

(2004) 07 BOM CK 0004

In the Bombay High Court

Case No : Second Appeal No. 24 of 1987

Vikram Awhale since deceased by LRs. Subidrabai Awhale
and Others

APPELLANT

Vs

Dashrath Kakde

RESPONDENT

Date of Decision : 20-07-2004

Acts Referred:

Evidence Act, 1872 — Section 91, 92, 92(6)
Transfer of Property Act, 1882 — Section 58

Citation : (2005) 1 ALLMR 172 : (2005) 2 MhLj 507

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; K.V. Sirpurkar, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—This is an appeal by the plaintiff who was successful in the trial Court, however, had failed in the 1st Appellate Court.

2. The facts in brief as narrated in the plaint are that:--

That the plaintiff who owned land Survey No. 17/1 8 acres 20 Gunthas to the extent of 3 acres therefrom, was in need of money and therefore, on 10-5-1976 agreed that he shall execute a nominal sale deed in favour of the defendant to secure a loan of Rs. 2000/-. The defendant agreed to lend a loan and to re-convey the property when the loan would be repaid. It was also agreed that on account of interest, the defendant shall enjoy the crop. Though the transaction was that of money lending, in order to overcome the difficulties, those would follow in view of law, the nominal sale deed was executed and for testifying the oral agreement, the defendant executed a document to reconvey the property on repayment of the debt. The defendant failed to concede to receive money and return the property. Therefore, the plaintiff issued notice and ultimately filed the suit on 11-4-1988.

3. The defendant on appearance filed the Written Statement, contended that :--

The transaction was out and out sale and not of money lending. He further pleaded that the plaintiff must have in collusion with the witnesses obtained the defendant's signature on some documents, any such document would not confer any right on the plaintiff and prayed for suit being dismissed.

4. The learned trial Judge, therefore, framed issues, crucial amongst is issue No. 1 which reads as follows :

"1. Does the plaintiff prove that the sale-deed regarding suit land executed in favour of Defendant on 10th May, 1976 was sham, nominal and not to be acted upon?"

Other issues are consequential as to what decree to be passed in the event issue would be answered in the affirmative.

5. It is the plaintiff has to prove that the sale deed regarding suit land executed in favour of the defendant on 10-5-1976 was sham, nominal and not to be acted upon.

6. After recording of evidence, the learned trial Judge proceeded to decide the case as to issue No. 1. The learned trial Judge has held as follows :

"5. Issue No. 1 : This is suit filed by the plaintiff on the ground that the sale deed executed by him on 10-5-1976 regarding suit land in favour of defendant was nominal and not to be acted upon. To prove this issue plaintiff has examined himself and the scribe of the document of reconveyance. Plaintiff deposed that this transaction was of money lending. As plaintiff was in need of Rs. 2000/- for house expenditure he approached to deft. along with Sudhakar. Defendant has shown his readiness to pay the amount but as he has no money lending licence - plaintiff has to execute the nominal sale deed of the suit land as security against loan advance. It was also settled that when plaintiff will return Rs. 2000/- to defendant he should re-transfer the suit land and in lieu of interest he should take the yield of the suit field. This contemporaneous agreement was supported by the evidence of witness Sudhakar is an attesting witness to Exh.18 and Exh.19. He was also present at the time of oral talks which took place between the parties at the house of defendant. There is no reason to disbelieve in testimony of witness Sudhakar on the point of contemporaneous oral agreement taken place at the residence of defendant. The present document i.e. sale deed at Exh. 19 constitutes as a sale but by adducing oral evidence about the agreement take place at the residence of defendant. Plaintiff has proved the intention of executing Exh.19. Such a oral evidence showing the intention of the parties about executing any document is admissible u/s 92 of evidence Act."

6. Plaintiff has filed the document of reconveyance at Exh.18. No doubt it was written on a simple paper and deft. had put his T.I. on revenue receipts but it being an agreement of reconveyance it was impounded and the parties relying on document was directed to pay the proper stamp fees and penalty. In order to

impound the document. Accordingly, stamp fees and penalty was paid. Now this document has effect that of agreement. This document was proved by the plaintiff by examining scribe of the document. The title of the document even though shows that it is a receipt but the contents of document shows that it is an agreement of reconveyance, by proving this document plaintiff has proved that the sale deed executed by him 10-5-1976 regarding suit land was nominal and not to be acted upon, hence, I answer this issue in affirmative."

7. The unsuccessful defendant carried the decree in appeal and raised in appeal the questions (i) whether any prejudice was caused to him due to failure to frame the issue relating to right to have the contract reconveyance, (ii) when there was no pleading of readiness and willingness, (iii) the agreement of reconveyance being dubious and was not executed and that the said document was concocted by the plaintiff in collusion with the witnesses and (iv) that the oral evidence of the plaintiff was not liable to be allowed and relied etc., as can be seen from the ground No. 2 and 4, 6 and 7 of the memo of appeal.

"2. That the learned lower Court ought to have framed the issues as contemplated by the provisions of the Specific Relief Act when particularly the pleadings to that effect were made and having not framed the important issues, certainly the judgment and decree are not tenable.

4. That the learned lower Court ought to have seen that when there is no specific averment qua-readiness and willingness and that the suit being for specific performance, based on the alleged agreement of reconveyance; certainly, the plaintiff cannot get any relief and the lower Court ought to have dismissed the suit with costs.

6. That the learned lower Court ought to have held that the alleged agreement of reconveyance to be dubious and that it ought to have held that the Defendant has not executed any such alleged agreement, particularly when the evidence and circumstances as well as the facts on record do point put that the same is concocted piece of the evidence, brought into existence by the Plaintiff in collusion with other persons who were his relations and were already at logger heads.

7. That the learned lower Court ought not to have relied upon the oral evidence which contradicts the contents of the sale-deed dated 10th May, 1976 and further ought not to have allowed to adduce the said evidence, when the alleged agreement was there."

8. Learned District Judge heard appeal and allowed it and set aside the decree of Trial Court.

9. Unsuccessful plaintiff has therefore, approached this Court. Second appeal was admitted.

10. While admitting the appeal, the Court had not framed substantial questions of law. It is therefore, necessary to first formulate the questions of law or to

accept those questions as incorporated in the grounds. In view of the facts those have been examined, the following grounds are found to agitate the substantial question of law :--

"(5) That the learned lower appellate Court erroneously interpreted the provisions of Section 58(c) of the Transfer of Property Act and proceeded to decide the questions which are not called for the determination of the lower appellate Court i.e. whether the suit agreement are in the nature of the mortgage or not, particularly when the plaintiff is seeking to enforce the agreement to reconvey or to repurchase the property and not to redeem the mortgage. The suit is framed for endorsement of agreement of repurchased property properly filed in the stipulated period of limitation and not filed for redemption of the mortgage. Under these circumstances, it was totally unwarranted for the lower Appellate Court to decide as to whether the transaction is that of mortgage or not.

(6) That the learned lower Appellate Court erroneously interpreted the provisions of Section 92 of the Indian Evidence Act which excludes extrinsic evidence which contradicts, varies, adds to or subtracts the terms of the written instrument which is in law required to be reduced in writing. In the case pleaded by the plaintiff the plaintiff pleaded altogether different transaction which is real nature of the transaction by pleading that the terms in the documents are sham, bogus and never intended to be acted upon and the document was executed for the security of the loan advanced by the Defendant to the plaintiff. This case is not covered by any of the prohibitions mentioned in Section 92 of the Indian Evidence Act, inasmuch as the Plaintiff has not pleaded anything contradicting, adding varying or subtracting the terms of the document. Thus, the learned lower Appellate Court erroneously held that the evidence adduced by the plaintiff cannot be taken into consideration in view of Section 92 of the Indian Evidence Act."

11. From above referred grounds substantial question of law was formulated and addressed by the parties is :--

Whether the transaction in question is covered by Section 58(c) of Transfer of Properties Act, being a "mortgage by conditional sale" and whether parties can be allowed to lead evidence to prove that the transaction was by way of security in view of Sections 91 and 92 of Evidence Act.

12. On perusal of judgment under appeal, it is seen that the learned District Judge has expressed on the point that asking for re-conveyance relying on agreement of re-conveyance amounts to bringing the transaction and of reconveyance and sale together within the compass of "mortgage by conditional sale" u/s 58(c) of Transfer of Property act. The learned Judge was also found as is apparent from the submissions those were made at the bar that leading the evidence to prove that the document was of mortgage, was not permissible in view of the scheme of Sections 91 and 92 of the Evidence Act.

As is seen from para 5 of the Judgment that all that was orally argued before the Court, and on which the Appellate Court has decided is not of what was pleaded were made in defence in trial Court, but rather what submissions were made in support of the appeal.

From para 5 of the Judgment, it is also clear that the appellant was represented, while the present appellant/respondents were unrepresented.

13. As referred to hereinabove, it appears that the agreement of reconveyance was attempted by the defendant to be framed into definition of "mortgage by conditional sale" to which appellate Court was prima facie convinced. In the result, the learned Appellate Judge framed the questions for determination, being question No. 1 as issue formulated by the 1st Appellate Court in para 6 as issues. The said question/issue No. 1 is quoted below :--

"(1) Is it permissible for the plaintiff to seek the relief of specific performance of an agreement of reconveyance concerning the suit land against the Defendant when the agreement of reconveyance was not embodied in the sale-deed dated 10th May, 1976?"

14. Relying upon the reported Judgment in Pandit Chunchun Jha v. Sk. Ibadat Ali, the 1st Appellate Court reached a conclusion that the transaction in question could not be regarded as mortgage by conditional sale. Relying on the said Supreme Court Judgment, the Court observed in para 8 of the judgment after discussing about Pandit Chunchun Jha's case that

"8. Various decisions that have been laid down as spoken to in the case of Abdul Rahman v. Bismillah Begum, AIR 1952 Punjab 539 or Mohd. Ismail v. Hakim Sayed, AIR 1952 Punjab 398. It is necessary to make a passing reference to these decisions. They are stated as below :

1. the existence of a debt.
2. the period of repayment, a short period being indicative of a sale, and a long period of a mortgage; but the fact that time was made the essence of the contract to re-purchase is not decisive;
3. the continuance of the grantor in possession indicates a mortgage;
4. a stipulation for the payment of interest on repayment indicates a mortgage;
5. a price below the true value indicates a mortgage; a fair market value is strong evidence that the transaction is a sale.

But then, these decisions are not absolute now, inasmuch as Supreme Court has held that the proviso to Section 58(c) sufficiently makes it clear that the transaction cannot be a mortgage if the sale and the agreement to repurchase had been embodied in separate documents. Reference in this regard may usefully be made to the above referred case namely Pandit Chunchun Jha or Bhaskar Waman Joshi. Thus, in order to constitute a mortgage by conditional

sale, there must be an ostensible and not real sale, and it must comply with the three conditions mentioned in Section 58(c). This was ruled in the case of Mahabir Singh v. Begum Sahu, AIR 1949 Patna 568. But even then it does not follow that if the stipulation for - reconveyance is embodied in the same document, the transaction is necessarily a mortgage. In the case of Pandit Chunchun Jha v. Sheikh ibadat Ali, Justice Bose observed as follows :

"The Legislation has made a clear-cut classification and excluded transactions embodied in more than one document from the category of mortgages, therefore, it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they display that presumption by clear and express words; and if the conditions of Section 58(c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage."

Prima facie, such a transaction may be regarded as a mortgage, but it would be open to the other side to show that it was intended to be an out and out sale. The question whether by the incorporation of such a condition a transaction ostensibly or sale may be regarded as a mortgage is one of intention of the parties to be gathered from the language of the deed interpreted in the light of surrounding circumstances. This was the observation in the case of Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, ."

Thus, as rightly found by 1st Appellate Court, in order to constitute a "mortgage by conditional sale", there must be document an ostensible and not real sale, and it must comply with the three constitution mentioned in Section 58(c).

15. From the above quotation and conclusion of appellate Court, it is clear that the learned Appellate Judge found that had there been only one document, in that case, it would have been possible rather imperative to construe that it was a case of mortgage by conditional sale while in the event, there would be more documents, however, contemporaneous, it would not be a mortgage by conditional sale. Having construed as to what was and is in law mortgage by conditional sale, the Appellate Judge recording a finding at the end of para 8 underlined in quotation in foregoing para which reads as follows :

"..... Prima facie, such a transaction may be regarded as a mortgage, but it would be open to the other side to show that it was intended to be an out and out sale. The question whether by the incorporation of such a condition a transaction ostensibly of sale may be regarded as a mortgage is one of the intention of the parties to be gathered from the language of the deed interpreted in the light of surrounding circumstances. This was the observations in the case of Bhaskar Waman Joshi (deceased) and Others Vs. Shrinarayan Rambilas Agarwal (deceased) and Others, ."

16. It would reveal that even from the finding recorded by the Appellate Court, reveals that the Appellate Judge has not been able to reach a positive finding

that the document in question is not a mortgage and has reached a conclusion that it appears to the Court, "prima facie", that it was not a case of mortgage.

17. As seen from the observation contained in para 9 which are quoted below for ready reference namely

"In these circumstances, question which falls for consideration is whether the agreement Exh. 18 was a contemporaneous agreement, a subsequent agreement, or an earlier agreement with reference to the sale deed Exh. 19. That is a very important question. It is settled law that it was open to the Plaintiff to contend that the sale deed Exh. 19 was not the real transaction between the parties, that he had secured a loan of Rs. 2000/- from the Defendant and had executed a nominal sale-deed vide Exh.19 by way of security from the defendant and had executed a nominal sale deed vide Ex. 19 by way of security for loan that the defendant was to enjoy produce of crops grown in the suit land until a specific period in lieu of interest, and on repayment of loan on a particular date or within a specified period. Defendant has agreed to execute a sale deed in respect of the suit land in favour of the plaintiff."

18. The quotations referred to above from paras 8 and 9, it is vivid and therefore, no doubt to conclude that the learned Appellate Judge approached to the question at hand as if the plaintiffs case was that of transaction in question was by way of "mortgage by conditional sale" and none else. It is pertinent to note that the learned Appellate Judge had no doubt in his mind that had the transaction been that of "security" there would be hesitation in permitting the plaintiff to prove such case. The learned Appellate Judge went ahead observing relying upon AIR 1927 Rangoon 314 and held that oral agreement for reconveyance could very well be allowed to be proved, as can be seen from findings recorded in para 9 which are quoted below.

"In these circumstances, question which falls for consideration is Whether the agreement Ex.18 was a contemporaneous agreement, a subsequent agreement, or an earlier agreement with reference to the sale-deed Ex. 19. That is a very important question. It is settled law that it was open to the plaintiff to contend that the sale deed Ex. 19 was not the real transaction between the parties, that he had secured a loan of Rs. 2,000/-, from the Defendant and had executed a nominal sale deed vide Ex. 19 by way of security for the loan that the Defendant was to enjoy produce of crops grown in the suit land until a specific period in lieu of interest, and on repayment of loan on a particular date or within a specified period. Defendant has agreed to execute a sale deed in respect of the suit land in favour of the plaintiff. Such a pleading was certainly permissible to have been adopted and proviso to Section 92 could not have operated as a bar in opting such a pleading in the way of the Plaintiff. But the plaintiff has not done so. He does not state that the above mentioned agreement relied upon by him in fact was a contemporaneous agreement between the parties, in the case of Mannan Shein and Anr. v. U. Yaing and Anr., reported in AIR 1927 Ran 314, it has been observed that in the case of an outright sale by registered deed, an independent

contract to re-sell either oral or by unregistered deed, an independent to re-sell either oral or by unregistered deed can be proved, but where the contract is not an independent transaction and together constitutes a mortgage, such contract cannot be proved. Reliance in support of that observation was also placed in the case of Harkisandas Bhagvandas and Others Vs. Bai Dhanu, .

19. The learned Judge answered the said issue in negative and therefore, had to allow the appeal.

20. In view of the scrutiny of the Judgment of the Appellate Court, now it has become necessary to find out how the Judgment of the Appellate Court has to be looked into and dealt with.

21. It is thus, seen that the learned Appellate Judge has erred in reading the evidence of the plaintiff when he observed that the plaintiff admitted in the stress of cross-examination that the agreement of reconveyance was prior to debt since such statement has very well found in examination-in-chief itself. It is in this total defective background the learned judge proceeded to record his various findings and observations which are recorded in later part of para 9 holding especially in summary that the plea raised by the plaintiff not being that of mortgage by conditional sale, he was not permitted to fall within the compass of mortgage conditional sale and the transaction in question did not fall within the compass of Section 58(c) of Transfer of Property Act. Moreover, he was precluded from proving that the contract in question was a mortgage by conditional sale. According to the learned Appellate Judge, the Trial Court, therefore, erred in holding that it was a case of mortgage by conditional sale made out by the plaintiff in which he had failed.

22. It can be further seen that not to be content with the totally erroneous approach adopted by the learned Appellate Judge, it proceeded further to record in para 10 of the Judgment as quoted below :

"Had the plaintiff pleaded that there was an independent contract in the shape of an agreement for sale subsequent to the execution of the sale deed Exh.19 which was either oral or reduced to writing on a simple paper also, there could not have been any bar whatsoever u/s 92 of the Indian Evidence Act, or Section 58(c) or proviso to Section 58(c) of the Transfer of Property Act in relying upon such an agreement and seeking the relief of specific performance of an agreement for reconveyance concerning the suit land. But since the plaintiff himself came forward with a case that there was an agreement of reconveyance in respect of the suit land between the parties on 10th May, 1976 only and that agreement is not embodied in the sale deed Ex. 19, not was that agreement subsequent to the execution of the sale deed, but it was the earlier agreement admitted clearly by the plaintiff himself; it is obvious that the plaintiff is not entitled to any relief. Point No. 2 is, therefore, answered in the negative."

The above observation will reveal that the learned Appellate Judge proceeded on total erroneous footing.

23. While dealing with the facts, the learned First Appellate Judge practically refused to look into the evidence when he observed in para 9 as follows :

"9..... Plaintiff proceeded to state that he insisted upon the defendant to execute an agreement Ex. 18 making a clear mention of money lending therein, but since defendant was not ready to do so, - reference of the real nature of the transaction - being a loan was not made in the agreement Ex. 18. What is more important is the material fact that the agreement Ex.18 was an earlier document or at the most an agreement in the course of the same transaction which - ultimately culminated in execution of a sale deed by the plaintiff in respect of the suit in favour of the defendant vide Ex. 19. If that is to be believed, no amount of evidence would be sufficient for permitting the plaintiff to allege and prove that the real nature of the transaction was that of loan or that sale deed was executed by him vide Ex. 19 merely by way of security for the loan of Rs. 2,000/- secured by the plaintiff from the defendant on 10th May, 1976. In addition to that, the rigor of Section 58(c) of the Transfer of Property Act can easily pressed into service by the defendant in objecting that since condition of reconveyance was not mentioned in the sale deed Ex. 19, it was not permissible for the plaintiff to seek the relief of specific performance of the agreement for sale pertaining to the suit land. Moreover, it is to be noted that neither the plaintiff has alleged satisfactorily as to what was the date or period during which defendant was to enjoy produce of crops grown in the suit land and when plaintiff had agreed to repay the loan. When period of date of specific performance of the agreement of reconveyance has neither been stated in the plaint, nor one can find these material dates or period in the agreement Ex. 18 and no evidence whatsoever has been adduced in proof of such important facts by plaintiff and his witness Sudhakar Gangaram Kakde, it is obvious that the case of reconveyance put forth by the plaintiff is neither permissible to be proved according to law, nor is it believable. The learned trial Judge however, ignored the mandatory provisions of Section 58(c) of the Transfer of Property Act and the real effect of proviso (6) of Section 92 of the Indian Evidence Act....."

24. It is clear from the above that the learned Judge has not considered Section 58(c) of Transfer of Property Act read with Section 92 of Indian Evidence Act, and discarded the entire oral evidence being inadmissible. In the result, he erroneously allowed the appeal and reversed the decree of the Trial Court dismissing the suit with costs.

25. The learned Counsel for the appellant also placed reliance on following Judgments :

(1) (2005) 6 SCC 595 , Roop Kumar v. Mohan Thedani., John Vallamattom and Another Vs. Union of India (UOI), , Ishwar Dass Jain (Dead) Thr. Lrs. Vs. Sohan Lal (Dead) By Lrs., , Velamuri Venkata Sivaprasad (D)By Lrs. Vs. Kothuri Venkateswarlu (D)By Lrs. Ors., .

26. In reply, the learned Counsel for the respondents placed reliance on the

following judgments.

(1) AIR 1926 Bom 131, Gajanan Narayan Patkar v. Jivangiri Chamelgiri (2) AIR 1926 Bom 134, Emperor v. Gulabchand Dosoji and Ors.

27. The reliance placed by the learned Counsel for the appellant is in order to support the plea that the agreement of reconveyance is enforceable as well as it is permissible to lead evidence in support of his plea that real transaction can be proved by bringing independent evidence to prove true transaction and prove such transaction does not amount to an attempt to lead evidence to array the terms of agreed contract. This being the settled law and the law having been accepted by the Appellate Court, detailed discussion with reference to the Judgment is not necessary. The Judgment relied upon by the respondents on the other hand is nothing but reiteration of the total fallacies relied upon by the first Appellate Court. The said Judgment in case of Pandit Chunchun Jha which is the foundation of the correct understanding of law by appellate Court, however, the entire approach of the first appellate Court was based on a mistake or error as to correcting and noticing exact issue involved in the case. While the proposition of law in said Pandit's and Chunchun Jha's case is uncontroverted and in present case, plea that of mortgage was, in fact not the plea of plaintiff, the appellate Court got itself totally misdirected.

28. In the result, the substantial question of law is liable to be answered in favour of plaintiff namely plaintiff's plea was never that of "mortgage by conditional sale, and was a case of transaction being that of security and consequently there was an agreement of reconveyance. The agreement promising reconveyance being one day prior to the sale deed, does not destroy the nature of agreement as pleaded by plaintiff, it rather re-enforces and fortifies it. The substantial questions of law is therefore, liable to be answered saying that the appellate Court committed error of law in identifying the question which fell for his determination and therefore, mistook the real issue and wrongly held that it was a case of "mortgage by conditional sale." Appeal, therefore, succeeds.

29. Second Appeal, therefore, deserves to be allowed. The Judgment and decree passed by the First Appellate Court in R.C.A. No. 130/83 is quashed and set aside and the decree of the Trial Court passed in R.C.S. No. 166 of 1978 is restored with costs throughout.