

CASE NO.:
Appeal (civil) 854 of 2007

PETITIONER:
Manjabai Krishna Patil (D) By L.Rs

RESPONDENT:
Raghunath Revaji Patil & Anr

DATE OF JUDGMENT: 20/02/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
[Arising out of S.L.P. (Civil) No.24582 of 2004]

S.B. SINHA, J :

Leave granted.

Appellants herein were owners of land bearing Survey No.198/3/2 admeasuring 2 acres at Village Waghad. They, being in need of money, approached the respondents. On negotiations having been held in that behalf by and between the parties, a deed of sale was executed by the appellants in favour of the respondents on 29.11.1966 for a sum of Rs.6,000/-. However, the said deed was registered on 17.12.1966. On the same day an agreement of reconveyance was also executed in terms whereof the respondents agreed to convey the property back to the appellants herein after five years on receipt of the amount of consideration specified therein. As the respondents failed and/or neglected to act in terms of the said agreement of reconveyance, a suit for specific performance was filed by the appellants herein against the respondents.

The said suit was decreed. However, on an appeal preferred thereagainst by the respondents, the First Appellate Court, inter alia, held that the appellants herein were not ready and willing to perform their part of contract. The First Appellate Court, however, rejected the contention of the respondents that time was of the essence of contract. The appeal was allowed, stating :

"To sum up, the agreement of reconveyance (exhibit 31) was the part and parcel of the agreement of sale evidence by the sale deed (exhibit 30), and for want of registration the plaintiff No. 2 Pandharinath did not acquire any right on the basis of the said agreement of reconveyance. Moreover, the said agreement of reconveyance is left vague on vital and important points discussed above. Respondent No. 3 Vijayabai was not a party to the said agreement of reconveyance and it was not signed, by her. We have also seen above that the plaintiffs were not ready and willing to perform their part of contract. On all these points, the learned Judge ought to have dismissed the suit for specific performance. Relying on all these circumstances discussed above, I do find that the plaintiffs are not entitled to claim a decree for specific performance. Relying on all these circumstances discussed above, I do find that the plaintiffs are not entitled to claim a decree for specific performance of contract."

In the Second Appeal filed by the appellants herein being aggrieved

by and dissatisfied with the said judgment, the High Court also opined that as the document of reconveyance was part and parcel of the same transaction and being compulsorily registerable; for want of registration, the same was neither admissible in evidence nor enforceable through a court of law.

Mr. Chinmoy Khaladkar, the learned counsel appearing on behalf of the appellants, would submit that keeping in view the fact that the deed of sale was executed on 29.11.1966, and the agreement of reconveyance was executed on 17.12.1966, the same was not required to be registered.

Mr. S.V. Deshpande, the learned counsel appearing on behalf of the respondents, on the other hand, submitted that although the sale deed was executed on 29.11.1966, but having been registered on 17.12.1966 itself on which date the agreement of reconveyance was executed, the same must be held to be a part of the same transaction and, thus, was compulsorily registerable.

In this connection, our attention was drawn to the agreement of reconveyance dated 17.12.1966, the relevant portion whereof reads as under :

"I, above referred vendee write down that you above referred vendor are selling the land to me for 6,000/- upon the condition that after cultivation for 5 years this particular land would be reconveyed to Pandrinath Ukhardu Patil as soon as he repays the amount i.e. 6,000/-

But within 5 years all the earnings of the land would be enjoyed by me as an interest."

The basic fact of the matter is not in dispute. Two documents were executed on different dates and at different places. Whereas the deed of sale was executed at Tal. Raver, the purported agreement of reconveyance was executed at Waghad where the registration office was situated.

By reason of the sale deed dated 29.11.1966, the respondents obtained possession of the entire suit property. The property was transferred absolutely so as to enable the vendee to use the same till their life time as also by their legal representatives. Appellants declared that they would have no right, title and interest in the said land, nor they would have ownership right and in case anyone claimed any such right, the same would be treated as cancelled. An easementary right was also conveyed. It was stipulated that the land was not encumbered as the mortgage which had been created in respect of the said land, has been redeemed and in the event "anything is found", 'they would be responsible for the same'.

The amount of consideration was received on different dates at different places. The said deed must, therefore, be construed to be a deed of absolute sale.

Furthermore, Section 58 (c) of the Transfer of Property Act, 1882 (for short, "the Act") provides for satisfaction of the conditions for mortgage by way of conditional sale providing :

"(c) Mortgage by conditional sale.- Where, the mortgagor ostensibly sells the mortgaged property \026

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."

Proviso appended to Section 58(c) is clear and unambiguous. A legal fiction is created thereby that the transaction shall not be held to be a mortgage by conditional sale, unless a condition is embodied in the document which effects or purports to effect the sale. Where two documents are executed, the transaction in question would not amount to a mortgage by way of conditional sale. In a case of this nature, ordinarily the same would be considered to be a deed of sale coupled with an agreement of reconveyance.

This aspect of the matter has been considered by this Court in *Bishwanath Prasad Singh v. Rajendra Prasad and Another* [(2006) 4 SCC 432], wherein it was held :

"A bare perusal of the said provision clearly shows that a mortgage by conditional sale must be evidenced by one document whereas a sale with a condition of retransfer may be evidenced by more than one document. A sale with a condition of retransfer, is not mortgage. It is not a partial transfer. By reason of such a transfer all rights have been transferred reserving only a personal right to the purchaser (sic seller), and such a personal right would be lost, unless the same is exercised within the stipulated time."

In *Mushir Mohammed Khan (Dead) By L.Rs. v. Sajeda Bano (Smt.) and Others* [(2000) 3 SCC 536], this Court referring to a well-known decision of *Pandit Chunchun Jha v. Sk. Ebadat Ali and Another* [(1955) SCR 174: AIR 1954 SC 345] held :

"14. Applying the principles laid down above, the two documents read together would not constitute a mortgage as the condition of repurchase is not contained in the same documents by which the property was sold. The proviso to clause (c) of Section 58 would operate in the instant case also and the transaction between the parties cannot be held to be a "mortgage by conditional sale." "

In *Shri Bhaskar Waman Joshi (deceased) and Others v. Shri Narayan Rambilas Agarwal (deceased) and Others* [(1960) 2 SCR 117], it was observed :

"The proviso to this clause was added by Act 20 of 1929. Prior to the amendment there was a conflict of decisions on the question whether the condition contained in a separate deed could be taken into account in ascertaining whether a mortgage was intended by the principal deed. The Legislature resolved this conflict by enacting that a transaction shall not be deemed to be a mortgage unless the condition referred to in the clause is embodied in the document which effects or purports to effect the sale. But it does not follow that if the condition is incorporated in the deed effecting or purporting to

effect a sale a mortgage transaction must of necessity have been intended. The question whether by the incorporation of such a condition a transaction ostensibly of 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 the surrounding circumstances. The circumstance that the condition is incorporated in the sale deed must undoubtedly be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. The definition of a mortgage by conditional sale postulates the creation by the transfer of a relation of mortgagor and mortgagee, the price being charged on the property conveyed. In a sale coupled with an agreement to reconvey 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 retransfer the property within the period specified. What distinguishes the two transactions is the relationship of debtor and creditor and the transfer being a security for the debt. The form in which the deed is clothed is not decisive. The definition of a mortgage by conditional sale itself contemplates an ostensible sale of the property\005."

In *Tulsi and Others v. Chandrika Prasad and Others* [(2006) 8 SCC 322], it was held:

"A distinction exists between a mortgage by way of conditional sale and a sale with condition of purchase. In the former the debt subsists and a right to redeem remains with the debtor but in case of the latter the transaction does not evidence an arrangement of lending and borrowing and, thus, right to redeem is not reserved thereby."

In the instant case, no relationship of debtor or creditor came into being. No security was created and in fact conveyance of the title of the property by the respondent to the appellant was final and absolute.

Reliance has been placed by the High Court on a Full Bench decision of the Bombay High Court in *Harkisandas Bhagvandas and Others v. Bai Dhanu* [AIR 1926 Bombay 497] wherein, it was held that if the transaction is really one of mortgage then the second deed would be inadmissible for want of registration; but where the transaction is not one of mortgage, the second document would not need registration, even if it is a part of the same transaction of sale.

In this case also the transaction is a mortgage by conditional sale and having regard to the provisions of Section 17 of the Indian Registration Act, the agreement of sale was not compulsorily registerable.

It has further been brought to our notice that whereas the Deed of Sale was executed in favour of two persons; the purported agreement of reconveyance has been executed by only one of the vendees, namely, Raghunath Revaji Patil, who has been described as 'Benami'; but the same has not been proved. The High Court did not go into the aforementioned question stating :

"20. Once, this issue is answered in the negative, the issue, whether execution by Defendant No. 1 alone (Defendant No. 2 has not signed the reconveyance deed) would obstruct the court from granting a decree for specific performance of reconveyance, is not required to

be considered since, a finding favourable to appellant on that issue is not going to make any favourable impact on the conclusion of the appeal."

We, therefore, are of the opinion that the interest of justice will be subserved if the matter is remitted to the First Appellate Court for consideration of the matter afresh on the said question. The impugned judgments cannot be sustained and are set aside accordingly. The Appeal is allowed and the matter is remitted to the First Appellate Court for consideration of the matter afresh .

In the facts and circumstances of this case, there is no order as to costs.

JUDIS