

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.481 of 1992

Gangadhar Ramchadnra Gaikwad ..Appellant

(Orig.Deft No.2)

V/s

Rambhau Santu Ushir
since deceased through his heirs
1. Sitabai Rambhau Ushir
and Ors. Respondents

Shri V.Z.Kankaria for Appellant
Shri V.D. Bhavsar for Respondents

CORAM:S.R.SATHE,J.
DATED:31st Jan. 2006

ORAL JUDGMENT> :-

1. The Appellant original defendant no.1 in Regular civil Suit No.68 of 1983 has preferred this appeal against the judgment and order passed by the Court of 4th Additional District Judge, Nasik in Civil Appeal No.93 of 1986 whereby the order dismissing the plaintiff's suit for declaration and possession passed by the Civil Judge, J.D., Chandwad was set aside and it was declared that plaintiff is the owner of the suit land and attachment and sale of the suit land in Reg.Darkhast No.69 of 1982 is illegal and void and defendants were directed to hand over possession of the suit land to plaintiff.

2. For the sake of convenience hereafter the parties shall be referred to as the plaintiff and the defendants.

. Brief facts giving rise to this appeal are as under:

3. The suit land admeasuring 40 Ares , out of Gat NO.479/1 described in detail in para 1 of the plaint was the ancestral property of the defendant no.3's father. On 10-2-1958 the defendant no.3 is father executed conditional sale deed for Rs.200/- in favour of the plaintiff and handed over the possession of the suit land as well as some other land. As per condition embodied in the said document it was agreed that if defendant no.3 pays amount of Rs.200/- to the plaintiff within 5 years then the plaintiff shall reconvey the property to the defendant no.3. According to the plaintiff, in pursuance of the sale deed he received the possession of the suit land. During the period of 5 years, and thereafter the defendant no.3's father did not pay amount of Rs.200/- to the plaintiff and naturally the suit land was not reconveyed. It is the case of the plaintiff that after period of 5 years he has become the owner of the suit land and the sale has become absolute. Not only that but since 10-2-1958 the plaintiff started taking crop out of the suit land and nobody obstructed him.

4. As same amount was due from defendant no.3 to the defendant no.1 the defendant no.1 filed Regular Civil Suit No.147 of 1973 and the said suit was decreed in his favour on 16-4-1974. On the basis of the said decree he filed execution proceedings NO.69 of 1982 on 15-10-1982. For recovery of decreetal amount the defendant no.1 asked for sale of the suit land as well as some other land. Accordingly on 6-11-1982 the executing court attached the suit land and ultimately entire Gat NO.479 was put to auction and the defendant no.1 purchased the said property for Rs.3100/- in the name of his son i.e. defendant no.2. When the plaintiff came to know about the execution of the said Darkhast he filed Regular Civil Suit no.68 of 1983 and prayed for declaration that he is the owner of the suit land and the attachment and sale carried out in Reg.Dark No.69 of 1982 is illegal and void. Alternatively, he prayed that in case it is proved that defendants are in possession of the suit land then the defendants be directed to hand over the possession.

5. The defendant nos.1 and 2 filed their joint written statement at exh.14 and opposed the suit claim. They denied all allegations in the plaint and contended that it was never agreed between plaintiff and defendant no.3's father to reconvey the suit land. They also contended that possession of the suit land was never

handed over to the plaintiff and on the contrary the defendant no.3's father continued with the said possession and ultimately in Dark.proceedings NO.69 of 1982 the land in question was attached and sold and defendant no.2 actually received the possession of the suit land. The defendants therefore contended that plaintiff is not the owner of the suit land and as such he is not entitled for possession, hence on all these grounds they prayed for dismissal of the suit.

6. The defendant no.3 filed his written statement at Exh.45 and admitted the contents of the plaint paras 1 and 2. He also contended that his father Ganpat had sold the suit land to the plaintiff for Rs.200/- and plaintiff was also put in possession of the same. The defendant no.3 also contended that when suit amount was put to auction he had in fact informed defendant nos.1 and 2 that he had no right, title or interest over the suit land and suit land is owned by the plaintiff. In short, he supported the case of the plaintiff.

7. On these pleadings the learned trial Judge framed issues on Exh.54. In order to prove his case plaintiff examined himself at Exh.62 and produced the certain documents. As against this on behalf of defendant nos.1 and 2 Kaialsh Ramchandra Gaikwad was examined at Exh.71 and certain documents were produced. The defendant no.3 examined himself at Exh.81 and supported

the claim of the plaintiff.

8. After considering the evidence adduced by both the parties the learned trial Judge came to the conclusion that the plaintiff has failed to prove that document executed on 10-2-1958 was executed for security and it was not sale out and out. He also held that plaintiff has failed to prove that the sale in execution proceedings NO.69 of 1982 is illegal and void. He, therefore, dismissed the plaintiff's suit.

9. Being aggrieved by the above mentioned order the plaintiff filed Civil Appeal no.93 of 1986. After hearing both sides the first Appellate Court came to the conclusion that the transaction dated 10-2-1958 under Exh.67 was sale out and out and by virtue of the same the plaintiff has become owner of the suit land. He also held that plaintiff is entitled for possession and sale in execution proceeding is illegal and void. He therefore allowed the appeal and decreed the suit in favour of plaintiff.

10. The original defendant no.2 the purchaser of the property in execution proceedings has challenged the above mentioned order in this second appeal.

11. From the perusal of the record it appears that at the time of admission this court (Coram:Patankar J) has

passed the following order:

Admit. Substantial question of law involved as framed in ground no.17.

17. The substantial points of law are as under:

a) Whether the plaintiffs suit is barred by law of Limitaton in view of Section 65 of the Indian Limitation Act?

b) Whether document Exh.67 dated 10-2-1958 is out and out sale, or conditional sale amounting to mortgage or only a document of security not to be acted upon?

c) Whether in absence of any type of protest in Regular Darkhast No.69 of 1982 the plaintiff can challenge the sale certificate issued on 27-4-1983 in view of public court auction held or finalised on 22-3-1983?

d) Whether the appellant-original defendant no.2 is a bonafide purchaser for value without notice?

12. In this appeal before me Shri Kankaria, learned Advocate for the original defendant no.2 has mainly

urged only 3 points. Firstly, he submitted that the first appellate court has not properly appreciated the evidence and has wrongly interpreted the document Exh. 67 and erred in holding that the said transaction was of sale out and out. Secondly, he canvassed before me that first appellant court ought to have considered the fact that suit land was not at all in possession of the plaintiff and as such the same was rightly put to auction and defendant no.2 has purchased the same in execution proceedings and sale certificate has been granted in his favour. Lastly, he submitted that the plaintiff's suit was in fact barred by Law of Limitation and it was hit by Article 65 of Limitation Act. He therefore, submitted that appeal be allowed and the order passed by the first appellate court be set aside and the suit be dismissed.

13. As against this the learned Advocate for the plaintiff supported the judgment and order passed by the first Appellate court.

14. It is not in dispute that the land in question is ancestral land of the defendant no.3. It is also an admitted fact that on 10-2-1958 the father of defendant no.3 viz. G.D.Shirshat executed conditional sale deed in favour of the plaintiff. Admittedly though it was mentioned in the said document that if the amount of Rs.200/- is paid by the father of defendant no.3 to

plaintiff within a period of 5 years then plaintiff shall reconvey the said property. The father of the defendant no.3 or defendant no.3 never paid the said amount to the plaintiff.

15. Thus according to the plaintiff as a result of non payment of the said amount within stipulated period he has become the owner of the suit land and the sale under the said document has become absolute.

16. Fate of this appeal depends on the question as to whether document dated 10-2-1958 is of sale out and out or whether it was conditional sale or whether it was a transaction of mortgage. It is well settled that mere nomenclature of the document would not determine the real transaction under document or the character of the document. There are various authoritative pronouncements in which it has been held that character of document has to be determined mainly with reference to the terms of the document itself and nature of the document has to be determined having regard to all the facts and circumstances of the case. Merely because the present document is styled as Conditional sale deed " -----" (**Shartiche Kharedi khat**) for the period of 5 years. We cannot jump to the conclusion that the transaction is of sale and it has become absolute after the period of 5 years. In order to find out as to whether the document was executed by way of

security or whether it was in the nature of mortgage, one has to take into consideration as to what was the relationship between the Vendor and Vendee. Whether there was relationship of debtor and creditor and whether price of the property is charged on the property conveyed. What were the obligations of both the parties etc. At the outset it must be mentioned that there are numerous circumstances from which it can be said that present transaction under deed dated 10-2-1958 was not of sale but it was in the nature of mortgage. One more factor which is always taken into consideration to determine whether transaction is of mortgage or not is the relations of the vendor and vendee. In the instant case we find that though there is no specific reference in the document that amount was advanced by the plaintiff to father of defendant no.3 or that there was relationship of creditor and debtor between the plaintiff and defendant no.3, if one takes into consideration the amount that has been paid under the document and period when same was paid it clearly indicates that the relationship between the parties was that of creditor and debtor. In the document Exh.67 it is clearly mentioned that consideration of the land i.e. Rs.200/- was received by executor i.e. father of defendant no.3 on 12-6-1957. It is pertinent to note that present document is executed after the period of about 8 months from that date and it is for the same amount which was

given by the plaintiff to the father of defendant no.3. So, it shows that as the defendant no.3's father was to repay amount of Rs.200/- to the plaintiff but he could not do so he executed the document in question Exh.67.

17. There is another aspect of the matter. From the evidence on record it is clear that as per document at Exh.67 in all 3 lands were sold under the sale deed. The total acreage of the same is 10 Acres 5 gunthas and the same has been sold for Rs.200/-. Though it is true that transaction is of the year 1958 still then it is difficult to believe that the price of the land at that time was Rs.20/- per acre. Thus this gross inadequate consideration also clearly indicates that the transaction was in fact not of sale but document was got executed by way of security and real transaction was in the nature of a mortgage.

18. It is pertinent to note that though in Exh.67 it is mentioned that possession of the land is given, the record shows that plaintiff was never in actual possession of 40 Ares or for that any portion of the land bearing Survey No.114/1 i.e. Block No.479 of village Bhaaduri. 7x12 extract of the suit land clearly goes to show that possession of Ganpat Shirsath and subsequently of Baban Shirsath, defendant no.3. In 7x12 extracts of the land in question, there is an endorsement that "-----" it means that

sale deed without possession. This clearly indicates that the plaintiff was not in possession of the suit land. Mutation Entry No.184 also shows that possession of the land mentioned in Exh.67 was not given to the plaintiff. Thus I have no hesitation to hold that the plaintiff was not put in possession of 40 Ares of the land bearing Gat NO.479 and document Exh.67 was not a sale deed but was executed only on way of security. At the most it can be said that transaction was in the nature of mortgage. But one thing is certain that by virtue of said document Exh.67 the plaintiff had not become the owner of the land in question. I am, therefore, of the opinion that the finding recorded by the first appellate court on the point of plaintiff's ownership is not legal and correct. Once it is said that plaintiff is not the owner of the suit land and is not entitled to claim possession as owner question of limitation does not arise.

19. It is not in dispute that defendant nos.1 and 2 have purchased the land in question under Court auction in the execution proceedings and even the sale certificate is granted in their favour. It is tried to be suggested on behalf of the defendant no.3 that he had executed unconditional sale deed in favour of one Fakira Mahadu subsequent to the transaction mentioned in the document Exh.67. However, curiously enough neither plaintiff nor defendant no.3 had adduced in

cogent evidence in that behalf. In fact even defendant no.3's contention in this behalf also indicates that the plaintiff is not the owner of the suit land in question.

20. It is pertinent to note that it is not the case of the plaintiff that he came to know about the action of the suit land only after the time when actual auction took place. On the contrary, it appears that even at the time of attachment of the land in question in execution proceedings, plaintiff had come to know about the same. However, in spite of the same the plaintiff did not raise any objection regarding the said attachment by making an application to the concerned Court. Not only that but even on the date of the auction plaintiff came to know about the auction but he did not raise any objection. Incidentally, it must be noted that there is absolutely not an iota of evidence to show that the defendant nos.1 and 2 were aware of the transaction between father of the defendant no.3 and plaintiff that is about the execution of Exh.67. Defendant no.3 has also admitted that he did not tell anything about the said transaction to the Bailiff at the time of auction or at the time when possession receipt was issued in Regular Darkhast NO.60 of 1982. Thus I have no hesitation to hold that the defendant no.2 is bonafide purchaser for value without notice.

21. In view of the above discussion it is very clear that the plaintiff is not entitled to get possession of the said land as he has no title to the same. He has challenged the sale certificate issued in favour of the defendant no.2 only on the ground that land in question is owned by him. However, as he has failed to do so. There is nothing to show that the sale certificate issued in favour of the defendant nos.1 and 2 in Regular Darkhast NO.69 of 1982 is illegal or void.

22. In this view of the matter it is very clear that finding recorded by the first appellate court was wrong and as such it is necessary to set aside the same and restore the order passed by the trial Court.

23. Hence I pass the following Order:-

- i. Hence the appeal is allowed.
- ii. The order passed by the 4th Additional District Judge, Nasik in Civil Appeal No.93 of 1986 is set aside.
- iii. The Plaintiff's suit is dismissed.
- iv. Under the peculiar circumstances of the case, parties to bear their own cost.

(S . R . SATHE , J .)