

(2017) 03 BOM CK 0156

In the Bombay High Court

Case No : 369 of 2013 WITH CIVIL APPLICATION NO 1011 of 2013

Sou Mangal Popatrao Sodmise

APPELLANT

Vs

Sou. Abdagiri Vishvanath Narale, Through her Power of Attorney holder Shri. Lahu Vishvanath Narale

RESPONDENT

Date of Decision : 07-03-2017

Acts Referred:

Transfer of Property Act, 1882, Section 60, Section 58(c) - Right of mortgagor to redeem - "Mortgage", "mortgagor", "mortgagee", "mortgage-money", and "mortgage- deed" defined

Citation : (2017) 03 BOM CK 0156

Hon'ble Judges : S.C. Gupte

Bench : SINGLE BENCH

Advocate : Vijay Patil, Vivek Salunke

Final Decision : Dismissed

Judgement

1. Heard learned Counsel for the parties.

2. This Second Appeal involves a question as to the interpretation of a deed executed by and between the parties termed as "VERNACULAR MATTER OMITTED", translated by the courts below as a "conditional sale deed." Whereas, according to the Appellant, this was an absolute sale with a condition of repurchase incorporated in the document, according to the Respondent, the document was a mortgage by conditional sale. The Trial Court held the document to be an absolute sale with an agreement for repurchase. The first Appellate Court reversed that order and held the document to be a mortgage by conditional sale and ordered reconveyance of the suit property by the Appellant (original Defendant) to the predecessor in title of the Respondents (original Plaintiff) in redemption of mortgage.

3. At the outset, it needs to be noted that the suit, as originally framed, simply prayed for reconveyance of the suit property in accordance with the deed of

conditional sale. By an amendment of plaint it was claimed that there was a relationship of creditor and debtor between the parties and that the transaction between the parties was of mortgage by conditional sale covered by clause (c) of Section 58 of the Transfer of Property Act. This amendment has since become final. Learned Counsel for the Appellant, however, submits that though the plaint has been amended, there is no prayer for redemption of mortgage in the suit; the original prayer for execution of a deed of reconveyance against payment of Rs.10,000/ is neither altered nor is any specific prayer for redemption added in the suit. Learned Counsel submits that relief in the nature of redemption of mortgage could not, in the premises, have been granted. There is no merit in this contention. The plaint, as amended, clearly makes out a case of a mortgage by conditional sale and seeks reconveyance effectively in redemption of mortgage. It is well within the remedy of the mortgagor to require the mortgagee to retransfer the mortgaged property to the former at his costs, within the meaning of Section 60 of the Transfer of Property Act, 1882. The plaint, read as a whole, together with the prayer for reconveyance against repayment of the mortgage money of Rs.10,000/, can only be termed as a suit for redemption.

4. Learned Counsel for the Appellant relies on judgments of the Supreme Court in the cases of *Tamboli Ramanlal Motilal vs. Ghanchi Chimanlal Keshavlal*, 1992 AIR (SC) 1236 and *Vanchalabai Raghunath Ithape vs. Shankarrao Baburao Bhilare*, 2013(6) Mh.L.J. 80 and of our Court in *Nana Tukaram Jaikar vs. Sonabai w/o. Madhav Saindare*, 1982 (1) Bom. C.R. 811 (Para 7) and *Kamal Shivajirao Katkar vs. Gajarabai Sopanrao Algude*, 2001 (4) Bombay C.R. 187 (Para 12), in support of his submission that the document in the present case is an absolute sale with an agreement to repurchase attached to it.

5. The principle of law in this behalf is succinctly formulated by the Supreme Court in the case of *Pandit Chunchun Jha vs. Shaikh Ebadat Ali*, 1955(1) SCR 174: AIR 1954 S.C. 345. That principle states that a document executed between the parties, which contains all incidents of a sale, does not cease to be so merely on the ground that there is a condition of repurchase provided in it. In every such case, the question is, what, upon a fair construction, is the meaning of the instrument.

6. In the case of *Tamboli Ramanlal Motilal*, the Supreme Court distinguished the law stated in *Chunchun Jha*'s case on two grounds. Firstly, the Supreme Court noted that unlike in the case of *Chunchun Jha*, where the transfer of possession under the deed was not an incident of the title passing to the transferee, in *Tamboli Ramanlal Motilal*, the enjoyment of possession by the transferee had to be "under the ownership right". Secondly, the Court noted that in *Chunchun Jha*, there was no clause for retransfer; instead the deed had provided that if the executants paid the money within the stipulated period, the property "shall come in exclusive possession and occupation of us, the executants." In the context, the court took these words to mean that if there was payment within the specified

time, the title would continue to reside in the executants. Learned Counsel submits that as in the case of Tamboli Ramanlal Motilal so in our case, though there was a stipulation for reconveyance within a period of five years, there was no corresponding right for the mortgagee to foreclose the right of redemption. Learned Counsel submits that on these facts, just as the Court in Tamboli Ramanlal Motilal held that the absence of such right to the mortgagee only meant that the transaction was of sale and not mortgage by conditional sale, in the present case also, such absence must lead to a finding of sale and not mortgage. There cannot be any absolute proposition of law that whenever a document of conditional sale provides for a right of redemption, i.e. to repurchase the property, to the transferor but no express right of foreclosure to the transferee, the document is an absolute sale and not a mortgage by conditional sale. It is merely one of the circumstances considered by the Court in that case in conjunction with other circumstances. The crucial question always is, whether the relationship between the parties is that of a debtor and a creditor, or a vendor and a purchaser. If it is the former, the document is a mortgage, whereas in case of the latter, it is a sale. The answer to the question as to whether the transaction is of sale or mortgage depends essentially on the language employed in the deed. When the language employed is sufficiently clear, one has to ordinarily go by such language. After all, the effort of the Court is primarily to ascertain the effect of the words used in the document and not to find out generally what the parties intended. If the words are not clear, it is permissible to look at the surrounding circumstances to ascertain the intent of the document. In the present case, the document, on the very face of it, makes it clear that the transfer is for a limited period. This period was of two years. The possession of the land was given to the transferee for a period of two years, during which the transferee was to take crops in the suit land. After completion of two years, and after taking the crop for the second year, the transferor was entitled to redeem or reclaim the land by repayment of the sum of Rs.10,000/ paid by the transferee to the transferor at the time of the document of conditional sale. The document also stipulated that within this period, if there was any objection or complaint regarding the title of the suit land, the same would be resolved by the transferor at his own cost. These terms clearly imply that the document does not contain an absolute transfer of the property. The transfer here is limited for a certain period. The transferee was to remain in possession of the property during this period. The transferor was entitled to tender the amount of Rs.10,000/, initially paid by the transferee to him, at the expiry of this period of two years (and after the transferee took his crop for the second year) and "redeem the land". These terms cannot be construed as an absolute or outright sale with an agreement of repurchase coupled with it. It is, as rightly held by the lower Appellate Court, a transaction of mortgage by conditional sale.

7. The stipulation as to the repurchase of the land here is couched in a clear language, which suggests that the repurchase is in the nature of redemption of

mortgage and not repurchase, as in the case of a mere agreement of repurchase. The vernacular words used in the document namely, "VERNACULAR MATTER OMITTED", are equivalent to redemption of mortgage against repayment of the stipulated amount. Had the intention been to purchase back the land, the words used would have been "VERNACULAR MATTER OMITTED". In a number of cases, our courts have construed documents similarly written with the words "VERNACULAR MATTER OMITTED". In the case of Vithoba Udebhanji Kunbi vs. Narayan Sonaji Sagne, A.I.R. (29) 1942 Nagpur 115, our Court considered a similar expression used in a document, where the stipulation for the transferee was to pay land revenue, use and enjoy the property, followed by the expression: "I shall pay and shall redeem my fields". The court held that this stipulation, along with the following expression, clearly proved the relationship of debtor and creditor between the parties. The relevant observations of the Court are quoted below:

"It is, therefore, clear that in the first instance, endeavour must be made to deduce the intention from the actual words used in the instrument and it is only when the words are ambiguous and do not yield clear meaning that extraneous evidence of surrounding circumstances may be looked into. In the present case, we are of opinion that the words are too clear to create any doubt as to their meaning and the intention of the parties. The expression "in default of payment this conditional sale is an absolute sale" leaves no doubt that the intention was that the sale was not to operate as an absolute sale from the outset, but was to take effect as an absolute sale only on the occurrence of default in payment of the agreed sum. The recitals "your amount shall carry no interest and my fields will not carry any rent" indicate that the consideration received by the transferor was to be treated as a debt. The interest was payable in the shape of appropriation by the transferee of the rent which he would otherwise be liable to pay to the transferor. That there has been an express mention of interest militates against any assumption that the transaction was intended to operate as an absolute sale. The stipulation that the transferee was to pay land revenue appears to be of no significance beyond the fact that the person who was to enjoy the profits was to bear the burden. Then the recital "I cease to have any right, etc., for five years" followed by the expression "I shall pay and shall redeem my fields" clearly goes to prove the existence of the relation of debtor and creditor between the parties. The vernacular words equivalent to the word "redeem" are "sodun ghein" ("VERNACULAR MATTER OMITTED") which mean "release or redeem." These are significant inasmuch as if there had been an intention to purchase back the fields, the words used would have been "vikat ghein" ("VERNACULAR MATTER OMITTED")"

8. To the similar effect are the observations of this Court in the cases of Sopan Sadashiv Kadam vs. Nivrutti Sakharam Jadhav, 2004 (6) LJSOFT (URC) 130 and Shankar s/o. Ganpat Thorat vs. Haribhau s/o. Patiba Wakchoure Deceased through L.Rs., 2014 (8) LJSOFT 203, which used the expressions, respectively, "VERNACULAR MATTER OMITTED". These judgments make it clear that specific

words colloquially used in a transaction of mortgage by conditional sale to describe the transaction are "VERNACULAR MATTER OMITTED" and the terms "VERNACULAR MATTER OMITTED" or "VERNACULAR MATTER OMITTED" are used to designate redemption of mortgage.

9. In Vanchalabai's case (*supra*), there was a sale deed which contained a provision for reconveyance. The sale deed was drafted as a pure and simple sale deed. Going by the plaintiff's stand in that case, the Court held that at the most, there was a contemporaneous agreement of reconveyance. The Court found that admittedly there was no relationship of debtor and creditor between the parties. These facts are clearly distinguishable.

10. In the premises, the impugned judgment and order of the lower Appellate Court does not disclose any error of law in the matter of construction of the document. The construction of a document is a mixed question of law and fact. As I have noted above, it is essentially to be decided by considering the words employed by the parties, though it is permissible to take into account surrounding circumstances in case the words used are not sufficiently clear to designate their effect. The words used in the present case are sufficiently clear and their effect is to create a mortgage by conditional sale with a right of redemption preserved unto the debtor. The relationship conveyed by the document is of debtor and creditor and not of vendor and buyer.

11. The Second Appeal is, accordingly, dismissed. No order as to costs.

12. In view of the dismissal of the Second Appeal, the Civil Application does not survive and the same is also dismissed.