleged in his deposition that he was in need of money and with a view to save stamp duty, the parties had agreed to execute two separate agreements. In the examination-in-chief, it was the case of the defendants that the transaction between the parties was of a mortgage by conditional sale. He submits that the witness examined by the defendants admitted the execution of the sale deed and deed of re-conveyance. He submits that the finding of the first appellate Court is contrary to the admissions of the witness examined by the defendants and more particularly the admissions made in the cross-examination.

17. Learned counsel for the plaintiffs invited my attention to the order passed by the learned 2nd Additional District Judge, Kolhapur on 4th October 1998 by which the matter was remanded back to the learned trial judge to decide only four issues referred to aforesaid. He submits that in view of the specific issues framed by the first appellate Court on 5th October 1990 while remanding the matter back with a direction to record oral evidence only on those four issues, the first appellate Court could not have recorded any finding about the nature of the transaction entered into between the parties and could not have held that the nature of the transaction was not an agreement for sale of the suit property but it was a mortgage by conditional sale. He submits that in view of the order passed by the learned 2nd Additional District Judge while remanding the matter, the first appellate Court could have decided only those four issues and could not have re-opened the issue as to whether the transaction entered into between the parties was a transaction of a mortgage by conditional sale or not.

18. It is submitted that the judgment and decree passed by the first appellate Court is contrary to the earlier judgment and decree passed by the 2nd Additional District Judge on 4th October 1998 restricting the remand to the limited four issues which was in respect of the agreement to sale and as to whether the plaintiff had proved that he had been ready and willing to perform his part of the contract or not. He submits that the impugned judgment and decree passed by the first appellate Court thus deserves to be set aside on this ground alone. He submits that there was no issue of mortgage by conditional sale for determination either before the trial Court or before the first appellate

Court after remand of the matter.

19. Without prejudice to the aforesaid submissions, learned counsel for the plaintiffs invited my attention to Section 58 (c) of the Transfer of Property Act, 1882 and more particularly on the proviso thereto. He submits that admittedly in this case, the parties had entered into two separate agreements i.e. one being agreement to sale and another being agreement of re-conveyance. He submits that in view of there being two separate agreements, the transaction between the parties could not have been considered as mortgage by conditional sale within the meaning of Section 58(c) of the Transfer of Property Act, 1882. He submits that the impugned judgment and decree passed by the first appellate Court is thus contrary to Section 58(c) of the Transfer of Property Act, 1882 and more particularly proviso thereto.

20. In support of the submission that the conditions of Section 58(c) and more particularly proviso thereto were not satisfied in this case for considering the transaction as mortgage by conditional sale, the learned counsel for the plaintiffs placed reliance on the judgment of the Supreme Court in case of *Mushir Mohammed Khan (dead) by Lrs. v. Sajeda Bano and Ors.*, reported in (2000) 3 SCC 536 and in particular paragraphs 9 to 11 and 14 thereof and also on the judgment of the Supreme Court in the case of *Bishwanath Prasad Singh v. Rajendra Prasad & Anr.*, reported in 2006 SAR (Civil) 272 in respect of the aforesaid submission.

21. It is submitted by the learned counsel for the plaintiffs that the finding of the first appellate Court that there was no evidence on record to show that the original plaintiff had gone to the original defendant to execute the re-conveyance except his bare words is perverse and contrary to an admitted position that before expiry of the time provided under the deed of re-conveyance, admittedly the original plaintiff had issued a notice inter alia calling upon the original defendant to accept the consideration mentioned in the deed of re-conveyance and to execute the deed of re-conveyance in favour of the original plaintiff. There was however no compliance in respect of the said requisition made by the original plaintiff. He submits that the finding of the first appellate Court is totally contrary to the evidence on record and admitted facts and is thus perverse and has to be therefore interfered with by this Court in this second appeal filed under Section 100 of the Code of Civil Procedure, 1908.

22. It is submitted by the learned counsel for the plaintiffs that the first appellate Court did not deal with the evidence led by the original plaintiff at all while reversing the decree passed by the learned trial Judge. He submits that the first appellate Court being the final Court of finding of fact ought to have appreciated and ought to have dealt with the evidence led by both the parties in the impugned judgment and decree while reversing the finding rendered by the learned trial Judge which in this case, the first appellate Court failed to do so. He submits that the impugned judgment and decree deserves to be set aside on this ground also.

23. It is submitted by the learned counsel for the plaintiffs that time was not an essence of the agreement of re-conveyance. There was no express plea raised by the defendants in the written statement that the time was an essence of the agreement in case of deed of reconveyance. He submits that there was no relationship of debtor and creditor between the parties. The plaintiffs had already deposited the entire amount payable under the said deed of re-conveyance before the trial Court as per the order of the said Court.

24. It is submitted by the learned counsel for the plaintiffs that the original plaintiff was always ready and willing to perform his part of contract and had complied with it by offering the consideration amount and issued a notice six months prior to the stipulated date to the original defendant, however, the original defendant or his legal heirs did not comply with their part of the obligation under the deed of re-conveyance. It is submitted that the defendants had not denied the execution of deed of re-conveyance or that the original plaintiff had approached the original defendant before expiry of the period provided in the deed of reconveyance.

25. Mr. Walvekar, learned counsel appearing for the defendant nos. 2A to 2D, 3A to 3D, 4A to 4D, 5 to 9 and 10A to 10D, on the other hand, invited my attention to paragraph 3 of the plaint and would submit that since the original plaintiff had not raised any plea in the plaint that the plaintiff was always ready and willing to perform his part of the obligation under the contract all throughout or even during the pendency of the suit, the learned trial Judge could not have passed a decree for specific performance of the deed of re-conveyance. He also heavily placed reliance on the examination-in-chief of the original plaintiff who deposed that he had raised loan of Rs.4,100/- from the deceased defendant and in security of the payment of the said amount, deceased defendant had asked him to deliver him the land of the plaintiff. After eight days of execution of the sale deed in respect of the suit land, the agreement regarding re-conveyance of the suit property was executed.

26. Learned counsel also placed reliance on the cross-examination of the original plaintiff and would submit that the original plaintiff himself had admitted in the cross-examination that when he received an amount of Rs.4,100/- from the original defendant, it was agreed to execute the mortgage by conditional sale deed in respect of the suit land. He submits that the plaintiff had admitted that since the stamp duty on execution of the mortgage of conditional sale was more, the document of sale deed for Rs.500/- and an agreement for reconveyance for Rs.4,100/- were executed. As per advice of the original defendant, the said documents were executed by and between the parties. He submits that the plaintiff had admitted that the defendant had advised him that the mortgage deed could not be executed and thus the sale deed for agreement was executed.

27. Learned counsel for the defendants also placed reliance on Form 47 prescribed under the Code of Civil Procedure, 1908 and would submit that it was mandatory for the plaintiff to file the pleadings in a suit for specific performance

in accordance with the said form and since the plaint filed by the original plaintiff was not in accordance with the said form, the suit for specific performance was liable to be dismissed on that ground alone. In support of this submission, learned counsel for the defendants placed reliance on the judgment of the Supreme Court in the case of Balkrishna and Anr. v. Bhagwan Das (dead) by Lrs. & Ors., reported in (2008) 12 SCC 145 and more particularly paragraphs 13 and 23 to 25 thereof and would submit that since there was no averment in the plaint about the alleged readiness and willingness on the part of the plaintiff in the plaint, no decree for specific performance could be granted by the learned trial Judge.

28. In support of the aforesaid submission, Learned counsel for the defendants also placed reliance on the following judgments of the Supreme Court :-

(i) Umabai v. Nilkanth Dhondiba Chavan (dead) by Lrs., reported in 2005 (6) SCC 243;

(ii) Inderchand Jain (D) through Lrs. v. Motilal (D) through LRS., reported in 2009 (14) SCC 663 and;

(iii) Sita Ram & Ors. v. Radhey Shyam, reported in AIR 2008 SC 143 (paragraphs 10 and 11).

29. It is submitted by the learned counsel for the defendants that relief of specific performance of the contract is a discretionary relief which can be granted under Section 16(c) of the Specific Relief Act, 1963 which discretion has to be exercised by the Court judiciously, however which in this case, the learned trial Judge has failed to exercise the discretion judiciously and has granted reliefs without considering the principles laid down by the Supreme Court in the said judgments.

30. Relying upon the oral evidence led by the plaintiff and more particularly his cross-examination, learned counsel submits that the first appellate Court has rightly considered the oral evidence led by the original plaintiff himself and has rightly held that the transaction between the parties was not an agreement to sale but was a transaction of agreement by conditional sale.

31. It is submitted by the learned counsel for the defendants that since the first appellate Court has rightly interfered with the judgment and decree passed by the learned trial Judge and has dismissed the suit, this Court should not interfere with the judgment and decree passed by the first appellate Court in view of the judgment and decree passed by the first appellate Court being not perverse.

32. Mr. Shah, learned counsel for the plaintiffs in rejoinder placed reliance on the judgment of the Supreme Court in the case of H.P. Pyarejan v. Dasappa (dead) by LRs. & Ors., reported in 2006 (3) Mh.L.J. 312 and more particularly paragraph 10 thereof and would submit that the Supreme Court has considered in the said judgment the nature of plea required to be raised in a suit for specific performance in so far as the issue of readiness and willingness is concerned and

as to how such plea has to be considered by this Court. He submits that the compliance with readiness and willingness has to be in spirit and substance and not in letter and form. He submits that the submission of the learned counsel for the defendants is totally hyper technical. He submits that in any event no such plea was raised by the defendants in the written statement.

33. Learned counsel invited my attention to the averments made by the plaintiffs in the plaint and more particularly paragraph 3 in support of his submission that the plaintiffs had, as a matter of fact, pleaded that the plaintiffs had called upon the defendants to accept the consideration amount and to execute the deed of re-conveyance on several occasions and finally had issued a notice for compliance of the obligations on the part of the defendants which they had failed. He submits that substance of plea has to be considered by the Court while exercising the discretion under Section 16(c) of the Specific Relief Act, 1963 and not form. He submits that the finding of the first appellate Court and more particularly paragraph 11 of the judgment and decree dated 29th July 1999 that there was no pleading that the plaintiff was ever ready and willing to pay the amount of Rs.4,100/- is totally perverse and contrary to the averments made in the plaint.

34. Learned counsel for the plaintiffs also placed reliance on the judgment of the Supreme Court in the case of V. Pechimuthu v. Gowrammal, reported in (2001) 7 SCC 617 and more particularly paragraphs 12 and 13 in support of the submission that the agreement entered into between the parties was an agreement for re-conveyance and not a transaction of mortgage by conditional sale. He submits that the learned counsel for the defendants has fairly conceded and rightly did not make any submission that conditions of Section 58 (c) of the Transfer of Property Act, 1882 were satisfied in this case.

REASONS AND CONCLUSIONS :-

35. There is no dispute that the original plaintiff and the original defendant had executed two separate agreements in respect of the suit property both dated 20th December 1972 i.e. one agreement to sale and another agreement of re-conveyance. A perusal of the record indicates that the original plaintiff had issued a notice to the original defendant before expiry of the period mentioned in the agreement of re-conveyance offering payment of the consideration amount and calling upon the original defendant to execute the deed of re-conveyance in favour of the original plaintiff. There was however no response to the said notice issued by the original plaintiff. The defendant did not dispute the factum of receipt of the said notice from the original plaintiff and that there was no reply or compliance on the part of the original defendant with the requisition made in the said notice.

36. A perusal of the plaint and more particularly paragraph 3 clearly indicates that it was averred by the original plaintiff that he had offered the amount mentioned in the said agreement of re-conveyance to the original defendant from time to time and to execute a deed of reconveyance and had in fact issued a

notice on 8th March 1979 calling upon the original defendant to comply with his part of the obligation, however, the original defendant did not comply with the same. I am thus not inclined to accept the submission of the learned counsel for the defendants that there was no averment in the plaint filed by the original plaintiff showing his readiness and willingness to comply with his part of the obligations under the agreement of re-conveyance.

37. In so far as the submission of the learned counsel for the defendants that the said plea raised in the plaint and more particularly in paragraph 3 was not accordance with the Form 47 appended to the Code of Civil Procedure, 1908 is concerned, Supreme Court in the case of H.P. Pyarejan v. Dasappa (dead) by LRs. & Ors. (supra) has dealt with the requirement of Section 16(c) of the Specific Relief Act, 1963 and has adverted to the earlier judgment in the case of Syed Dastagir v. T.R. Gopalkrishna Setty, reported in (1999) 6 SCC 337 and more particularly paragraphs 9 and 10 thereof.

38. The Supreme Court in the said judgment in the case of Syed Dastagir v. T.R. Gopalkrishna Setty (supra) has held that the Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. Such expression may be pointed, precise, sometimes vague but still it could be gathered what he wants to convey through only by reading the whole pleading, depending on the person drafting a plea. It is held that in India most of the pleas are drafted by counsel hence the aforesaid difference of pleas which inevitably differ from one to the other. Thus to gather true spirit behind a plea it should be read as a whole. It is held that the language in Section 16 (c) does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract. It is held that the compliance with "readiness and willingness" has to be in spirit and substance and not in letter and form. Supreme Court has held that to insist for a mechanical production of the exact words or a statute is to insist for the form rather than the essence. So the absence of form cannot dissolve an essence if already pleaded.

39. In my view, the Court has to consider the entire averments made in the plaint as a whole and cannot read the averments mechanically. The original plaintiff in this case had clearly made a reference to the agreement dated 20th December 1972, the consideration payable by the plaintiff to the defendant under the said agreement, about the steps taken by the plaintiff for compliance with his part of the obligation by offering the consideration amount from time to time to the defendant and calling upon him to comply with his part of the obligation. The plaint also indicates that it was also the case of the plaintiff that the defendant however did not comply with his part of the obligation. The intention of the plaintiff is clearly spelt out in the averments made in the plaint.

40. In my view, there is thus no substance in the submission made by the learned counsel for the defendants that there was no plea of readiness and willingness on the part of the original plaintiff in the plaint or that the same was

not in accordance with form 47 of the Code of Civil Procedure, 1908. In my view, the judgment of the Supreme Court in the case of H.P. Pyarejan v. Dasappa (dead) by LRs. & Ors. (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

41. In so far as the judgments of the Supreme Court in the case of Umabai v. Nilkanth Dhondiba Chavan (dead) by Lrs. (supra), Inderchand Jain (D) through Lrs. v. Motilal (D) through LRS. (supra) and Sita Ram & Ors. v. Radhey Shyam (supra) relied upon by the learned counsel for the defendants are concerned, in my view, none of these judgments would assist the case of the defendants. In my view, the original plaintiff had complied with the requirement under Section 16(c) of the Specific Relief Act, 1963 and had also brought on record the steps taken by him under the said agreement of re-conveyance.

42. In so far as the submission of the learned counsel for the defendants that relief of specific performance of the contract is a discretionary relief and such discretion has to be exercised by the Court judiciously under Section 16(c) of the Specific Relief Act, 1963 is concerned, there is no dispute about this proposition of law canvassed by the learned counsel for the defendants. In this case, the learned trial Judge after considering the oral and documentary evidence found that the defendants had not complied with their part of the obligations and had rightly exercised the discretion under Section 16(c) of the Specific Relief Act, 1963 in favour of the plaintiff. The defendant had not disputed the factum of receipt of the notice issued by the original plaintiff calling upon the original defendant thereby offering the consideration amount payable under the deed of re-conveyance and calling upon the original defendant to execute the deed of re-conveyance in favour of the original plaintiff.

43. In my view, there is no substance in the submission of the learned counsel for the defendants that the first appellate Court has rightly considered the oral evidence led by the original plaintiff himself and that has rightly held that the transaction between the parties was not an agreement to sale but was an agreement of mortgage by conditional sale. There is no dispute that the learned trial Judge had initially framed eight issues including the issue whether the defendant had proved that the suit transaction was a mortgage by conditional sale. There is no dispute that by the judgment and decree dated 5th October 1999, the learned 2nd Additional District Judge while allowing the Regular Civil Appeal No.222 of 1985 filed by the legal heirs and representatives of the original defendant and while remanding the matter back to the learned Single Judge had directed that the suit shall be tried afresh only on four issues out of eight issues framed by the learned trial Judge and has directed the learned trial Judge to record the evidence only on those four issues.

44. It is not in dispute that pursuant to the said judgment and decree dated 5th October 1999, the learned trial Judge upon remand had rendered a fresh opportunity to both the parties to lead additional evidence only on four issues which did not include the issue as to whether the transaction between the parties

was a transaction of mortgage by conditional sale or not. A perusal of the issues framed by the trial Court clearly indicates that the limited issues which were referred back to the learned trial Judge upon remand were relating to the execution of the deed of re-conveyance and as to whether the plaintiff had proved that he was ready and willing to perform his part of the contract.

45. A perusal of the judgment and decree passed by the first appellate Court on 29th July 1999 which has been impugned by the plaintiffs in this second appeal clearly indicates that the first appellate Court has rendered a finding that the nature of the transaction between the parties was not an agreement for sale of the suit property but it was a mortgage by conditional sale. The first appellate Court has also dealt with some part of the evidence which was led by the parties before the learned trial Judge in the first round of litigation. In my view, Mr. Shah, learned counsel for the plaintiffs is right in his submission that the first appellate Court has exceeded its jurisdiction by rendering a finding on the issue which was not referred back to the learned trial Judge by the first appellate Court while remanding the matter back to the learned trial Judge by the judgment and decree dated 5th October 1999. In my view, the first appellate Court has clearly exceeded its jurisdiction by rendering a finding on the issue as to whether the defendant had proved that the transaction between the parties was the transaction of mortgage by conditional sale and not an agreement to sale. The judgment and decree dated 5th October 1999 had attained finality. The impugned judgment and decree passed by the first appellate Court thus deserves to be set aside on that ground also.

46. Learned counsel for the defendants could not defend the impugned judgment and decree passed by the first appellate Court rendering a finding on the issue which was not referred back to the learned trial Judge while remanding the matter back to the learned 2nd Additional District Judge while passing a judgment and decree dated 5th October 1999. It is not in dispute that though the learned 2nd Additional District Judge while remanding the matter back to the learned trial Judge had granted an opportunity to both the parties to lead additional oral evidence upon remand of the matter on those four issues, the defendants did not lead further oral evidence before the learned trial Judge though the plaintiffs had led additional oral evidence. In my view, the learned trial Judge had considered and adjudicated upon only those issues which were referred back to the learned trial Judge by the learned 2nd Additional District Judge, Kolhapur and after considering the oral and documentary evidence had rendered a finding on those referred back issues. In my view, the first appellate Court could not have thus interfered with the findings rendered by the learned trial Judge which were not perverse.

47. A perusal of the judgment and decree passed by the first appellate Court clearly indicates that while reversing the finding rendered by the learned trial Judge, the first appellate Court which is the last Court regarding findings of fact has not appreciated and dealt with the evidence on the limited issues referred

back by the learned 2nd Additional District Judge, Kolhapur and has adopted a causal approach in the matter. The impugned judgment and decree passed by the first appellate Court thus deserves to be set aside on that ground also.

48. Mr. Shah, learned counsel for the plaintiffs rightly placed reliance on Section 58(c) of the Transfer of Property Act, 1882 in support of his submission that conditions of Section 58(c) of the Transfer of Property Act, 1882 for construing the document for mortgage by conditional sale were not satisfied in this case. It is not in dispute that there were two separate agreements entered into between the parties i.e. agreement to sale and agreement of re-conveyance. In view of this admitted position, in my view, the agreement of re-conveyance could not be construed as mortgage by conditional sale within the meaning of Section 58 (c) of the Transfer of Property Act, 1882. Supreme Court in the case of *Mushir Mohammed Khan (dead) by Lrs. v. Sajeda Bano and Ors.* (supra) has dealt with this issue at length in paragraphs 9 to 11 and 14 of the said judgment. It is held that the legislature enacted that a transaction shall not be deemed to be a mortgage unless the condition for re-conveyance is contained in the document which purports to effect the sale. It is held that in a sale coupled with an agreement to re-convey, there is no relation of debtor and creditor nor is the price charged upon the property conveyed, but the sale is subject to an obligation to re transfer the property within the period specified. It is held that the definition of a mortgage by conditional sale itself contemplates an ostensible sale of property. In my view, the principles of law laid down by the Supreme Court in the said judgment in the case of *Mushir Mohammed Khan (dead) by Lrs. v. Sajeda Bano and Ors.* (supra) squarely applies to the facts of this case.

49. It is clearly beyond reasonable doubt that since there were two separate documents entered into between the parties, the intention of the parties was clear beyond reasonable doubt that the second document i.e. agreement of re-conveyance was not a transaction of mortgage by conditional sale within the meaning of Section 58(c) of the Transfer of Property Act, 1882. In my view, conditions of Section 58 (c) of the Transfer of Property Act, 1882 were not satisfied. The judgment of the Supreme Court in the case of *Mushir Mohammed Khan (dead) by Lrs. v. Sajeda Bano and Ors.* (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

50. Supreme Court in the case of *Bishwanath Prasad Singh v. Rajendra Prasad & Anr.* (supra) has taken a similar view after construing Section 58(c) of the Transfer of Property Act, 1882 and has held that if the sale and agreement to repurchase are embodied in separate documents, then the transaction cannot be a mortgage. The said judgment of the Supreme Court also squarely applies to the facts of this case. I am respectfully bound by the said judgment.

51. Be that as it may, learned counsel for the defendants could not dispute this proposition that if the transactions were recorded in two separate agreements, conditions of Section 58(c) of the Transfer of Property Act, 1882 were not attracted. In my view, the judgment and decree passed by the first appellate

Court holding that the transaction between the parties was a mortgage by conditional sale and was not an agreement to sale is totally perverse and contrary to Section 58(c) of the Transfer of Property Act, 1882 and also contrary to the principles of law laid down by the Supreme Court in the cases of *Mushir Mohammed Khan (dead) by Lrs. v. Sajeda Bano and Ors.* (supra) and *Bishwanath Prasad Singh v. Rajendra Prasad & Anr.* (supra) and deserves to be set aside.

52. In my view, since the order passed by the learned 2nd Additional District Judge while remanding the matter back on the limited four issues had attained finality, the first appellate Court could not have reopened the other four issues and could not have referred to the evidence led by the parties in the first round of litigation in respect of the other issues in view of remand of the matter on limited four issues. In my view, the order passed by the first appellate Court thus deserves to be set aside.

53. In so far as the substantial questions of law formulated by this Court while admitting the second appeal are concerned, for the reasons recorded aforesaid, the same are answered in negative.

54. I therefore pass the following order :-

(i) The judgment and decree dated 29th July 1999 passed by the learned Additional District Judge, Gadhinglaj in Regular Civil Appeal No.88 of 1998 is set aside;

(ii) Regular Civil Appeal No.88 of 1998 filed by the defendants is dismissed;

(iii) The judgment and decree passed by the learned trial Judge in Regular Civil Suit No.33 of 1979 is upheld;

(iv) Second Appeal No.604 of 1999 is allowed in aforesaid terms;

(v) There shall be no order as to costs.

R.D. Dhanuka, J.