IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD

SECOND APPEAL NO. 54 OF 1992
WITH
CIVIL APPLICATION NO. 4161 OF 1997
WITH
CIVIL APPLICATION NO. 6151 OF 2011

Balam Monibhai Shaikh
Age 50 years, Occu. Business,
R/o. Shirdi, Taluka Kopargaon,
Dist. Ahmednagar. (Died) per L.Rs.

1-a. Salim s/o. Balambhai Shaikh

1-b. Usman s/o. Balambhai Shaikh

1-c. Abdul s/o. Balambhai Shaikh

1-d. Shaikh Chand s/o. Balambhai Shaikh

All Age Major, Occu. Business,
R/o. Shirdi, Taluka Kopargaon,
District - Ahmednagar. **....Appellant.**
(Ori. Defendant)

Versus

Amin Karimbhai Shaikh
Age 55 years, Occu. Agriculturist,
R/o. Shirdi, Taluka Kopargaon,
Dist. Ahmednagar.
Deceased through his L.Rs.

A) Smt. Chhanubee Amin Shaikh
Age 50 years, Occu. Household,
R/o. Shirdi, Tal. Kopargaon,
District Ahmednagar.

B) Madeenabee Amin Shaikh,
Age 33 years, Occu. Service,
R/o. Sainath Hospital,
Shirdi, Tal. Kopargaon,

Dist. Ahmednagar.

C) Rubabee Sandu Sayyad,
Age 29 years, R/o. Kolgaonpati,
Tal. Kopargaon, District Ahmednagar.

D) Chandbee Amin Shaikh,
R/o. Shirdi, Near Masjid,
Tal. Kopargaon, District
Ahmednagar. **....Respondents.**
(Ori. Plaintiff)

Mr. V.D. Hon, Senior Counsel i/b. Shri. P.B. Shirsat, Advocate for appellants.
Mr. Sanket Kulkarni h/f. Mr. S.D. Kulkarni, Advocate for respondent Nos. 1A to 1D.

CORAM : T.V. NALAWADE, J.
DATED : 6th April, 2016.

JUDGMENT:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No. 261/1983, which was pending in the Court of Civil Judge, Senior Division, Kopargaon, District Ahmednagar and also against the judgment and decree of Regular Civil Appeal No. 127/1989, which was pending in the Court of 3rd Additional District Judge, Ahmednagar. Both the sides are heard.

2) The suit was filed for redemption of mortgage in respect of house property bearing No. 303 situated at Shirdi,

Tahsil Kopargaon, District Ahmednagar. The size and boundaries of the property are given in the plaint by the respondent, plaintiff. It is his case that the property was mortgaged for consideration of Rs. 9500/- to the defendant. Two documents were executed by plaintiff in favour of defendant, dated 16.4.1970 and 13.7.1970 and under those documents, total amount of Rs. 9500/- was taken as loan and the property was mortgaged. It is contended that it was mortgage transaction and so, plaintiff was entitled to get the redemption of mortgage, but the defendant is not ready to return back the possession of the property by accepting loan amount. The suit was filed on 25.2.1983.

3) The defendant filed written statement and contested the matter. The defendant first contended that there was no relationship as creditor and debtor between plaintiff and defendant. Alternatively, defendant contended that he was required to spend Rs. 4,000/- for repairs of one wall and plaintiff is bound to give that amount also. Defendant contended that plaintiff needs to give Rs. 9500/-, the loan amount and the amount of Rs. 4,000/- spent by defendant on repairs and only after that relief of redemption of mortgage can be given.

4) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. Copies of aforesaid two documents were produced on the record. In view of the contents of the document and aforesaid pleading and nature of evidence, both the Courts below have held that the transaction was of mortgage by conditional sale. Both the Courts below have held that the defendant failed to prove that he spent Rs. 4,000/- on repairs and plaintiff is liable to pay that amount also.

5) When this Court admitted appeal on 9.2.1992, no substantial question of law as such was framed. Learned Senior Counsel Shri. V.D. Hon appearing for appellants submitted that following substantial questions of law need to be formulated.

(i) Whether the Courts below have committed error in construing documents and by holding that the transaction was of mortgage by conditional sale ?

(ii) Whether the Courts below have committed error in not considering the material and whether the defendant has proved that he was required to spend Rs. 4,000/- on repairs ?

(iii) Whether after expiry of period of 10 years, the defendant had become owner in view of the language of two documents ?

6) Both the Courts below have reproduced the relevant contents of the two documents. Defendant did not produce the original document and so, certified copies of two registered documents were produced on the record and they are at Exhs. 22 and 23. In the first document dated 16.4.1969, there is mention that the suit property was given in possession of defendant under the transaction of conditional sale. The document was also titled as conditional sale. The period of 10 years was fixed during which the defendant was to enjoy the property and during which the plaintiff was to return the amount after giving six months notice. In this document, there is mention that the plaintiff had agreed to make the construction of southern wall which was in dilapidated condition at his own cost. Exh. 23, the second document was also titled as conditional sale deed (but it was also specifically mentioned that it was mortgage deed). Additional amount was accepted by plaintiff, mortgagor, but the other conditions were kept intact. In the body of the document also, it was specifically mentioned that it was mortgage transaction and during the period fixed in the previous document, the amount (Rs. 9500/-) was to be returned by the mortgagor.

7) Both the Courts below have considered the provisions of section 58 (c) of Transfer of Property Act, 1982 and aforesaid contents of the two documents. On the basis of the conditions laid down in aforesaid provision of law and the contents of the two documents, the Courts below have held that it was mortgage by conditional sale. In such document, always the period is fixed for returning the money, but that does not mean that after expiry of the period, the document automatically becomes sale deed. The provision of section 67 of the Transfer of Property Act, 1982 shows that it is necessary for mortgagee to obtain decree of foreclosure before giving of the decree of redemption by the Court in favour of mortgagor. Such step was not taken.

8) The learned Senior Counsel placed reliance on the case reported as **1982 (1) Bom.C.R. 811 [Nana Tukaram Jaikar Vs. Sonabai w/o. Madhav Saindare & Ors.].** In view of the facts of that case, it was held that the transaction was not of mortgage transaction and there was no relationship of debtor and creditor. It is also observed that the construction of document involves question of law. There cannot be dispute over this proposition. In view of the facts and circumstances of the present case, which are already quoted, this Court has no

hesitation to observe that it was mortgage transaction and the mortgage was mortgage by conditional sale. As aforesaid steps were not taken by defendant, mortgagee, the plaintiff was entitled to get redemption of mortgage. Defendant failed to prove that he has spent Rs. 4,000/- on repairs and he was entitled to get back that amount. So, the aforesaid points are answered accordingly against the defendant and following order is made.

O R D E R

The appeal stands dismissed. All Civil Applications disposed of.

Five weeks time is given to the appellants to challenge the decision of this Court. Till then the decree is not to be executed.

[T.V. NALAWADE, J.]

ssc/