

S U P R E M E C O U R T O F I N D I A  
R E C O R D O F P R O C E E D I N G S

CIVIL APPEAL NO. 4867 OF 1999

BALMUKUND S. BHARUKA (DEAD) BY LRS.  
Appellant (s)

VERSUS

SHANKARLAL G. KHANDELWAL (DEAD)BY LRS. Respondent(s)

(With office report )

Date: 09/02/2005 This Appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE ASHOK BHAN  
HON'BLE MR. JUSTICE A.K. MATHUR

For Appellant(s) Mr. V.A. Mohta, Sr.Adv.  
Mr. A.K. Sanghi,Adv.  
Mr. Neelkanth Nayak, Adv.

For Respondent(s) Mr. Prasenjit Keswani, Adv.  
Mr. Gaurav Agarwal, Adv.  
Mr. Prashant Kumar,Adv.

UPON hearing counsel the Court made the following  
O R D E R

Appeal is partly allowed in terms of the signed order.

(Parveen Kr. Chawla)

(Kanwal Singh)

Court Master

Court Master

[Signed Order is placed on the File]

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4867 OF 1999

Balmukund S Bharuka (Dead) by Lrs.

..Appellant(s)

Versus

Shankarlal G. Khandelwal (Dead) by Lrs.

..Respondent(s)

O R D E R

Defendant has come up in appeal before this Court.

Briefly stated the facts are:

Original plaintiff-respondent (hereinafter referred to as the 'respondent')

had executed a sale deed in favour of the original defendant-appellant (hereinafter referred to as the 'appellant') of a plot of land measuring 19.81 X 9.14 meters within the municipal limits of Malkapur, District Buldana on 23rd November, 1972 for a sum of Rs. 10,000/-(Rupees Ten thousand only). Respondent filed a suit in the year 1977 seeking a declaration that the sale deed dated 23rd November, 1972 executed by him in favour of the appellant was a nominal transaction. The transaction between the parties was a money lending transaction. The respondent had taken a loan of Rs.10,000/-(Rupees Ten Thousand only) and the suit property was transferred in favour of the appellant as a security with the understanding that as and when the respondent would repay the amount of Rs.10,000/-(Rupees Ten Thousand only)

along with simple interest @ 6% , the appellant would re-convey the plot in favour of the respondent.

Appellant in his written statement took the stand that the sale made in his favour was an absolute sale and the case put up by the respondent that it was a nominal transaction to secure the repayment of the money lent to the respondent by way of security was an afterthought.

On the basis of the pleadings, necessary issues were framed on which parties led their evidence. Trial Court on appreciation of evidence held that the sale deed dated 23rd November, 1972 executed by the respondent in favour of the appellant was a nominal transaction. It was not intended to convey any title in the suit property. It had been executed to secure the return of money lent to the respondent and the appellant was to re-convey the suit property in favour of the respondent on repayment of the sum of Rs.10,000/- (Rupees Ten Thousand only) along with 6% simple interest.

Aggrieved against the judgment and decree of the trial court, the appellant filed an appeal before the first appellate court which was accepted. Judgment and decree of the trial court was set aside. The first appellate court recorded two sets of findings. Firstly, that the nature and intent of the transaction could be gathered only from the terms of the document itself and no evidence of any oral agreement or statement between the parties to such document for the purpose of contradicting or

modifying its terms could be led. Secondly, the first appellate court on re-

appreciation of entire evidence held that the transaction entered into between the appellant and the respondent was not a nominal transaction but was an absolute sale of the property. It conveyed a valid title of the suit property in favour of the appellant. Accordingly, the judgment and decree of the trial court was set aside and the suit filed by the plaintiff-respondent was dismissed.

Aggrieved against the judgment and decree of the first appellate court, the respondent filed Regular Second Appeal No. 136 of 1983 in the High Court of Judicature at Bombay, Bench at Nagpur, which has been disposed of by the impugned judgment. At the time of admitting the appeal, the following two substantial questions of law said to be arising from the findings recorded by the first appellate court were framed:

- "1. Whether evidence of the party was inadmissible because of the provisions of Section 91 & 92 of the Evidence Act?
2. Whether the plea is that the transaction is a sham one and not meant for acted upon, can the bar of Section 91 still operate?"

The High Court, on the questions of law framed, referred to above, relying

upon the judgment of this Court in Gangabai vs. Chhabubai [1982 (1) SCC 4] held that Sections 91 & 92 of the Evidence Act (for short 'the Act') creating a bar to the leading of evidence of an oral agreement contrary to the terms of the written document was not applicable. A party could lead oral evidence to assert that the intention of the parties was to enter into a different transaction than the one recorded in the document. That the party could lead oral evidence to show that the document executed was never intended to operate as an agreement of what is recorded but some other agreement altogether, not recorded in the document, was entered into between the parties.

After recording this finding the High Court entered into the realm of question of fact and on reappreciating the evidence came to the conclusion that the first appellate court had grossly mis-appreciated the evidence present on the record. The evidence recorded on facts can be upset by the High Court in Second Appeal only if it is proved to the satisfaction of the High Court that the findings of fact recorded by the first appellate court were perverse inasmuch as it was based on no evidence or on misreading of evidence or that the view taken by the first appellate court was so perverse as no reasonable person of ordinary prudence could have taken that view. No such question of law was framed. The High Court proceeded to re-appreciate the evidence on the assumption that once the appeal is admitted on a question of law then it gets the jurisdiction to hear the appeal on questions of fact as well without framing a

substantial question of law regarding the findings being perverse. The High Court

has, therefore, clearly erred in re-appreciating the evidence on questions of fact

without framing a question of law as to the perversity of the findings recorded by the first appellate court on facts.

Normally we would have rested our judgment and accepted the appeal on this short ground but taking an overall view of the facts and circumstances of the case, especially, the fact that possession of the suit property may not have been delivered soon after the execution of the sale deed, we deem it appropriate to remand the case to the High Court for a fresh disposal.

Accordingly, the judgment under appeal is set aside in so far as the High Court has entered into the realm of re-appreciating the evidence. The High Court

shall now decide the appeal afresh in accordance with law and if is of the opinion that a question of law regarding perversity of the findings recorded by the first appellate court on facts arises, then it would first frame the question of law to that effect and then proceed to decide the same. If the High Court is of the opinion that no question of law arises on the same then the High Court would be at liberty to pass the order in accordance with law.

Since the suit pertains to the year 1977, we would request the High Court to

take up the matter out of turn and dispose it of as expeditiously as possible.

The Registry is directed to transmit the original record forthwith.

The Civil Appeal is partly allowed in the above terms. No costs.

.....J.

[Ashok Bhan ]

New Delhi;  
J.

.....

February 09, 2005.

[A.K. Mathur]