

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

Second Appeal No. 270 of 1990

- * Bhairu, died his legal representatives:
- 1) Manik s/o Bhairu Jagtap,
Age 44 years,
Occupation ; Agriculture,
R/o Ruibhar,
Taluka & District Osmanabad.
 - 2) Vithal s/o Bhairu Jagtap,
Age 54 years,
Occupation: Agriculture
R/o As above.
 - 3) Subhash s/o Bhairu Jagtap,
Age 38 years,
Occupation: Agriculture,
R/o As above.
 - 4) Chandrabhagabai w/o Bhairu Jagtap,
Age 74 years,
Occupation: Household,
R/o As above.
 - 5) Jijabai s/o Dagdu Mane,
Age 45 years,
Occupation: Household,
R/o Ansurda,
Taluka & District Osmanabad.
 - 6) Bhamabai w/o Dasa Bhanage,
Age 44 years,
Occupation: Agriculture,
R/o Ruibhar,
Taluka & District Osmanabad.

- 7) Sakharbai w/o Bhimrao Kolge,
Age 29 years,
Occupation: Household,
R/o Wadi Bamni,
Taluka & District Osmanabad. .. **Appellants.**

Versus

- * Rajendra S/o Balbhim Kinikar,
Age 48 years,
Occupation : Agriculture,
R/o Baramgaon (Budruk)
Taluka & District Osmanabad. .. **Respondent.**

Smt. M.A. Kulkani, Advocate, for appellants.

Shri. A.S. Shelke, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 19th JULY 2016

JUDGMENT:

- 1) The appeal is filed against the judgment and decree of Regular Civil Suit No.107/1979 which was pending in the Court of the Civil Judge, Junior Division, Osmanabad and against the judgment and decree of Regular Civil Appeal No.28/1983 which was pending in the Court of the 3rd Additional District Judge, Osmanabad. Suit filed by respondent Rajendra for relief of possession, redemption of mortgage etc., is decided by the trial Court in his favour and the first appellate Court has confirmed

the decision though on different grounds by giving different reasons. Both sides are heard.

2) In short, the facts leading to institution of the appeal can be stated as follows :-

3) The suit was filed in respect of land Survey No.81 admeasuring 4 acres 19 gunthas situated at Bharamgaon (Budruk), Tahsil Osmanabad. It is the case of the plaintiff that he was in need of money and so he had approached defendant Bhairu for giving loan of Rs.5,500/-. It is his case that he wanted to make repayment of loan taken from one cooperative society and he was in need of money for other purposes also. It is contended that he mortgaged the property for getting loan of Rs.5,500/- from defendant and he was to get the property back within 7 years from the date of transaction. It is contended that said transaction was made on 12-5-1972 and possession was given to defendant Bhairu and he was to enjoy the income from the property as interest on the principal amount. It is contended that the document which was titled as sale deed was executed as a security and there

was specific mention that within 7 years the property was to be re-conveyed to the plaintiff.

4) It is the case of the plaintiff that market price of the property was Rs.5,000/- per acre and so it was not sale transaction. It is contended that annual income from the property was around Rs.3,000/-. It is contended that as loan was already taken by mortgaging this property with VKSS Society, sale of the property was not permissible in view of provisions of sections 47 and 48 of the Maharashtra Cooperative Societies Act. It is contended that the transaction of sale is void under these provisions if the property is mortgaged to cooperative society.

5) In the suit, plaintiff contended that the transaction itself is void in view of the provisions of the said Act and alternatively he is entitled to get redeemed the property by repaying the amount of Rs.5,500/-. Thus, two reliefs were claimed, one for declaration that the transaction was void and other for redemption of the mortgage.

6) Successors of Bhairu filed written statement and they contested the matter. They denied that it was mortgage transaction. However, they admitted that there was agreement that plaintiff was to pay amount of consideration within 7 years from the date of execution of the document and then land was to be returned to the plaintiff. It is contended that the plaintiff did not avail that opportunity and so the suit cannot be decreed. They denied that there was bar of the provisions of the Maharashtra Cooperative Societies Act to the transaction made in favour of Bhairu. They contended that Bhairu had deposited the money with the said cooperative society to make payment of dues of plaintiff and so sale deed was not void.

7) On the basis of the aforesaid pleadings issues were framed. Both sides gave evidence. The trial Court gave declaration that the sale deed was void and it was hit by the provisions of the Maharashtra Cooperative Societies Act as contended by the plaintiff. In the appeal filed by the defendants the decision is upheld by the first appellate Court but it is held that the transaction is

mortgage by conditional sale which falls under section 58(c) of the Transfer of Property Act.

8) This Court, other Hon'ble judge, admitted the appeal by order dated 10-8-1990 but no substantial questions of law were formulated. In view of nature of dispute this Court allowed both sides to argue on following substantial question of law.

“Whether the first appellate Court has committed error in holding that the transaction between the parties was mortgage by conditional sale under section 58(c) of the Transfer of Property Act ?”

9) The original document is at Exhibit 44. The document was executed on 12-5-1972. Title of the document is “sale deed”. Only at the end condition is quoted as addition to the document and it is mentioned that the consideration mentioned in the document of sale viz. Rs.5,500/- was to be returned by the vendor to the purchaser within 7 years from the date of execution and he was to get the land redeemed.

“ता. क. रक्कम मजकूर आज पासून 7 वर्षांचे आत तुम्हास देऊन जमीन सोडवून घेण्याचा मला हक्क आहे”

There is oral evidence of the plaintiff which is consistent with the pleadings of the mortgage. One witness Balbhim is examined on Exhibit 44 by the plaintiff and he has supported the case of the plaintiff. He has deposed that the document was nominal and it was mortgage transaction.

10) In rebuttal, Subhash, a son of Bhairu, has given evidence. He has no personal knowledge regarding the transaction and it can be said that he is relying mainly on the contents of Exhibit 44.

11) The aforesaid material shows that there is evidence of the plaintiff and one witness on the document with the plaintiff and there is also evidence of contents of the document in favour of the plaintiff and as against that there is evidence of one son of Bhairu who has no personal knowledge.

12) Both sides relied on some reported cases. Learned counsel for the appellant relied on a case reported as **AIR 1992 SC 1236 (Tamboli Ramanlal Motilal v. Ghanchi Chimanlal Keshavlal)**. In that case even when there was condition of repurchase in the document and time of 5 years was given, in view of the other contents of the document and the fact that the suit was filed in the year 1966 when the document was executed in the year 1950, the Apex Court held that there was intention of sale and it was not mortgage transaction. It is also observed that the case law cannot make much difference and each case needs to be decided on the basis of the facts of that case. In one case reported as **2006 (1) Mh.L.J. 867 (Vamanrao vs. Vithal)** this Court held that document was out and out sale. In that case also the document was executed in the year 1953 and 10 years period was given for repurchase of the land but the suit was filed in the year 1986. In the first case the Apex Court had given stress on a circumstance that in the document there was no condition of forfeiture.

13) Learned counsel for the respondents placed reliance on three reported cases like (1) **AIR 1954 SC 345 (Chunchun Jha v. Ebadat Ali)**; (2) **AIR 2006 SC 3359 (Tulshi v. Chandrika Prasad)**; and (3) **AIR 2008 SC 2510 (Vishwanath Dadoba Karale v. Parisa Shantappa Upadhye)**. In these cases the Apex Court has discussed provisions of section 58(c) of the Transfer of Property Act. In the first case it is laid down that question as to whether the transaction is a mortgage by conditional sale or a sale outright with a condition of repurchase is a vexed one and it needs to be decided on its own facts. It is observed that intention of the parties is a determining factor. There cannot be dispute over this proposition. In the present matter the recital of the document which is in favour of the plaintiff is quoted and the recital shows that right was given to redeem the property and the period of 7 years was fixed. The suit was filed within this period of 7 years is again one circumstance in favour of the plaintiff. In the cases cited for the appellant the suits were filed after the period which was mentioned in the document. The first appellate Court appreciated the oral evidence and the document is interpreted in favour of the plaintiff. This

Court holds that the District Court has not committed any error in interpreting the document in favour of the plaintiff, in holding that it was the mortgage transaction.

14) Learned counsel for the appellant argued much on a circumstance that the first appellate Court has given right of set off to the plaintiff and the plaintiff is allowed to deduct the cost of the matter before depositing the mortgage money in Court. It can be said that after deducting such cost the money is deposited by the plaintiff in the Court. On the basis of this circumstance learned counsel for the appellant submitted that plaintiff was never ready to return the amount. It was submitted that if the transaction is treated as sale with condition of repurchase, relief cannot be given in favour of the plaintiff. This submission is not acceptable. Learned counsels for parties make submissions which are suitable to their case but it is upto the Court to decide the matter. In any case, the costs generally follow the cause. The trial Court had not given decree of cost in favour of the plaintiff and the first appellate Court made an attempt to give such decree. So on that point also it is not possible

to interfere in the decision of the appellate Court. In the result, the point is answered in favour of the respondent, plaintiff and the appeal is dismissed. Protection of six weeks to the possession is granted.

Sd/-
(T.V. NALAWADE, J.)

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