IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 549 OF 2017
WITH
CA/10768/2017 IN SA/549/2017
(STAY APPLICATION)
WITH
CA/12612/2023 IN SA/549/2017
(CANCELLATION OF INTERIM RELIEF)

Krishnalal Santaram Mendru,
Age : 83 years, Occ : Nil,
R/o : Karalewadi, Tq. Rahuri,
District : Ahmednagar.
Through : GPA holder
Narendra Ashok Mendru,
Age : 30 years, Occ; Service,
R/o; Rahuri Factory,
Tq. Rahuri, District : Ahmednagar. ...**APPELLANT**.
(Orig. Defendant)

VERSUS

Sakharam Dagadu Zambre,
Deceased Through L.R.s.

1) Gangadhar Sakharam Zambare
Age : 55 years, Occ. Labour,
R/o; Chinchvihire, Tq. Rahuri,
District : Ahmednagar.

2) Rajendra Sakharam Zambre,
Age; 53 years, Occ; Labour,
R/o; Mohewadi, Tq.Dhule,
District : Dhule.

3) Gorak Sakharam Zambre,
Age : 51 years, Occ : Labour,
R/o : Golewadi, Tq.Karhad,
District : Satara. ...**RESPONDENTS**.
(L.R.s, of Orig. Plaintiff)

.....
Mr.N.B. Patekar : Learned Advocate for Appellant
Mr.R.B.Temak : Advocate for Respondents
.....

CORAM : S. G. CHAPALGAONKAR, J.

Date : 03.03.2025

JUDGMENT :

1. Appellant (Original Defendant) impugns judgment and decree dated 03.05.2017 passed by learned District Judge-7, Ahmednagar in Regular Civil Appeal No. 459 of 2014, thereby upholding judgment and decree dated 04.10.2014, passed by Civil Judge, Junior Division, Rahuri in Regular Civil Suit bearing No. 392 of 2006.

2. Respondent/Original Plaintiff instituted RCS No. 392 of 2006 seeking relief of redemption of mortgage in respect of land bearing Block No. 789, ad-measuring 1 H 21 R, situated at village Devlali Pravara, Tq. Rahuri, District Ahmednagar. Plaintiff contends that suit land is his ancestral property. He was in need of money for his domestic difficulties, therefore, he approached defendant to advance amount of Rs. 3,500/- and executed registered document dated 04.05.1970, in form of mortgage by conditional sale. Period of mortgage was 12 years against mortgaged amount of Rs. 3,500/-. Possession was handed over to defendant. Defendant had agreed that plaintiff can redeem mortgaged property by making re-payment of mortgage money of Rs. 3,500/- within 12 years. After expiry of 12 years, plaintiff offered amount of Rs. 3,500/- to defendant but he avoided to receive the same. Lastly, plaintiff issued legal notice on 16.08.2006 to defendant calling upon him to receive mortgage amount

and to execute redemption of mortgage. However, on 31.08.2006 defendant gave false reply and refused to redeem mortgage and to hand over possession of suit property.

3. Defendant refuted plaintiff's claim contending that plaintiff proposed him to sell suit land with condition of re-purchase. Accordingly, he purchased suit land for a consideration of Rs. 3,500/- under registered document of sale, with condition of re-purchase. In difference to said document, he was put into possession. Plaintiff failed to re-purchase suit land from defendant by making payment of Rs. 3,500/- within 12 years. Eventually, sale became absolute. Plaintiff's claim that transaction was mortgage by conditional sale is false. Plaintiff or anybody from his family never offered repayment of amount within stipulated period. Suit is filed beyond period of limitation. According to defendant, he gave reply to plaintiff's notice dated 16.08.2006. Inadvertently, he used word mortgage in his reply, although, transaction was of sale with condition of re-purchase.

4. Trial Court framed issues, recorded evidence of parties and concluded that transaction between parties was mortgage by conditional sale, finally decreed the suit for redemption of mortgage. In appeal by defendant, learned District Judge concurred with findings of trial Court and confirmed decree. Hence this Second Appeal.

5. Mr. M.B. Patekar, learned Advocate appearing for

appellant/defendant vehemently submits that Courts below have recorded perverse finding that transaction between parties was mortgage by conditional sale. According to him, document is clearly titled as sale-deed with condition of re-purchase. Relation of creditor and debtor is not discernible from document. It no where suggests transfer of land was by way of security to loan. Since plaintiff failed to abide by condition of repayment of consideration amount and get sale deed executed in his favour within stipulated period, the sale attained finality. Plaintiff has lost his right of re-purchase in terms of agreement. He would further submit that suit is clearly barred by limitation. No relief could have been granted in favour of plaintiff. In support of his contention he relies upon following reported judgments :

> *"(i) Suraj Narain Kapoor and Others Vs. Pradeep Kumar & Others,*[1]
> *(ii) Vanchalabai Raghunath Ithape (Dead) by Lrs. Vs. Shankarrao Baburao Bhilare (Dead) by Lrs. & Others,*[2]
> *(iii) Tamboli Ramanlal Motilal (Dead) Vs. Ghanchi Chimanlal Keshavlal (Dead) by Lrs. & Another,*[3]
> *(iv) Nana Tukaram Jaikar Vs. Sonabai & Others,* [4]
> *(v) Vamanrao Sawalaram Bhosale & Others Vs. Vithal Tukaram Kadam & Another,*[5]
> *(vi) Dharamji Shankar Shinde & Others Vs. Rajaram Shripad Joshi (Dead) Through Lrs. And Others,*[6]
> *(vii) Sopan (Dead) Through his Lrs. Vs. Syed Nabi,* [7]
> *(viii) Chunchun Jha Vs. Ebadat Ali and Another.*[8]*"*

6. Per-contra, Mr. R.B.Temak, learned Advocate appearing for

1 *2017 SCC Online SC 1246,*
2 *(2013) 7 SCC 173,*
3 *AIR 1992 SC 1236,*
4 *AIR 1982 Bombay 437,*
5 *2006(1) Mh.L.J. 867,*
6 *2019) 8 SCC 401,*
7 *(2019) 7 SCC 635,*
8 *AIR 1954 SC 345.*

respondent/plaintiff supports impugned judgment and decree. According to him, title of document is not of any significance to decide nature of transaction. Intention of parties has to be gathered having regard to contents of document and attending circumstances. Both fact finding Courts concurrently held that transaction between parties was mortgage by conditional sale. According to him, no substantial question of law arises for consideration in this appeal. In support of his contention he relies upon following judgments :

> *"(i) Vishwanath Dadoba Karale Vs. Parisa Shantappa Upadhye,*[9]
> *(ii) Lohia Sheet Products Vs. Commissioner of Customs,*[10]
> *(iii) Patel Ravjibhai Bhulabhai (Dead) Through Lrs. Vs. Rahemanbhai M. Shaikh (Dead) Through Lrs.,*[11]
> *(iv) Vithal Tukaram Kadam and Another Vs. Vamanrao Sawalaram Bhosale and Others,* [12]
> *(v) Ganpati Babji Alamwar (Dead) by Lrs. Vs. Digambarrao Venkatrao Bhadke,* [13]
> *(vi) Sushilabai Radhakisan Bhagwat and Others Vs. Laxman Balwant Kalaskar,* [14]
> *(vii) Madhavan Nair Vs. Bhaskar Pillai (Dead) by Lrs."*[15]

7. Having considered submissions advanced, apparently controversy between parties revolves around interpretation of registered document dated 04.05.1970 executed by plaintiff in favour of defendant. Plaintiff is coming with a case that intention of parties was to create mortgage with conditional sale, whereas, defendant contends that it was absolute sale with condition to re-purchase. So

9 *(2008) 11 SCC 504*
10 *(2008) 11 SCC 510*
11 *(2016) 12 SCC 216*
12 *(2018) 11 SCC 172*
13 *(2019) 8 SCC 651,*
14 *2005 (4) LJSOFT 165*
15 *2003 SCC Online SC 889*

as to decide nature of transaction between parties, following contents of documents are relevant. Firstly, document is titled as sale with condition to re-purchase. It stipulates as under :

> *"शर्त खरेदीखत मौजे देवळाली येथील जमीनीचे रूपये तीन हजार पाचशेचे रू. ३५००/— तारीख ०४.०५.१९७० मुदत वर्ष १२*
>
> *कृष्णालाल संतराम मेंद्रु रा. देवळाली — लिहून घेणार*
>
> *सखाराम दगडू झांबरे रा. मौजे चिंचविहीरे — लिहून देणार*
>
> *कारणे शर्त खरेदीखत लिहून देतो की मे. सब रजिस्ट्रारसाहेब राहूरी यांचे समक्ष रोख रूपये तीन हजार पाचशे शेतीचे खर्चाकरीता पावले तक्रार राहिली नाही. या रूपया ऐवजी माझे वडीलार्जीत मालकी वहिवाटीची जमीन सदरचे रूपयास शर्त खरेदी देतो ती तुकडी अहमदनगर पोट तुकडी व तालुका राहुरी पैकी देवळाली या गावचे शिवारातील जमीन सरकारी जिरायतसर्व्हे क्र. १९४/२ पैकी पश्चिमेकडील २ एकर १७ गुंठे, पुर्वेस — सर्व्हे क्र. १९४/२ पैकी, दक्षिणेस सर्व्हे क्र. १८९, पश्चिमेस सर्व्हे क्र. १९२ आणि उत्तरेस सर्व्हे क्र. १९३/३ जमीन दसरचे रूपयात शर्त खरेदी देउन आज रोजी जमीन तुमच्या ताब्यात दिली आहे. तरी सदर जमीनीचा सरकार सारा देत जावा. सदरचे दस्तऐवजाची अशी शर्त आहे की, तुमचे रूपये साडे तिन हजार आज पासून बारा वर्षाच्या आत देवून मी आपली **जमीन सोडून घेईन.** जर तसे नाही केले तर हे कायम खरेदी खत समजून वहिवाट व उपभोग घेत जावा. तुमचे वहिवाटीस व उपभोगास कोणाची हरकत आल्यास त्याचे निवारण की करीन. तुम्हास तोषीस लागू देणार नाही. हे शर्त खरेदी खत लिहून दिले."*

Translated as :

> *"Conditional Sale Deed of the land at village Devlali for the consideration of Rs. Three Thousand Five Hundred only, Rs. 3,500/- dated 4-5-1970 for the term of 12 years.*
>
> *[BETWEEN]*
>
> *Krishnalal Santram Mendru, R/o Devlali ---- First Party*
>
> *AND*
>
> *Sakharam Dagdu Zambre, R/o Chinchvihire --- Second Party*
>
> *The Second Party do hereby executes this Conditional Sale Deed that, Received Rs. Three Thousand Five Hundred for the agricultural expenes in presence of the Hon'ble Sub-Registrar, Rahuri and no grievance remained. In lieu of the money, I sell the land on condition, that is ancestral one and under my easement. The land is a part and parcel of the Registration District of Ahmandnagar, Registration Sub-District of Rahuri Taluka and within the vicinity of Devlali village, bearing Agricultural Land Survey No. 194/2 admeasuring 2 Acres and 17 gunthas and [the land is bounded by] Towards East- Survey No. 194/2 Part, Towards South- Survey No. 189, Towards West- Survey No.192 and Towards North- Survey No. 193/3. The possession of the land is handed over to you on conditional sale against the consideration [above mentioned]. You*

> *shall pay the agricultural cess [henceforth]. The condition of the sale is that, I shall repay your Rs. Three Thousand and five hundred to you within 12 years from today and then* ***get the land released from you****. If I fail to do so, treat this conditional sale deed as a perpetual sale deed and enjoy the fruits of land and easementary rights. I shall be responsible for removing obstacle, if any, created by anyone for your enjoyment and easement of the land without any cost to you. Hence this Conditional Sale Deed."*

8. Plain reading of aforesaid document shows that plaintiff is an agriculturist. He obtained amount of Rs. 3,500/- for agricultural expenses from defendant and handed over possession of 2A 17R land to defendant. In last 3 lines, plaintiff stated that after repayment of amount of Rs. 3,500/-, within a period of 12 years, he shall redeem his land, however, on failure, it would be absolute sale. There is no condition that plaintiff would re-purchase land, but he would redeem land by repaying advanced money within a period of 12 years. Therefore, although first part of document stipulates that it is conditional sale, there is no condition of re-purchase. The condition is for redemption after paying money.

9. One more glaring fact surfaced on record is that when plaintiff issued notice dated 16.08.2006, calling upon defendant to accept money and redeem the mortgage, he replied on 31.08.2006, stipulating that "it was a mortgage, however, because of non refund of mortgage money, right of redemption has been elapsed as time barred, hence, defendant acquired absolute title of suit property."

10. Mr. M.B. Patekar, relied upon various judgments, which are decisions on its own facts and reiterates that clauses of deed

consistent with expressed intention of making transaction, is to be gathered from contents of documents and surrounding circumstances. In case of Dharmaji Shinde (supra), Supreme Court observed in paragraph No. 13 reads thus :

> *"As per the proviso to Section 58 (c), if the sale and agreement to repurchase are embodied in the separate documents then the transaction cannot be a "mortgage by conditional sale" irrespective of whether the documents are contemporaneously executed; but the converse does not hold good. Observing that the mere fact that there is only one document, it does not necessarily mean that it must be a mortgage and cannot be a sale."*

11. In case Chun Chun Zha Vs. Ebadat Ali (supra), Constitutional Bench of Supreme Court, it is observed in paragraph No. 5 reads thus :

> *"5. The question whether a given transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one which invariably gives rise to trouble and litigation. There are numerous decisions on the point and much industry has been expended in some of the High Courts in collating and analyzing them. We think that is a fruitless task because two documents are seldom expressed in identical terms and when it is necessary to consider the attendant circumstances the imponderable variables which that brings in its train make it impossible to compare one ease with another. Each must be decided on its own facts. But certain broad principles remain."*

12. In case of Ganpati Babji (supra) Supreme Court observed in paragraph No. 12. Paragraph No. 12 reads thus :

> *"An agriculturist will normally not so easily dispose of his agricultural land, the source of his survival and livelihood merely for purchases made by him on credit. The dire financial straits of the plaintiffs are evident from the fact that they were left with no option but to mortgage 2 & ½ ac of their agricultural lands for credit purchase of daily necessities."*

13. Looking to the aforesaid observations and expositions of law, concurrent findings recorded by Courts below appears to be in consonance with legal position that holds field. Apparently, title of document is not decisive or significant to decide nature of transaction. Intention of parties can be gathered only on basis of stipulation and other surrounding circumstances. In present case, construction of document nowhere suggest that plaintiff wanted to transfer his land reserving rights to re-purchase same by repaying consideration amount. What transpires is that plaintiff was in dire need of money to satisfy his agriculture expenses. He put defendant in possession of land reserving his rights of redemption by making re-payment of advances within a period of 12 years. Document nowhere suggest that plaintiff reserved his right to re-purchase or defendant agreed to execute sale deed in favour of plaintiff after receipt of sum, equal to the consideration amount. Apart from contents of document in response to legal notice, defendant has clearly stated that mortgage deed was executed between parties and plaintiff failed to redeem his land within stipulated period, which suggests that transaction was mortgage by conditional sale and not sale with condition of re-

purchase. No perversity can be found in interpretation adopted by Courts below. In that view of the matter, no substantial question of law arises for consideration in this appeal. The Second Appeal stands dismissed.

14. In view of dismissal of Second Appeal, pending Civil Applications stand disposed off.

(S. G. CHAPALGAONKAR)
JUDGE

mahajansb/

15. After pronouncement of judgment a request is made to continue interim relief, since the appellant wish to approach Hon'ble Supreme Court.

16. Considering request advanced and nature of dispute, interim relief as granted earlier shall remain in force for a period of four weeks from today.

(S. G. CHAPALGAONKAR)
JUDGE

mahajansb/