

(1926) 06 BOM CK 0019
Bombay High Court
Case No: Second Appeal No. 546 of 1924

Harkisandas
Bhagvandas

APPELLANT

Vs

Bai Dhanu

RESPONDENT

Date of Decision: June 10, 1926

Acts Referred:

- Transfer of Property Act, 1882 - Section 14

Citation: (1926) 28 BOMLR 954

Hon'ble Judges: Shah, J; Norman Macleod, J; Madgavkar, J; Fawcett, J; Coyajee, J

Bench: Full Bench

Final Decision: Allowed

Judgement

Madgavkar, J.

The answers of the Full Bench to the reference have been given, and we have now to apply the law as laid down by the Full Bench to the facts. The law, as I understand it has now been left by the decision of the Full Bench, is as follows: The case is one of a registered sale deed with an unregistered agreement giving the vendor an option to re-purchase. The Full Bench has now decided that, if the transaction which assumes this form above is really one of mortgage, then the second deed is inadmissible for want of registration, the opposite view taken in *Sayad Mir Gazi v. Miya Ali* ILR (1914) 38 Bom. 703 being overruled, and the view in [Bala Khandapa Vazirde Vs. Sadashiv Hari Chivate](#), being affirmed in the cases where the transaction is one of mortgage.

2. Where, however, the transaction is not one of mortgage, then the second document, it is held, does not need registration, even if it is a part of the same transaction as the sale; in other words, even if it is an essential condition of the sale, so long as it is embodied in a separate document from the sale-deed itself. The view that it may be taken to be an essential condition of the sale, and therefore to be

compulsorily registrable, has not found favour with the majority of the Full Bench, And we must, therefore, take it now to be the settled law in this Presidency that, so long as the transaction is not one of mortgage, the second document, even though an essential condition of the sale and part therefore of the same transaction, is not compulsorily registrable. The decision in [Vaman Trimbak Joshi Vs. Changi Damodar Shimpi](#), is approved. The decision in [Gajanan Narayan Patkar Vs. Jivangiri Chamelqiri](#), is apparently not overruled, but is reconciled with the Full Bench ruling on the ground that in the former case the document in question, although the transaction was not a mortgage, limited the interest of the vendee in the property.

3. In the present case I agree with my learned brother that the transaction in this case is not proved to be a mortgage. The agreement to re-convey (Exh, 39) is not, therefore, on the authority of the Full Bench ruling, compulsorily registrable, and is admissible in evidence and not, as was held by the lower appellate Court on the strength of the observations of Macleod C.J. in *Bala v. Sadashiv*, inadmissible.

4. The other question is, whether this agreement is void as offending against the rule of perpetuity. As I said, while there is much to be said on equitable principles for the view that the agreement is void as in AIR 1922 165 (Privy Council) on the other hand, the language of Sections 14, 40 and 54 of the Transfer of Property Act, strictly construed, is sufficient to validate the document. On the whole, therefore, I see no sufficient reason to differ from the view of Sulaiman J. in *Basdeo Rai v. Jhagru Rai* ILR (1924) All. 333 and the conclusion of my learned brother that the document cannot be held to be void on this ground.

5. The suit of the plaintiffs-appellants was, however, on the basis of a mortgage, so that, on the pleadings as they stand, the suit would have to be dismissed But in the lower Court (Exhibit 23 in appeal) he asked in the alternative for relief for specific performance of the same document, The fact that, until the decision of the Full Bench overruling *Sayad Mir Gazi v. Miya Ali*, this last decision stood, and was binding on the Subordinate Courts, is some excuse for his not pleading in the alternative from the outset. We are, therefore, of opinion that the amendment of the plaint, now sought, although at a late stage, ought to be allowed, subject to an appropriate order as to costs.

6. The appeal is, therefore, allowed, the order of the lower Courts dismissing the suit set aside, the plaintiffs allowed to amend the plaint as above, and the suit remanded to the trial Court for a decision on the merits, after opportunity to the defendant to reply to the amended plaint and to raise new issues, and to the parties to adduce fresh evidence, if necessary, on them. Each party to pay its own costs throughout up to date.